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THE

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CALCUTTA—VOL. XIII.

I.L.R., 25 CALCUTTA.

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25 C. 1 (P.C.)=24 I.A. 164=1 C.W.N. 433=7 M.L.J. 127=7 Sar. P.C.J. 194.

1897
APRIL 7.

PRIVY COUNCIL.

25 C. 1 (P.C.)= 24 I.A. 164= 1 C.W.N. 433=7 M.L.J. 127= 7 Sar. P.C.J. 194.

PRIVY COUNCIL.

PRESENT :

Lords Watson, Hobhouse and Davey, and Sir R. Couch.

[*On appeal from the High Court at Fort William in Bengal.*]

MODHU SUDAN SINGH (*Plaintiff*) *v.* E. G. ROOKE (*Defendant*).
[10th March and 7th April, 1897.]

Landlord and tenant—Recognition of an under tenure by the zemindar—Result of his receiving rent in respect of it—Deposit of rent by tenure-holder under Bengal Tenancy Act (VIII of 1885), s. 61, and acceptance by zemindar—Hindu widow, Lease granted by, while in possession of widow's estate.

A widow in possession of her widow's estate in a zemindari made a grant of a *putni* tenure under it to a lessee at a rent. In this suit brought by the reversionary heir, on her death, with the object of having the grant set aside as invalid as against him, the *putni* lease was not proved to have been made with authority or from necessity justifying the alienation by the widow.

Held, that the *putni* was, on the death of the widow, only voidable, and not of itself void; so that the plaintiff, the next inheritor of the zemindari, might then elect to treat it as valid.

The plaintiff had done so. He had accepted rent in respect of the tenure, as that tenure was specified in a petition which accompanied the *putnidar's* deposit of the rent in a Court, under the Bengal Tenancy Act (VIII of 1885), s. 61. This was *prima facie* an admission that the *putni* was still subsisting. In the absence of evidence to put a different construction upon the plaintiff's act, and to negative its effect, there was a sufficient *prima facie* case of an election to affirm the validity of the *putni*.

[**F.**, 28 C. 532=5 C.W.N. 279; 30 C. 990=7 C.W.N. 864; 31 C. 698 (702); 34 C. 329 (332) (**P.C.**)=4 A.L.J. 329=9 Bom. L.R. 602=5 C.L.J. 334=11 C.W.N. 424= 34 I.A. 87=17 M.L.J. 154=2 M. L. T. 133; **Rel. on**, 18 C.W.N. 940=23 Ind. Cas. 298; **R.**, 29 A. 331 (**P.C.**)=4 A.L.J. 232=9 Bom.L.R. 591=5 C.L.J. 344= 11 C.W.N. 474=2 M.L.T. 145; 33 C. 257=1 C.L.J. 408=9 C.W.N. 636; 35 M. 177=5 Ind. Cas. 922=20 M.L.J. 371=7 M.L.T. 165; 8 C.L.J. 458 (468)=13 C. W.N. 201; 5 Ind. Cas. 752=6 N.L.R. 46; 16 Ind. Cas. 634; 4 O. C. 31 (36, 37) (B.); 5 O.C. 197 (200); 26 M.L.J. 600.]

1897
APRIL 7.
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PRIVY
COUNCIL.
——
25 C. 1
(P.C.) =
24 I.A. 164 =
1 C.W.N.
433 = 7
M.L.J. 127 =
7 Sar. P.C.J.
194.

APPEAL from a decree (17th August 1894) of the High Court, reversing a decree (25th February 1893) of the Subordinate Judge of Burdwan.

[2] The plaintiff, now appellant, was the zemindar of the Pandraraj estate in Manbhoom, which he inherited as collateral heir to Raja Sagar Narain Singh, who died in 1847, leaving a widow, Rani Hingan Kumari, upon whose death in 1881 the plaintiff inherited the zemindari. The defendant, Mr. Rooke, was holder of a *putni* tenure in two villages granted to him by the widow on the 26th January 1864, at a rent of Rs. 475 a year, and for a premium of Rs. 2,525. Both the Courts below had found this grant to have been made by the widow without authority, or legal necessity. The first Court, for this reason, had set aside the grant, and decreed the claim for *khas* possession in favour of the plaintiff. The High Court, on appeal, had, however, decided that the suit must be dismissed, as the plaintiff had become tenant to the plaintiff from year to year to the end of each year, and no notice had been given terminating the relation between the parties.

The question on this appeal was whether by reason of the plaintiff's having taken out of Court and accepted rent from the defendant for the year 1887-1890, the plaintiff had recognized and admitted the *putni* lease, so as to disentitle himself to contest its validity.

The succession to the Pandra estate was regulated by the customary law, whereby the eldest son in the eldest branch succeeded, excluding others.

Their Lordships' judgment states all the facts of this case.

The widow was engaged in litigation from 1849 to 1853 against her late husband's brothers, resulting in her obtaining a decree for her widow's estate in half the zemindari. The present appellant on succeeding to the zemindari defended the suit—*Periag Singh* v. *Modhusudan Singh*, decided in 1888 by the High Court in favour of the present appellant, who maintained his title in proceedings which lasted from March 1882 to April 1887. In that case the Court considered whether Pandra was by custom an impartible zemindari, and whether it was by custom inheritable according to lineal primogeniture, deciding in the affirmative. A Receiver had been appointed during the litigation.

The respondent on the 10th September 1890, under the [3] Bengal Tenancy Act (VIII of 1885), s. 61, paid Rs. 1,043 into Court as rent for the Bengali years 1295 and 1296 with cesses from 1294, stating in his petition that the rent had not been received, but acceptance of it had been refused by the zemindar. This sum was taken out of Court by the appellant on the 24th September following. The petitions in this matter are set forth in the judgment on this appeal.

On the 11th March 1892 the appellant's plaint was filed for possession of the two villages held by Rooke under the grant from Rani Hingan Kumari, and for two years' mesne profits. His plaint referred to the suit brought by Periag Singh, stating that until the final decision of the High Court he was not aware of the particulars connected with the villages now in dispute, and that when he attempted to take possession of them he was prevented by the defendant who claimed title under the *putni*. The plaint also contained an account of the deposit and withdrawal above stated, averring that the plaintiff had not thereby admitted any right of the defendant.

The defendant filed a written statement, in which he denied the plaintiff's title as reversionary heir, asserted that Rani Hingan Kumari

had an absolute estate, and not merely that of a Hindu widow, and, in the alternative, that she had executed the *putni* under circumstances of necessity which made it binding on the estate. He also alleged that he had received no sufficient notice to quit, and relied on the receipt of rent by the Receiver and the plaintiff as barring the suit by estoppel.

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The issues raised all these defences.

On the 25th February 1893, the Subordinate Judge of Burdwan decreed in favour of the plaintiff. In his judgment he found that the plaintiff was the true heir to the estate; that Rani Hingan had no greater right than that of an ordinary Hindu widow; that there was no evidence of any facts which would make the *putni* binding on her successor, and that it was invalid as against the plaintiff. He also found that the plaintiff had not recognized or ratified the *putni* by taking out the deposit. As regards the question of notice he held it to be immaterial.

On an appeal by the defendant to the High Court, a Division Bench (Chandra Madhub Ghose and Gordon, JJ.) reversed the [4] decree of the Subordinate Judge. In giving their reasons they referred to the receipt of the rent deposited by the defendant as due in respect of the *putni* in September 1889; and referred to the previous payments by the Receiver though recognition of the *putni* was beyond his power. They stated that there was nothing on the record explaining on the part of the plaintiff the circumstances under which he had received the rent; deciding that this receipt operated as a recognition of the defendant's right as tenant constituting in him some kind of tenancy which would require a notice to quit before it could be determined. As to the legal effect of the recognition of a tenant by receipt of rent, they referred to *Betts* v. *Jamie Shaik* (1), *Bunwari Lal Roy* v. *Mahima Chandra Knuall* (2), *Chaturi Singh* v. *Makund Lal* (3), *Kali Krishna Tagore* v. *Golam Ali* (4), *Sonet Koer* v. *Himmut Bahadoor* (5), *Drobomoyi Gupta* v. *Davis* (6), *Unhamma Devi* v. *Vaikunta Hegde* (7). They said that in all these cases it seemed to have been held that the receipt of rent from a person, "after his lease had expired," operated as a recognition of his right as a tenant, and constituted in him some kind of tenancy.

In their view, and according to the plaintiff's case, the defendant's *putni* came to an end with the life of Rani Hingan Kumari. But the Receiver who was in charge of the estate, and afterwards the plaintiff himself, for several years received rent from the defendant. After such receipt of rent, the defendant could not be treated as a trespasser. The recognition of the defendant's tenancy was at least a recognition of a tenancy from year to year. The plaintiff was bound to show that by having given due notice he had determined that tenancy. He had not done so, and his cause of action was not complete. Reference was made to *Doe d. Lord* v. *Crago* (8), and the judgment concluded thus :—

[5] "In the present case, the plaintiff has not proved the circumstances under which he received the rent deposited by the defendant, and in the absence of any such proof, we should think that the plaintiff meant to treat the defendant as a tenant upon the property. No doubt, the tenancy was not, in its inception, a tenancy from year to year; but we should think that, after the expiry of the lease, upon the death of the life-tenant Rani Hingan Kumari, it was quite competent to the plaintiff either

(1) 23 W.R. 271. (2) 4 B.L.R. Ap. 86. (3) 7 C. 710.
(4) 13 C. 248. (5) 1 C. 391 = 3 I.A. 92. (6) 15 C. 323.
(7) 17 M. 218. (8) (1848) 6 C. B. 90.

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to treat the tenancy as having come to an end, or to treat the defendant as a tenant of the property; and we are of opinion that the combined acts of the Receiver and the plaintiff are such as to constitute in the defendant some kind of tenancy, at least a tenancy from year to year, which required a legal determination before the plaintiff could be entitled to eject. As already mentioned, the defendant, in the circumstances which have transpired, could not be regarded as a trespasser, and he could not certainly be called upon, for the reasons which have been so fully explained by Norman, J., in the case of *Bunwari Lal Roy* v. *Mahima Chandra Knuall* (1), to quit the property in the middle of the year. And in this connection we might refer to s. 106 of the Transfer of Property Act (IV of 1882), which requires six months' notice to be given expiring with the end of the year of the tenancy.

"For these reasons we are of opinion that the suit must fail upon the ground that, upon the date of the suit, the plaintiff had no valid cause of action.

"In the view that we have just expressed, it is unnecessary to express any opinion upon any other questions that have been raised in this case; but if we were called upon to decide the question whether the *putni* granted by Rani Hingan Kumari is valid and binding upon the plaintiff, or whether it has been ratified by him, we should be prepared to say that the defendant has not proved, the *onus* being entirely upon him, that the Rani was justified in granting the *putni* in question, that there was no ratification of the *putni* by the plaintiff, and it is not therefore binding upon him.

"The result is, that the suit must be dismissed and this appeal allowed; but, under the circumstances of the case, without any costs."

The plaintiff having appealed, Mr. *M. Crackanthorpe*, Q, C., and Mr. *J. D. Mayne*, for the appellant, argued that the decree of the High Court was not sound in law, and that the decree of the original Court should be restored. Neither of the Courts below had attributed to the appellant's act of withdrawing the money deposited under Act VIII of 1885, the effect of having been a recognition of the *putni* tenure. The High Court had considered that act to have been a recognition of a tenancy from year to year. The deposits, however, had been made expressly in [6] reference to the *putni* lease, and because, as stated in the petition, the respondent had refused to accept rent from the appellant, or to give him *dakhilas*. The appellant had taken the money out of Court without doing any act that would prevent his afterwards claiming his right to have the *putni* lease set aside, for the reason that he was entitled to take that money out of Court as payment due to him for the use and occupation of his land by the respondent. The drawing the money by the appellant should be considered as having taken place in pursuance of the latter right. There were no facts before the High Court which would have justified it in finding that the appellant had recognized the *putni* lease. Nor was there any ground for finding that the respondent was in possession as tenant from year to year. There had been a demand of immediate possession, the appellant's right having accrued on the death of the widow, and his cause of action was complete. Reference was made to the Transfer of Property Act (IV of 1882), s. 106; *Doe d. Lord* v. *Crago* (2); *Dugald* v. *McCarthy* (3).

(1) 4 B.L.R. Ap. 66. (2) (1848) 6 C.B. 90. (3) (1893) L. R. 1 Q.B. 736.

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Mr. *C. W Arathoon*, for the respondent, argued that the High Court was right in dismissing the suit, but submitted that there was evidence of ratification by the appellant of the *putni* in his act on the 24th September 1890 in accepting the rent. Upon this ground the suit might have been dismissed. The cause of action was, however, not complete when this suit was commenced, no legal notice to quit having been given, whether the *putni* was to be supported or not; and either according to the view that the *putni* subsisted or that the defendant was tenant on the terms found by the High Court, the suit could not succeed. The petition filed by the defendant on the 11th September 1890 showed that the rent was paid into Court from a tenant claiming to hold a *putni* right. This rent having been accepted, ratification should have been held to have taken place.

Mr. *M. Crackanthorpe*, Q.C., replied.

JUDGMENT.

Afterwards, on the 7th April, their Lordships' judgment was delivered by

SIR R. COUCH.—The suit in this case was instituted to recover possession of two villages part of the zemindari of the [7] Pandraraj in the district of Manbhoom. The appellant is the heir of Raja Sagur Narain Singh, the former owner of it, who died in May 1847, leaving his widow Rani Hingan Kumari and two brothers. The right of the widow to succeed him was disputed by the brothers, and she had to bring a suit to recover possession of an 8 annas share of the zemindari. In this she was successful, and, having obtained possession of the estate, she remained in possession of it till her death in December 1881. The appellant then took possession, and in March 1882 a suit was instituted against him by the younger of the brothers claiming as the heir of Raja Sagur Narain Singh. It was dismissed by the District Court in April 1887, and this decree was confirmed by the High Court on the 25th June 1889. In July 1882 a Receiver was appointed to take charge of the estate, and he continued to be in charge of it until the 3rd of May 1887, when he was discharged.

On the 26th January 1864, the widow granted a *putni* lease or settlement of the two villages to the respondent at an annual rent of Rs. 475, and upon receipt of a bonus of Rs. 2,525. The appellant in his suit asked to have this *putni* set aside on the ground that the widow had no legal reason or necessity for making it. This was the subject of one of the issues which has been found in the appellant's favour by the District Court and the High Court. The question upon which the Courts have differed arises from the receipt of rent by the appellant after the widow's death. For three years the rent was paid to the Receiver. The important payment is of the rent due for the native years 1295 and 1296 (1887-1890) after he was discharged.

On the 10th of September 1890 the respondent presented a petition in the Court of the Munsif of Ranigunge under Act VIII of 1885 in a rent suit in which the respondent is called "First Party" and the appellant "Second Party." It is as follows: "The representation of Mr. E. G. Rooke of Jore Janoki * * * is this: That I am in possession on *putni* right of *mouzah* Naharjore and *mouzah* Amkura in *thana* Assensole, *pergunnah* Pandra, under the said second party at an annual rent of Rs. 475. My officer repeatedly went to pay the aforesaid rent for the years 1295 and 1296, amounting to Rs. 950 [8] and Rs. 93 cesses from the year 1294 to the year 1296, in all Rs. 1,043, into the *mal catcheri* of the said second party at Poddardihi in due time, but the rent

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was not received and *dakhilas* were refused. Therefore I deposit the said rent in Court, praying that it may be credited in the name of the second party, and that orders may be passed to serve notice on him." On the 21st of September the Raja executed a *vakalutnama* by which he appointed four pleaders by name in order to file a petition and other papers and argue the case on his behalf in the rent suit and authorized them to sign his name and file petitions, &c., and take vouchers for monies in deposit. And on the 24th the following petition was filed in the rent suit—"The representation of the second party in the above case is this: My tenant, the said first party, has deposited Rs. 1,043 rent due to me. The said first party has not deposited interest, &c., and I shall take steps for the same hereafter. A voucher for Rs. 1,043 in deposit may be given for the present." None of the pleaders was called to explain how the money came to be drawn out, or to prove that there had been a mistake in doing it. There is no evidence in the case upon this matter but these documents.

In considering their effect it must be observed that the *putni* was not void; it was only voidable; the Raja might elect to assent to it and treat it as valid. Its validity depended upon the circumstances in which it was made. The learned Judges of the High Court appear to have fallen into the error of treating the *putni* as if it absolutely came to an end at the death of the widow. After referring to six or seven cases in the Indian Courts they say: "In all these cases it seems to have been held that the receipt of rent from a person after his lease has expired operates as a recognition of his right as a tenant and constitutes in him some kind of tenancy which would require a notice to determine." Also they speak of the expiry of the lease upon the death of the life-tenant. And they hold that a receipt of rent was at least a recognition of a tenancy from year to year which required a notice to quit. The real question does not appear to have been considered by them or properly by the Subordinate Judge, who says that in the petition for the withdrawal of the rent deposit the status of the plaintiff as *putnidar* was not recognized, but [9] takes no notice of the petition depositing the money. The taking rent which was in that petition stated to be due under the *putni* was *prima facie* an admission that the *putni* was still subsisting, an election by the Raja to treat it as valid. If it could have been shown that the receipt of the rent ought not to have that effect evidence bearing upon that point ought to have been adduced by the Raja. In the absence of such evidence their Lordships think there is a sufficient *prima facie* case of an election by the Raja to affirm the validity of the *putni*; and they will humbly advise Her Majesty to dismiss the appeal and to affirm the decree of the High Court which in their opinion is right, although not for the reasons given by the Court. The appellant will pay the costs of this appeal.

Appeal dismissed.

Solicitors for the appellant: Messrs. *Broughton, Nocton and Broughton.*
Solicitors for the respondent: Messrs. *T. L. Wilson and Co.*

C. B.

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PRESENT:

Lords Watson and Davey and Sir R. Couch.

[*On appeal from the Court of the Recorder of Rangoon.*]

AGA MAHOMED JAFFER BINDANIM (*Defendant*) *v.* KOOLSOM BEEBEE AND OTHERS (*Plaintiffs*) AND KOOLSOM BEEBEE AND OTHERS (*Plaintiffs*) *v.* AGA MAHOMED JAFFER BINDANIM (*Defendant*). [7th April and 7th and 16th May, 1897.]

Mahomedan law—Will—Right of childless widow—Administration of the estate of a Shiah Mahomedan under his will—Alleged gift—Claims as between his childless widow and the estate—Rights of the widow—Legacies chargeable on one-third only of the estate.

A Mahomedan of the Shiah sect, dying without issue, left a widow. She as his childless widow was entitled to one-fourth of his estate other than land.

In the administration of his estate the following matters arose, and were decided :—

The handing over, with formal words of gift by the testator to the widow, of deposit receipts, with intent afterwards to transfer the money into her name at the Bank, which transfer was not effected, would not constitute a gift.

[10] A commission of three per cent. on the proceeds of the sale of the testator's property, directed by his will, was bequeathed to the executor. This was by way of remuneration, but was in no sense a debt. As a legacy it was payable only out of one-third of the estate which passed by the will.

A Mahomedan widow is not entitled to maintenance out of the estate of her late husband, in addition to what she is entitled to by inheritance, or under his will —Hedaya, Book IV, chap. 15, s. 3, Baillie's Mahomedan Law, Imamia, p. 170, referred to.

No contract could be implied that this widow should pay an occupation rent on account of her *having continued* to occupy a house belonging to the testator's estate, for eleven months after his death. Her occupation was referable to her position, and no notice was given to her that rent would be charged.

A Mahomedan childless widow is not by Shiah law entitled to share in the value of land forming the site of buildings that belonged to her husband's estate. Her one-fourth includes, as was admitted, a share in the proceeds of sale of the buildings. The text quoted in Book VII, chap. IV, p. 293 of Baillie's Mahomedan Law, Imamia, is not to be construed as referring only to agricultural land.

[F., 18 C.W.N. 494 = 19 C.L.J. 335 = 22 Ind. Cas. 500 ; R., 10 C.W.N. 449 (495) ; D., 24 Ind. Cas. 385 = 12 A.L.J. 886.]

APPEAL and cross-appeal from a decree (14th September 1893) of the Recorder of Rangoon.

This suit, commenced on the 30th March 1891, was for the construction of the will, and for the distribution of the estate, of Hadji Hoosain Bindanim, who, at his death, on the 20th February 1890, owned land, with buildings on some of his land, and other property, in Rangoon. He had no issue but left a widow, Koolsom Beebee (the plaintiff-respondent in the principal appeal and cross-appellant in the other), and some collateral relations, children of a deceased half-brother, among whom was the defendant-appellant, Aga Mahomed Jaffer Bindanim, whom the deceased by his will appointed his sole executor. Probate to this executor was delivered on the 21st March 1890.

The principal dispositions made by the will appear in their Lordships' judgment.

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The suit was originally brought by one Abdul Razak against the executor, with whom the widow was made a co-defendant. The widow filed in her defence a written statement of her claims against the estate. The suit of the then plaintiff was dismissed on the 5th February 1892, and this was affirmed on appeal on the 10th March 1894 in *Abdul Razak* v. *Aga Mahomed Jaffer* [11] *Bindanim* (1). Before that final order she was, on her own petition, made a plaintiff instead of a defendant.

On the 14th September 1892 the executor filed his accounts. To these the widow objected, and on the 5th December following she filed a petition stating, as plaintiff, all her claims and contentions, which were to the same effect as in her former written statement. She stated that the bequests in the will of her husband, as a Shiah Mahomedan, could only be valid so far as they could be payable out of one-third of his estate; that she was entitled to sums amounting to Rs. 30,000 held in fixed deposit by a Bank on her late husband's account, they having been assigned by him to her as a gift; that she was entitled to have her one-fourth share, as widow, assessed upon the value of land on which houses belonging to the estate were built, as well as on the houses, which latter had been admitted to be subject to her share; that she was entitled to maintenance for one year from her husband's death; that she had been wrongly debited with rent as due from her to her husband's estate on account of her having occupied a house of his till it had been sold—a period of eleven months.

On the 21st November 1892, the Recorder gave judgment on the widow's claim relating to her right to share in the proceeds of the sale of the land as follows :—

"The plaintiff in this case is the childless widow of a Mahomedan belonging to the Shiah sect, and I have to decide now whether she is entitled to a share in the land on which certain houses belonging to her husband's estate are built. It is admitted that she is entitled to one-fourth of the pure personalty and to one-fourth of the value of the houses apart from the land. The authorities seem to me to make it perfectly clear that she is not entitled to share in the land. The law is thus stated by Baillie, Imamia, p. 295 : 'Where the wife has had a child by the deceased she inherits out of all that he has left; and if there was no child she takes nothing out of the deceased's land, but her share of the value of the household effects and buildings is to be given to her. It has been said, however, that she is to be excluded from nothing except the mansions and dwellings; while Moortuza (may God be pleased with him) has expressed a third opinion to the effect that the land should be valued and her share of the value assigned to her. But the first opinion is that which appears to be best founded on traditional authority.' The correctness of this translation was impeached in *Asloo* v. *Umdutunnissa* (2), and another translation [12] was made by the Court interpreter, the material portion of which is this: 'If there be no child she inherits nothing of the land, but her share of the value of goods and buildings will be given to her.' Ameer Ali, J., in "The Personal Law of the Mahomedans," says : 'But when she has no child, or when a child was born to her, but died before the decease of her husband, then she is entitled to a fourth share in the personal estate only including household effects, trees, buildings, &c.' She takes no interest in the real estate. And in the Tagore Lectures, 1874, the rule is thus stated: 'If there is no such child she takes nothing out of the

(1) 21 C. 666=21 I. A.56.

(2) 20 W.R. 297.

deceased's land (*arz*), but her share of the household effects (*alat*) and buildings is to be given to her.' I think, therefore, that the widow is not entitled to share in the land." 1897 MAY 16.

On the 24th January 1893 the Recorder gave judgment restricting the source of the three per cent. commission bequeathed to the executor (on the ground that it was no debt, but a legacy) to a one-third part of the testator's estate. He added :— PRIVY COUNCIL. 25 C. 9 (P.C.) = 24 I.A. 196 = 1 C.W.N. 449 = 7 M.L.J. 115 = 7 Sar. P.C.J. 199.

"The law is perfectly clear that a Mahomedan cannot by a testamentary disposition deprive his lawful heirs of their share in the inheritance; nor dispose of more than one-third of his estate. It was argued that the *khoom* is a debt, and that an executor is entitled to sell as much of the estate as is necessary in order to defray debts. But the answer to this argument appears to me to be this that if a Shiah died intestate or leaving a will without a provision as to *khooms* there would be no one who could legally enforce the payment of money on this account, and I find in Mr. Justice Ameer Ali's recent work on Mahomedan Law the statement that a bequest is lawful, for, among other objects, '*Kowm*' so that he does not treat it as a debt" (1).

Upon the question whether this widow was entitled to one year's maintenance, in addition to her share by law, the Recorder on the same date adjudged her to be so entitled on the authority of the passage in the Koran translated by Mr. Justice Ameer Ali in his work on the "Personal Law of the Mahomedans," Vol. II, 1894, containing the law relating to "Succession and Status," where it is said that several jurists have, in consequence of that passage, held that a widow has a right to maintenance, independently of any share that she may obtain in the property left by her husband.

As to whether this widow had been properly charged by the executor for the use and occupation by her of her late husband's house after his death till the sale of it under his will, the Recorder [13] found no authority for holding that an heir was so chargeable; and he therefore answered the question in the negative.

On the 2nd March 1893, after taking evidence as to the alleged gift of the money deposited in the Bank, the Recorder found against the gift having been made, both because he disbelieved the evidence and because he held "that the mere possession of the receipts was not enough to enable the plaintiff to exercise the right of property over the money in the Bank." He was of opinion that, even assuming the plaintiff's statement to be true, she could not succeed: and upon the facts, also, he could not find that the gift was made.

On the same date the Recorder made a decree for an account to be taken on the basis of the previous decisions. The executor filed his account on the 10th July following according to the above principles. On the 24th July, then next, the widow filed further objections, upon which the Recorder, delivering another judgment, gave his opinion that the "only way of ascertaining the share of the rents is by ascertaining the value of the land, and of the houses, separately, and apportioning the amount received as rent; and this has been done." He added :—

"As regards the moneys invested, it is admitted that the widow would not have been entitled to share in the immoveable properties if they had

(1) The word *khoom* is given in Wilson's Glossary of Indian Terms as vernacular for *khaum*, meaning people, tribe, &c.

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remained unsold, and I do not think that she can be allowed to share in the proceeds."

"The final decree, dated the 14th September 1893, so far as it related to the points disputed in this appeal, was as follows:—

"It is ordered and declared that: 1. The plaintiff is not entitled to share in the land on which the testator's houses stood, but her share in such house property is a one-fourth share of the value of the buildings on such land. 2. The directions in the will of the deceased that the executor shall be allowed to charge three per cent. commission, and that he shall deduct one-fifth for *khooms*, are only valid as bequests out of one-third of the testator's estate. 3. The plaintiff is not entitled to the amounts of the fixed deposits. 4. The plaintiff is entitled to share in the income arising from the rents of houses until her share has been fully paid to her. 5. The plaintiff is entitled to be paid maintenance out of the estate of the testator, at the rate of Rs. 150 a month for twelve months. 6. The executor is not entitled to charge the plaintiff for the use and occupation of one of the testator's houses, after his death."

From this decree both parties appealed.

[14] Mr. *J. D. Mayne*, for the executor, appellant.—In reference to the commission of three per cent. payable under the will to the executor, the decision of the Recorder should have been that the whole estate was chargeable with this money. It was a remuneration directed to be paid by the will on account of the duties to be discharged by the executor, and it should not have been dealt with as a legacy of which payment was to be made out of one-third only of the testator's estate. The one-fifth share allotted for *khooms* by the will should also be taken as payable out of the whole estate. This might be regarded as a direction for the management of the estate, and the commission also. Next to be disputed was the allotment to the widow of Rs. 1,800, as money for a year's maintenance, over and above her share as one of the heirs. It was a rule founded on principle that a widow should have no maintenance after her husband's death. The main authority was to be found in the Hedaya (as translated by Hamilton), Book IV, chap. 15, s. 3, where it was plainly declared that maintenance is not due to a woman after her husband's decease according to law, forasmuch as the husband's right in his property ceases on his decease. Reference was also made to Baillie's Mahomedan Law, Imamia (1869), at pp. 170, 171. The contention was that the widow took only her share by inheritance, or under the will, by Mahomedan law.

The Court below had also erred in its judgment that the widow was not to be charged rent for the months during which she had remained in occupation of the premises of which a sale had been directed by the will. At the death of the testator the property passed to his heirs, and if the widow remained in possession of what had become their house, the executor was right in charging her with an occupation rent. There were no grounds for the widow's cross appeal. The Court below had been right in rejecting the claim to a gift effected by the handing over of the deposit receipts.

That Court had also been right in deciding that the childless widow of a Shiah Mahomedan could take no interest by inheritance in any land that had been her husband's.

Mr. *J. H. A. Branson*, for the widow, respondent and cross-appellant.—The widow's right, according to Mahomedan law, [15] was to inherit a one-fourth share of the estate of her husband, as a share fixed under all circumstances; and this could not be reduced by any directions

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in the will of her husband. Her right to that share arose immediately on the death of her husband, and she was entitled to all profits to the amount of her share. Her right to a proper maintenance for twelve months after her husband's death was supported by the text quoted in the "Personal Law of the Mahomedans," 1894, by Mr. Justice Ameer Ali, which text was the highest authority. He referred to chap. X relating to the "rights and duties of the married parties," s. 1, p. 369. The passage from the Koran was : "Such of you as shall die and leave your wives ought to bequeath to them a year's maintenance." This was understood by several jurists, as stated by Mr. Justice Ameer Ali, to be a maintenance independent of any share she might obtain.

Next, the widow was not chargeable with the occupation rent, and the Recorder's judgment on both this and the above points should be maintained. In her cross-appeal, however, she contended that the Recorder's decision was wrong in declaring her disentitled to the fixed deposits, and to a share in the land on which the houses belonging to the estate had been built. As to the latter claim, the authority cited by the Recorder from Baillie's Imamia might refer to land not built upon. The opinions which negatived the widow's right to a share in the land of her husband might refer, on a proper construction of them, to land other than the sites of houses, and not refer to land which went with a building, as part of the whole tenement. It was difficult to see how the value of the house separately from that of the ground could be estimated unless a ground rent had been fixed. He referred to the passage quoted in Baillie's Imamia Law, Book VII, chap. IV, from the Shurayul Islam, discussed and re-translated in *Asloo* v. *Umdutunnissa* (1).

Mr. *J. D. Mayne* replied, contending that in the calculation of the widow's share, it was necessary to deduct both the proceeds of the land sold, and the rental value of the sites of all rent-paying houses belonging to the estate.

JUDGMENT.

Afterwards on the 7th April, their Lordships' judgment was delivered by

[16] LORD DAVEY.—This appeal and cross-appeal from the Court of the Recorder of Rangoon deal with questions which have arisen in the administration of the estate of Hadji Hoosain Bindanim, a Mahomedan of the Shiah sect. The testator died in February 1890, leaving one widow Koolsom Beebee (respondent in the principal appeal and appellant in the cross-appeal) and no children.

The contents of the will so far as material may be shortly stated. The testator appointed his nephew Aga Mahomed Jaffer Bindanim (the appellant in the principal appeal) his sole executor and trustee, and directed him to sell his property and deduct from the proceeds of sale all costs and charges and a commission of three per cent. He devoted one-fifth part of the remainder (called *khooms*) and a sum of Rs. 3,000 to religious purposes, and directed his executor and trustee to divide the remainder, after deduction of the said sum of Rs. 3,000 and Rs 2,500 due to his wife Koolsom Beebee for dower, into three equal shares and to retain a one-third share and divide the remaining shares between his heirs who were his said wife and brother Aga Abdul Hadee Bindanim in the shares and proportions in which they would be entitled to the same according to

(1) 20 W. R. 297.

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Mahomedan law, and made a particular provision of the reserved one-third share. The testator declared that his executor and trustee should have power to charge a commission of three per cent. on the proceeds of sale of his property real and personal and cash.

Part of the testator's property consisted of land with buildings on it.

Several questions were raised on taking the accounts of the executor, four of which are submitted for decision in these appeals.

1*st.* Whether the commission of three per cent. to the executor and trustee is payble out of the entire estate or only out of the one-third which alone the testator could bequeath by his will?

2*nd.* Whether the widow was entitled to maintenance for any and what period after the testator's death?

3*rd.* Whether she ought to be charged with an occupation rent for the time during which she continued to reside in the testator's house after his death?

[17] 4*th.* Whether the widow can by Shiah law take any share by inheritance in the land on which the buildings stand as well as in the value of the buildings.

The widow also claimed adversely to the estate to be entitled to a sum of Rs. 30,000 owing to the testator on deposit notes of the Bank of Bengal which she alleged the testator had given to her on the Monday preceding the Friday on which he died.

To deal with the last-mentioned question first. The deposit notes signed by the agent of the Bank are in the form of receipts from the testator of the sum mentioned in them as a deposit bearing interest at the rate mentioned to remain till notice of twelve months on either side expires. They contain in the margin the words "not transferable," and are not in a form which would entitle the bearer of the notes to the debts created thereby as transferee thereof. The respondent Koolsom Beebee in her evidence stated that on the day in question the testator being then indisposed (but not apparently in contemplation of his early death) handed her the notes with certain formalities, and added "after taking a bath I will go to the Bank and transfer the papers to your name." Her story to this extent is confirmed by two witnesses who said they were present. The testator never did transfer the notes in the Bank, or do any act to complete Koolsom Beebee's title.

The learned Recorder has expressed doubts as to the truth of the story told by Koolsom Beebee and her witnesses, but he has also held that even if her evidence be accepted the gift was incomplete, and that she is not therefore entitled to the money on deposit.

As their Lordships entirely agree with the Recorder on the latter point, it is unnecessary for them to express any opinion on the value of the evidence. It is quite clear that the effect of handing the notes was not to transfer the debts or to give the widow the dominion over them or enable her to recover the money secured by the notes. At most the evidence shows an intention to make such a transfer, but the gift is incomplete and no legal effect can be given to it. There is no question here of a *donatio mortis causa* in English sense, even if such a mode of passing property were known to the Mahomedan law.

[18] Their Lordships also agree with the learned Recorder that the executor's commission can be paid only out of the one-third part of the testator's estate which passed by his will. It is given no doubt by way of remuneration, but it is a gratuitous bequest and nothing more than a legacy to the executor, and certainly not in any sense a debt.

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The learned Recorder has decided that the widow is entitled to maintenance at the rate of Rs. 150 per mensem for one year after the testator's death, and he has done so on the authority of a passage of the Koran quoted by Mr. Justice Ameer Ali in his work on the Personal Law of Mahomedans, on which the text-writer makes the observation that several jurists have held that a wife has a right to be maintained out of her husband's estate for a year independently of any share she may obtain in the property left by him. Unfortunately the writer does not give any references in support of his statement, and Counsel have not been able to furnish their Lordships with any. On the other hand, the Hedaya (Book IV., ch. XV, s. III) says expressly: "Maintenance is not due to a woman after her husband's decease," and gives reasons for so holding. The Imamia (Baillie, p. 170) after saying that it would seem that after the death of her husband the widow has no right to a residence except in the single case of her being pregnant, says: "A widow has no right to maintenance, even though she be pregnant."

Their Lordships on these authorities must hold that a Mahomedan widow is not entitled to maintenance out of her husband's estate in addition to what she is entitled to by inheritance or under his will. They do not care to speculate on the mode in which the text quoted from the Koran, which is to be found, Sura II. vv. 241-2, is to be reconciled with the law as laid down in the Hedaya and by the author of the passage quoted from Baillie's Imamia. But it would be wrong for the Court on a point of this kind to attempt to put their own construction on the Koran in opposition to the express ruling of commentators of such great antiquity and high authority.

The executor in his accounts charged the widow with an occupation rent for the period of eleven months during which she continued to occupy the testator's house after his death. She [19] objected to the charge on the ground that she had never contracted to pay a rent, and the learned Recorder has decided in her favour. Their Lordships do not disagree with the Recorder. It is quite true that when one occupies the house of another with his permission there is *prima facie* an implied contract to pay an occupation rent. But this implication may be rebutted by showing the circumstances under which possession was taken, *e.g.*, that the house was lent to the occupier, or that he was a caretaker. In this case the widow's occupation is referable to the previous occupation by her husband and herself, and as one of the heirs and one of the residuary legatees she had an interest in the house (apart from the land). No notice appears to have been given her that she would be charged a rent, and their Lordships think that in the circumstances of the case they cannot imply a contract on her part to pay a rent, but they must treat her as having occupied the house until sale on behalf of herself and the other parties interested as caretakers.

There only remains the question raised on the widow's behalf that she is entitled to share in the land on which the buildings stand as well as in the value of the buildings themselves. The argument urged by Mr. Branson was that the text from Baillie's Imamia, p. 295, quoted by the learned Recorder refers only to agricultural land, and that a childless widow is, according to the proper construction of that text entitled by Shiah Law to share in land forming the site of buildings. The argument is characterized by novelty and boldness. It is unsupported by any authority, and is contrary to the accepted doctrine on the subject. Their

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Lordships have no hesitation in agreeing with the learned Recorder in rejecting it.

Their Lordships, therefore, will humbly advise Her Majesty that the final decree of the learned Recorder dated the 14th September 1893 be reversed so far as it decrees "7. That the plaintiff Koolsom Beebee is entitled to be paid maintenance out of the estate at the rate of Rs. 150 per month for twelve months," and instead thereof it be declared "that the plaintiff Koolsom Beebee is not entitled to maintenance out of the estate after the date of the testator's death," and in other respects that the decree be affirmed. As the appeal of the appellant [20] Aga Mahomed Jaffer Bindanim has partly failed and partly succeeded there will be no order as to the costs of that appeal. The appellant Koolsom Beebee must pay to Aga Mahomed Jaffer Bindanim the costs of her appeal. The other respondents in each appeal have not appeared and there are no costs.

Decree affirmed with a variation.

Solicitors for the appellant, Aga Mahomed Jaffer Bindanim: Messrs. *Bramall, White & Sanders.*

Solicitors for Koolsom Beebee: Messrs. *Hopgoods & Dowson.*

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PRIVY COUNCIL.

PRESENT:

The Lord Chancellor, Lord Watson, Lord Hobhouse, Lord Macnaghten, Lord James of Hereford, Sir Richard Couch and Mr. Way.

[*On appeal from the Chief Court of the Punjab.*]

MUHAMMAD YUSUF-UD-DIN (*Petitioner*), *Appellant v.* THE QUEEN-EMPRESS (*Respondent.*) [7th July, 1897.]

Jurisdiction of Criminal Court—Criminal Jurisdiction along the Railway through Indian Independent States—Locality of crime—Illegal arrest on lands occupied by the Hyderabad State Railway.

The authority for the exercise of criminal jurisdiction by the Government of India upon lands within the limits of the Hyderabad State Railway is derived from a grant to that Government in 1887 by His Highness the Nizam as ruler of the territory. The railway lands remain part of his dominions.

The grant of civil and criminal jurisdiction contained in the correspondence of that year between the Nizam's Minister and the Resident at Hyderabad is expressed to be "along the line of railway as is the case on other lines running through Independent States."

This jurisdiction, notwithstanding any words in the Notification of the Government of India of the 22nd March 1888 (which could not of itself give any authority, or add to that granted by the Nizam), does not justify the arrest on the lands of the Hyderabad State Railway of a subject of the Nizam under the warrant of the Magistrate of a District in British India, on a charge of a criminal offence committed in British India, and unconnected with the Hyderabad Railway administration.

The mere presence of the accused on the railway lands, over which criminal jurisdiction had been granted as above, was no legal ground for his arrest under the warrant of the Court in British India, his offence, if committed at all, not having been committed on those lands, and not having been connected with the railway.

[R., 35 B. 225 = 1 Bom. Cr. Cas. 26 (36) = 13 Bom.L.R. 296 = 12 Cr. L.J. 356 = 10 Ind. Cas. 956 ; 33 C. 219 = 3 C.L.J. 395 (401) = 3 A.L.J. 250 = 8 Bom. L.R. 129 = 10 C.W.N. 361 = 33 I.A. 1 = 16 M.L.J. 115 = 1 M.L.T. 115 ; 26 M. 607 (619) = 1 Weir 13 (20) ; 12 Cr. L.J. 113 = 9 Ind. Cas. 677 = 1 P.R. 1911 = 84 P.L.R. 1911 = 4 P.W.R. 1911.]

[21] APPEAL from an order (17th February 1896) of the Chief Court as a Court of Criminal Revision.

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The question raised on this appeal was whether or not the jurisdiction conferred by His Highness the Nizam of Hyderabad upon the Government of India along the line of the Hyderabad State Railway had been exceeded by the arrest of one of his subjects, on the lands of that railway, under a warrant of the Magistrate of a District in British India, upon the charge of having committed a criminal offence within that Magistrate's District.

The appellant, Sayad Muhammad Yusuf-ud-din, a Hyderabad subject, and a *talkudar*, or District Officer, in the service of the Nizam, was arrested on the 28th November 1895, under a warrant of the Magistrate of Simla in the Punjab, on a charge of having abetted at Simla the offer of an illegal gratification to a public servant, the Record-keeper of the Foreign Department of the Government of India, contrary to ss. $\frac{116}{161}$ of the Indian Penal Code.

Of the substantive attempt to bribe Mr. Schorn on the 12th and 13th June 1895, the attempt not having succeeded, one Gopalchunder was convicted by the District Magistrate of Simla, Captain Beadon, on the 8th July, 1895. In the course of that trial it appeared that Gopalchunder, who kept an hotel at Simla, had acted at the request of a person, then staying in the hotel, known as a Sirdar of Hyderabad.

On the 18th September 1895 the District Magistate, on application made from Hyderabad, signed and issued to the Resident at Hyderabad a warrant for the arrest of the appellant. In issuing this instead of a summons, the Magistrate recorded his reason, in conformity with s. 90 of the Criminal Procedure Code (that being one of the reasons there specified), and he added the following note :—

" *N. B.*—In handing this warrant over to the Thagi and Dakaiti Department, I have explained that it cannot be executed outside British India, except through a Political Agent. If the accused is in Foreign Terriorty, the Resident who applies for the warrant, and is Political Agent for Hyderabad, must decide whether he can be made over to the British Courts under the Extradition Law."

[22] The warrant on reaching Hyderabad was endorsed by the second Assistant Resident to the Magistrate Superintendent of Railway Police, and by him endorsed for execution by the chief constable of Railway Police, who executed it by the arrest of the appellant within the limits of the Hyderabad State Railway at one of the stations, on the 28th November 1895. On the 30th of the same month the accused was released and held to bail to appear to the charge at Simla. This he did on the 11th December. The case was adjourned, and in the end fixed for hearing at Amballa, an order having been made, upon consent, by the Chief Court, transferring the case to that District, where it was postponed. Meantime, on the 22nd January 1896, the appellant petitioned the Chief Court to cancel the warrant under which he had been arrested, and the order for its issue. Among other grounds, he alleged that the issue of this warrant by the Simla Magistrate for execution in Hyderabad territory was contrary to law, and that his arrest in that territory was illegal. His petition was that the proceedings taken should be set aside, and that further proceedings should be stayed, pending the orders of the Court. On the 17th February 1896 this petition was dismissed by the Chief Court, Frizelle and P. C. Chatterji, JJ. ; and against this order of dismissal the present appeal was afterwards preferred.

On the 7th April following the charge against the appellant came on to be heard by Captain Parsons, Magistrate of the Amballa District, the

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accused being present. A commission was issued for the examination of some witnesses at Hyderabad, and their examination took place. But on the 11th May 1896 the proceedings in the Amballa Court were stayed, the accused, on a petition preferred by him to Her Majesty in Council, having obtained special leave to appeal.

The following is the material part of the Government Notification of the 22nd March 1888, published in the *Gazette of India* of the 24th *idem*, upon which the judgment of the Chief Court proceeded, without other evidence before them showing the jurisdiction granted by the Nizam:—

"Fort William, 22nd March, 1888. Whereas His Highness the Nizam of Hyderabad has granted to the British Government full jurisdiction within the [23] lands which are occupied, or may hereafter be occupied, by His Highness the Nizam's Guaranteed State Railways Company, by the Great Indian Peninsular Railway, by the Madras Railway, and by the Southern Mahratta Railway respectively (including the lands occupied as stations, outbuildings, and for other railway purposes); in exercise of this jurisdiction, and of the powers conferred by ss. 4 and 5 of 'The Foreign Jurisdiction and Extradition Act, 1879' and of all other powers enabling him in this behalf, the Governor-General in Council is pleased to issue the following orders:—

"Part 1. The provisions, so far as they may by applicable and as amended for the time being by subsequent enactments of the Acts mentioned below, are hereby extended to the aforesaid lands, namely, Act XLV of 1860 (the Indian Penal Code), Act V of 1861 (for the Regulation of the Police), Act VI of 1864 (the Whipping Act), Act I of 1871 (the Cattle Trespass Act), Act X of 1882 (the Code of Criminal Procedure) &c., &c.

"Part 2. For the purpose of the exercise of criminal jurisdiction within the aforesaid lands, the Governor-General in Council is pleased to make the following arrangements: 1. There shall be a Railway Magistrate who shall be the second Assistant to the Resident at Hyderabad. 2. The Railway Magistrate shall have the powers of a District Magistrate as described in the Code of Criminal Procedure."

Act XXI of 1879, called the "Foreign Jurisdiction and Extradition Act, 1879," referred to in the above, contains in chap. II the following:—

"Powers of British officers in places beyond British India. Section 4. The Governor-General in Council may exercise any power of jurisdiction which he for the time being has within any country or place beyond the limits of British India and may delegate the same to any servant of the British Indian Government in such manner and to such extent as the Governor-General in Council from time to time thinks fit. Section 5. A Notification in the *Gazette of India* of the exercise by the Governor-General in Council of any such power or jurisdiction, and of the delegation thereof by him to any person or class of persons, and of the Rules of Procedure or other conditions to which such persons are to conform, and of the local area within which their powers are to be exercised, shall be conclusive proof of the truth of the matters stated in the Notification."

Section 6 relates to the appointment, powers and jurisdiction of Justices of the peace. Section 7 confirms the powers of existing officials as to jurisdiction under this Act, which in that section extends the criminal law of British India to British subjects, European and Native, out of British India, subject as to procedure to such modifications as the Governor-General in Council from time to time may direct.

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[24] At the making of the order of the 17th February 1896 by the Chief Court, after dealing with objections on behalf of the petitioner to the legality of the criminal proceedings at Simla, FRIZELLE, J., said :—

"The main ground of this petition is that the Magistrate of Simla had no jurisdiction to issue a warrant of arrest for execution in the Hyderabad State for an offence committed at Simla against ss. 116 and 161 of the Penal Code by a subject of the Hyderabad State, contrary to the Extradition Treaty with His Highness the Nizam, which exempts the subjects of His Highness from surrender; and that it never should have been executed. This objection would have had more force had the warrant been issued for execution, or been executed, at a place in the Hyderabad State over which the British Government has no jurisdiction. But it was executed at a place over which full jurisdiction is possessed by the British Government under the Notification already quoted, and to which the whole of the Criminal Procedure Code was extended by that Notification, and in my opinion a warrant so executed was as legal as if it had been executed in any district in British India. If it had been executed or intended to be executed in Hyderabad territory, in which no such jurisdiction had been ceded, I think exception might have been more properly taken than, as the case stands, to both its issue and execution. But it was not carried out, or apparently issued with a view to its being carried out, at a place within the Nizam's jurisdiction. It was addressed to the Resident of Hyderabad, and its manner of execution expressly left to him. He, it may be observed, has under the Notification jurisdiction for all purposes connected with the administration of criminal justice within the limits therein specified."

The Judge further said :—

"Had there been an addition to ss. 1 and 82 of the Criminal Procedure Code that this Act extended to the whole of British India, and any territory over which jurisdiction was ceded under s. 4 of Act XXI of 1879 (under which the Notification was issued), and that a warrant of arrest may be executed at any place in British India, or any place over which jurisdiction had been ceded under the last-mentioned Act, the case would have been perfectly clear. To my mind the Notification had exactly the same purport and effect as if this addition had been made to the Criminal Procedure Code. It expressly extended the whole of that Code to the lands specified, and this involved the extension of the limits mentioned in s. 82 and made s. 83 applicable, under which the District Magistrate of Simla could have sent the warrant to the Railway Magistrate of Hyderabad. The latter Magistrate was bound to treat the warrant in the same way as any other Magistrate, subject to the Procedure Code, would, have been bound to treat it, and did accordingly execute it in the manner laid down in s. 83.

[25] "That the petitioner is a subject of the Hyderabad State does not affect the matter. Full jurisdiction in the place where he was arrested was ceded over Hyderabad subjects as well as British subjects. The Notification contained no exception or reservation, and petitioner was, within those limits, equally liable to arrest as he would have been at Simla itself, or in any other district in British India."

CHATTERJI, J., who concurred, said in the course of his judgment :—

"The petitioner must be presumed, for the purposes of this case, to be a subject of His Highness the Nizam, as stated in his affidavit, there being no averment to the contrary, but his alleged offence was committed at Simla, and is triable there, and there is no question of his exemption

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from the jurisdiction of the Simla Court on the ground of his being a foreign subject."

The Judge further said :—

"It was admitted by the learned Counsel for the petitioner that the jurisdiction exercised by the Governor-General in Council over the lines of railway extended to all classes of persons found within their limits, whether subjects of the British Government or of the Hyderabad State. Indeed this seems perfectly clear from the preamble to the Foreign Jurisdiction and Extradition Act, 1879, as well as from the terms of the Notification above quoted. The contentions of the petitioner against the warrant are divisible into two heads—(1) illegality of the warrant as issued from the Simla Court; (2) illegality of its execution within the line of railway in the Hyderabad territory.

"The legality of the warrant is attacked on the grounds—(1) that it was intended to be executed in foreign territory, as shown by its being directed to the Resident at Hyderabad, and its description of the petitioner; and (2) that the Code of Criminal Procedure gives no authority to British Indian Magistrates to issue warrants executable outside British India. In my opinion the conclusion does not seem to follow from the premises."

He further said :—

"In so far, therefore, as the argument proceeded upon the provisions of the Code of Criminal Procedure or on general principles, it does not appear to be sound; but it is not necessary to discuss this part of it any further, as the warrant does not appear to have been intended by the District Magistrate of Simla to be executed outside British India. The mere fact that it was addressed to the Resident at Hyderabad does not prove that it was so intended. On the contrary, Captain Beadon's order, dated 18th September 1895, clearly shows that he was fully aware of the provisions of s. 82. His views about extradition may be mistaken, but they are not sufficient to show that he asked for the execution of the warrant contrary to law.

"Executions of warrants of British Courts within the railway lines in Hyderabad territory, and of warants of the Railway Magistrate of such [26] territory in British India, must be of constant occurrence, for the object of acquiring the British jurisdiction within the railway limits is to obviate the dangers and inconveniences of the difference and clashing of jurisdictions. A contention like the present, though possibly not yet raised, can be raised in scores of cases, and, if it is correct, must nullify the whole arrangement, and leave matters where they were before the special jurisdiction was acquired."

In conclusion, the Judge summarized his reasons as follows :—

"The Notification extends the provisions of the Code of Criminal Procedure to the territory occupied by the railways, 'so far as they may be applicable." These provisions have, therefore, to be applied with modifications suited to the circumstances and conditions under which such territory is administered. Bearing in mind the object in acquiring jurisdiction over these tracts, and in order to give effect to it and to avoid the inconveniences which would necessarily result from adopting a different construction, we must, I think, read ss. 1 and 82 of the Code as in force there, as if words specifying such lands were inserted after the words 'British India' in those sections, and the word 'warrant' in Chap. VI, understood to include warrants issued by Criminal Courts in British India as well as by such Courts within the lines of railway. If this construction

is correct, as I hold it is, the warrant in this instance could be and was lawfully executed at Lingampally." 1897 JULY 7.

Pursuant to leave obtained by him as above mentioned, the accused appealed to Her Majesty in Council.

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While his appeal was pending, copies of a correspondence between the Governments of India and of Hyderabad were added in a supplemental record, showing the grant of civil and criminal jurisdiction made by the Nizam in 1887. The letters included one of the 10th September 1887, from the Nizam's Minister to the Resident, stating that his Highness acceded to the request of the Government of India that such a jurisdiction should be granted, "as is the case on other lines running through Independent States." The contents of this are stated in their Lordships' judgment.

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Mr. *H. H. Asquith*, Q. C. and Mr. *J. H. A. Branson*, for the appellant.—The arrest was illegal for want of jurisdiction in the Court which issued the warrant, and for absence of lawful authority to execute it at the place of the arrest. The Simla Magistrate had no jurisdiction to order the execution of the warrant in Hyderabad territory. The accused was not a British subject, nor was he resident in British India. He was a subject of the Nizam, within whose territories he was when arrested.

[27] That the place of arrest was a station on the Hyderabad State Railway within the lands occupied by the Railway, as referred to in the Notification of the 22nd March 1888, did not render the arrest any the more lawful. This was the appellant's case.

The judgment of the Chief Court was erroneous in holding that the sections of the Code of Criminal Procedure enacted for British India relating to the warrant of arrest and its execution, had obtained force, in virtue of a grant of criminal jurisdiction from the Nizam to the Government of India, over the railway lands in Hyderabad territory, as much as if those lands were a district in British India. No jurisdiction so extensive as to render possible such a state of things had been granted by the Nizam. The authority which he had, in fact, granted was contained in the letter from the Nizam's Minister to the Resident of the 10th September 1887, which showed the jurisdiction of the British Indian Magistrate to be exerciseable for the maintenance of order along the lines of railway in Hyderabad, as in other Independent States, upon the lines running through them. In so far as the Notification exceeded the terms of that grant it had no effect. The railway station where the arrest was made was, no doubt, within the limits specified in the Notification. But the lands occupied by the Railway Company were not in any sense British territory. The plan of cession of territory for the purpose of administering justice on the lines of railway in Independent States, at one time followed, had been abandoned as inexpedient; and the grant of a jurisdiction, civil and criminal, over the lands comprised within railway limits, had been made at the request of the Indian Government. This, however, was not a general jurisdiction for the repression of crime in India, but for maintaining order in connection with railways in Independent States. The Notification purported to extend the provisions of the Code of Criminal Procedure "so far as they may be applicable" to railway lands in Hyderabad. It was submitted that they could not be applied for the purpose of arresting an offender in the circumstances of the accused. The argument, however, for him did not rest only on the construction of these words. The character of the offence charged, taken in connection with the place of its commission, if committed at all, showed that the **[28]** criminal

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jurisdiction along the line, as granted by the Nizam, could have no application to this offence. That criminal jurisdiction comprehended only offences that had a local, or some other, connection with the Hyderabad State Railway, its good order and regulation—a connection that did not exist in the present case. The Notification purported to extend the provisions of the Code of Criminal Procedure "so far as they may be applicable" to railway lands in Hyderabad. It was submitted that they could not be applied for the purpose of arresting an offender in the circumstances of the accused. The argument, however, did not rest only on the construction of these words. The character of the offence charged, taken in connection with the place of its commission, if committed at all, showed that this jusisdiction, as granted by the Nizam, could have no application. It was applicable only to offences that had local, or some other, connection with the good order and regulation of the Hyderabad State Railway, a connection that did not exist in this case.

Mr. *A. Cohen*, Q. C., and Mr. *J. D. Mayne* submitted the following as their principal points.—The jurisdiction over the railway lands depended, not upon any legislation, but upon powers acquired by agreement with the State through which the railway was made, the Government of India, in the exercise of the rights of the Crown delegated to them, accepting the authority conferred by the Nizam. There were several kinds of extra-territorial jurisdiction exercised by the Governor-General of India in Council over lands in Independent Indian States. Some of these were referred to in the Act XXI of 1879. The Indian railways, especially in the west and central parts of India where Indian States and British Indian territory were interlaced, had been found to require the exercise of this jurisdiction, to secure the administration of justice. Different jurisdictions at short intervals along a line of railway could not have worked effectively to repress crime and maintain order. Therefore it had been conceded that there should be one jurisdiction only, which should be that of the paramount Power. This, at one time, as stated already, had been secured in some States by obtaining an actual cession of territory. The same result was now generally secured by obtaining only a grant of civil and criminal jurisdiction [29] over the lands comprised in the railway. There was no difference on this point between the Hyderabad State Railway and railways in other Indian States, from which, as would be found, by reference to "Aitchison's Treaties, &c.," a considerable number of grants had been obtained by the Government of India.

The question here was how far the grant made by the Nizam went in regard to criminal procedure. Reference was made to the official letter, from the Nizam's Minister to the Resident, dated 10th September 1887. After that grant of jurisdiction, the Notification of the 22nd March 1888 was published by the Government of India in the *Gazette*. From that time this jurisdiction, as well in Hyderabad as in other States, had been exercised on the understanding that the railway lands along the lines were, for all purposes of criminal process, in the same relation to the judicial system of the Government of India as if they formed part of the territories under the administration of that Government. The jurisdiction has been used for executing on railway lands the process of the British Indian Codes with a complete understanding between the two Governments. Taking the proceedings in their order, they were legal before the Simla Magistrate who acted correctly in issuing the warrant. Next came the arrest in an exceptional part of foreign territory, where the warrant of a British Indian Court was permitted to have force by the

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grant of criminal jurisdiction to the Indian Government. If there had been irregularity, when the accused appeared, as he had done, on the 11th December 1895, in the Simla Court, no ground for staying the proceedings against him was afforded.

Again, it was apparent that the Chief Court Judges, upon whom an Act of the Indian Legislature was binding, had no choice but to comply with s. 5 of the Foreign Jurisdiction and Extradition Act XXI of 1879, which required them to accept the Notification as conclusive. However, the contention for the respondent now was that the letter of the 10th September 1887 had conceded sufficient powers to justify this arrest. The Government of India had the right under this grant to entrust the exercise of the jurisdiction on railway lands to such officers to be carried out in such manner, and with such procedure, as [30] that Government might consider suitable, employing such officers as it might choose for the purpose. Lastly, the Chief Court had been right in holding that the jurisdiction granted by the Nizam was not limited to persons of any one nationality, and that it included his own subjects.

Reference was made to the Foreign Jurisdiction and Extradition Act, 1879, and to the Statute of 1890, the 53 and 54 Vic., Chap. 37.

Counsel for the appellant was not called upon to reply.

Their Lordships' judgment was then delivered by—

JUDGMENT.

LORD HALSBURY (LORD CHANCELLOR).—In this case their Lordships are called upon to pronounce their opinion as to whether the arrest of Yusuf-ud-din, a native of the Nizam's State, was lawfully executed by a warrant issued by a Magistrate at Simla.

The alleged offence for which the accused was arrested was the abetment in British territory of the offence which we may call compendiously bribery. Their Lordships have nothing to do with the question whether or not, if the accused had been found within British territory, he could have been lawfully tried and convicted of that offence, because the question reserved for their Lordships here to consider is whether or not the arrest of the man, while he was at the station on a railway which is locally situated within the dominions of the Nizam, was a lawful arrest; nor, except for the purpose of this particular case, have their Lordships anything to do with the consequences of that arrest being lawful or otherwise. The one question which they have to determine is whether the arrest was lawful.

Now, the offence which was charged against the accused was an offence committed, if committed at all, in British India, and subject to what is said hereafter, their Lordships are of opinion that the territory on which the railway is locally built has been, and has continued to be, part of the dominions of the Nizam. It is important to observe this, because crime is in its essential nature local, and if the accused had been arrested in British territory there is no doubt that the British authorities would have ample jurisdiction to try and punish him for crime. But their [31] Lordships are of opinion that the railway territory has never become part of British India, and is still part of the dominions of the Nizam. The authority, therefore, to execute any criminal process must be derived in some way or another from the Sovereign of that territory, and the only authority relied on here is the authority given in the correspondence, which constitutes the cession by the Nizam of jurisdiction to the British Government. It is important to observe that the Notification

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upon which the learned Judges in India appear to have relied could itself give no such authority. Even if in more extensive terms than in fact are included in the Notification it had purported to give jurisdiction, as the stream can rise no higher than its source, that Notification can only give authority to the extent to which the Sovereign of that territory (the Nizam) has permitted the British Government to make that Notification. Their Lordships are not prepared to differ from the construction which has been placed by the learned Judges in India on the Notification, if the Notification was itself the source of authority, but the notification is not the source of authority. The authority, of which this is only the Notification, is derived from the Sovereign Power of the Nizam himself. It becomes therefore necessary, as there is no express treaty and no words which in themselves precisely define the amount of jurisdiction intended to be conveyed by the Nizam, to revert to the correspondence which passed between those representing the two Governments—to see in the first place what was asked for and what was ultimately conceded.

Now, the authority which was asked for was the authority to exercise civil and criminal jurisdiction over the railway lands and premises ; and if there is one thing manifest in the course of the correspondence more than another, it is that the Nizam jealously refused anything in the nature of a cession of territory such as would confer by itself local jurisdiction. It is the one thing which all through the correspondence appears to have been refused. The result is that one must look and see what was ultimately conceded, and when one comes to look at that which was asked for and that which was granted it seems to be very plainly set forth in the additional papers, which their Lordships understand not to have [32] been placed in the hands of the Chief Court, whose judgment is appealed from.

On the 28th March 1887 the British Resident stated that the thing desired by the Government of India was sufficient power "over the railways" to enable a Magistrate and Police Officer, recently appointed with the Nizam's assent, to perform their duties ; that at present their action was irregular because the Nizam had never formally transferred to the Government of India "full jurisdiction over the railways," and that "a few laws of British India which are necessary for the ordinary administration of criminal and civil justice should be regularly applied to the railways." Upon these grounds he suggested a transfer of "full criminal and civil jurisdiction over the railway lands."

He pointed out that the thing asked involved no sort or degree of encroachment on the Nizam's prerogative or independence ; that it was only doing formally what had been done practically ever since the commencement of the railway, and what had been done by every other Native Chief as railways were made. He ended by writing: "The jurisdiction is not *assumed* by the British Govenment in its own right, but is conceded by His Highness of his own free will for the sake of legal and administrative convenience over an area limited by the railway fences in which the difficulties that may occur are likely to be occasioned by Europeans."

The Nizam's Minister demurred even to this limited proposal lest it should encroach on his Sovereignty, and he made a counter proposal to pass by his own authority such British Indian laws as are necessary for the ordinary administration of civil and criminal justice.

These objections were met by the Resident by pointing out that he had not asked for the cession of any territory, and that the Nizam could

hardly intend to assert "that the grant of the means for carrying on a small piece of administration in a more legal and efficient mode than has hitherto been found possible, can possibly be viewed as a 'commencement of annexation of large tracts in His Highness's dominions' by the English Government." And he concluded thus: "I hope that this letter will serve to 'clear the air' a little about what really is only a matter of administrative convenience and is absolutely free of any such [33] far-reaching consequences or designs as the draft letter would seem to prognosticate from it."

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The concluding letter, No. 21 of the additional papers, is from the Nizam's Minister: "In reply to your letter, dated the 6th instant, I beg to state that His Highness's Government is willing to accede to the wishes of the Government of India regarding the civil and criminal jurisdiction along the line of railway as is the case on other lines running through Independent States." If that is the only jurisdiction which is given, and there is no evidence of any other jurisdiction whatsoever given by treaty or usage or otherwise, it is manifest that the jurisdiction conferred is a criminal and civil jurisdiction "along the line of railway as is the case on other lines running through Independent States." The only question therefore that remains is whether the act complained of in this case was one which can in any sense be regarded as coming within the jurisdiction "along the line of railway." It is not suggested that the particular offence charged was committed on the railway, or that it was in any way connected with the administration of the railway. What is suggested is that in another part of India (at Simla) an offence was committed in British territory, and because the appellant was physically present on a portion of that line of railway over which jurisdiction is given for the purpose of criminal and civil jurisdiction, he was open to criminal procedure for an offence committed elsewhere. Their Lordships are of opinion that there is no foundation for any such claim, that the arrest was illegal, and that the petition therefore ought to have been granted, and that the judgment of the Chief Court of the Punjab ought accordingly to be reversed. Their Lordships will therefore recommend to Her Majesty that the warrant and arrest and proceedings thereon should be set aside. There will be no order as to costs.

Appeal allowed.

Solicitors for the appellant: Messrs. *Morgan Price & Mewburn.*
Solicitors for the respondent: *The Solicitor, India Office.*

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JULY 16.
APPEL-
LATE
CIVIL.
25 C. 34.

25 C. 34.

[34] APPELLATE CIVIL.

Before Mr. Justice Macpherson and Mr. Justice Ameer Ali.

MATHURA MOHUN LAHIRI AND OTHERS (*Plaintiffs*) *v.* UMA SUNDARI DEBI AND OTHERS (*Defendants*).*
[16th July, 1897.]

Second appeal—Bengal Tenancy Act (VIII *of* 1885), *ss.* 104, 106, 108—*Special Judge under the Bengal Tenancy Act—Appeal from the decision of the Special Judge.*

Under the terms of s. 108 of the Bengal Tenancy Act (VIII of 1885), a second appeal lies from the decision of the Special Judge on questions with regard to the prevailing standard of measurement, area of lands in the possession of tenants, and the liability of the tenants to pay rent on account of any excess lands in their possession.

[**Rel.**, 16 C.L.J. 182 = 15 Ind. Cas. 332; **Appr.**, 31 C. 380 (383); **R.**, 37 C. 30 = 10 C. L.J. 343 = 13 C.W.N. 1149 = 3 Ind. Cas. 449; 5 C.L.J. 538 (540); **D.**, 26 C. 556 (558).]

Babu *Saroda Charan Mitter* and Babu *Mukund Nath Roy*, for the appellants.

Babu *Promotho Nath Sen*, for the respondents.

THE judgment of the High Court (MACPHERSON and AMEER ALI JJ.) was as follows :—

JUDGMENT.

This is an appeal against the decision of the Special Judge under s. 108 of the Tenancy Act, and a preliminary objection is taken that no appeal lies, as the proceeding in which the decision was given was one under s. 104, and not a proceeding in which a dispute within the meaning of s. 106 was decided. It appears that in the course of a proceeding for the preparation of a record of rights, the landlords applied for a settlement of the rent, alleging *inter alia* that the tenants were holding land in excess of what they paid rent for, and that the rod of 18 inches to the cubit was the standard rod of measurement.

The defendants put in written statements, alleging that the standard rod was one of 20 inches to the cubit. They denied that they held any excess land, and stated that they held their holding at a consolidated rent.

The Settlement Officer proceeded to deal with these allegations of the parties treating the application of the landlords as a plaint [35] and the proceeding as one in which the landlords were plaintiffs and the tenants defendants. Issues were framed, three of which were (1) as to the prevailing standard of measurement; (2) as to whether the defendants held their holdings at a consolidated rent; and (3) as to whether the excess land, if any, could be assessed. He dealt with and decided those issues, and then there was an appeal by the plaintiff to the Special Judge, in which the correctness of his decisions was questioned.

It is difficult to say, having regard to the confused terms of ss. 104 to 106, under what precise section the proceeding was held. There are cases in this Court in which it was held that there could be no dispute, and no decision of a dispute, under s. 106 until the draft record was prepared, as,

* Appeal from Appellate Decree No. 2239 of 1895, against the decree of K. N. Roy, Esq., Officiating District Judge of Pubna and Bogra, dated the 30th of August 1895, affirming the decree of Moulvi Abdul Mahammad, Settlement Officer of Pubna, dated the 29th of April 1895.

until then, there was no entry with reference to which a dispute could be said to arise. These cases were made the subject of a reference to a Full Bench, and it was substantially decided that the exact point of time at which the dispute arose was immaterial, and that a dispute within the meaning of s. 106 might arise with reference to an entry which the Settlement Officer proposed to make in the draft record of right, although no such record had been prepared (1). In this case we find the landlords on one side, and the tenants on the other, making certain conflicting allegations as to the area of the land, the standard of measurement, and the liability of the tenants to pay any rent on account of the alleged excess area, and we find the Settlement Officer laying down ssues on those points and deciding them. It would, we think, be difficult to conceive any thing more nearly approaching a dispute and the decision of a dispute to which s. 106 would be applicable. The appeal does not raise any question as to what the fair and equitable rent is, but it does raise questions as to matters which must be decided before the Settlement Officer could settle the amount of rent payable, and we must hold that under the terms of s. 108 a second appeal does lie on those questions from the decision of the Special Judge.

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Turning to the appeal itself, the objection of the appellants, who are the landlords and the plaintiffs in the proceeding, is that the Special Judge has not decided but ought to have decided the **[36]** length of the measure used in measurement, whether the defendants hold excess land, and whether they are liable to pay rent for the same. The Settlement Officer, we may add, decided that the measure was one of 18 inches to the cubit, but that the plaintiffs had failed to prove that the defendants were in possession of any land in excess of what they had been paying rent for, and he also found that they held at a consolidated rent. The Special Judge declined to go into those questions, considering that they were not properly raised in the plaint of the plaintiffs, which did not state what the original area of the holding of the tenants was, and the excess area in respect of which they wanted additional rent. The landlords in their original application under s. 104 distinctly asserted that the tenants had been found by the survey then made with the measure of 18 inches to the cubit to be in possession of excess lands which ought to be assessed with the rent. If it was necessary to get from them any particulars as to the original area of the holdings or other matters, this might have been done, or if additional evidence was required it might have been called for.

The questions were raised, put in issue, and decided by the Settlement Officer; they were the material questions, and the Special Judge was bound, we think, to decide them one way or the other. We, therefore, set aside his decision in so far as it relates to the matters referred to above, and the case must go back in order that he may dispose of them. The costs will abide the result.

Case remanded.

(1) 24 C. 462.

1897 JULY 13. — APPELLATE CIVIL. — 25 C. 36 = 2 C.W.N. 106.

25 C. 36=2 C.W.N. 106.

APPELLATE CIVIL.

Before Mr. Justice Banerjee and Mr. Justice Stevens.

SHAMA CHURN MITTER AND OTHERS (*Plaintiffs*) *v.* WOOMA CHURN HALDAR (*Defendant*).* [13th July, 1897.]

Landlord and tenant—Notice to quit—Bengal Tenancy Act (VIII of 1885)—Suit for ejectment—Notice including some land of which the defendant is found to be not in possession.

A notice to quit is not bad in law simply because of a small error in the statement in such notice of the area of the land, in consequence of which [37] it included some land which the defendant was found not to hold under the plaintiff.

THE facts of the case, so far as they are necessary for the purposes of this report, appear sufficiently from the judgment of the High Court.

Babu *Taruck Nath Palit*, for the appellants.

Babu *Nilmadhub Bose*, for the respondent.

The judgment of the High Court (BANERJEE and STEVENS, JJ.) was as follows:—

JUDGMENT.

BANERJEE, J.—This appeal arises out of a suit for ejectment upon a notice to quit. The defence was limitation, denial of the plaintiffs' right, denial of the notice, and a plea that a part of the land in dispute belonged to the defendant and had been held by him for twelve years, and that the defendant had acquired a right to the whole of the land in dispute by twelve years adverse possession.

The first Court found for the plaintiffs upon all the questions raised, except one, namely, that as to the defendant's title by adverse possession to 1¾ cottahs of land out of the land in dispute, and it accordingly gave the plaintiff a decree for the land in dispute excepting 1¾ cottahs.

Against this decree of the first Court the defendant preferred an appeal, and the plaintiffs a cross-appeal. The lower appellate Court has dismissed the plaintiffs' cross-appeal, holding that they have failed to make out their title to 1¾ cottahs in regard to which their claim had been disallowed by the first Court, and it has decreed the defendant's appeal on the sole ground that the notice is bad in law, that is to say, bad because it includes some land which the defendant is found not to hold under the plaintiffs.

In second appeal it is contended for the plaintiffs-appellants that the decision of the lower appellate Court, so far as it decreed the defendant's appeal, is wrong in law, and that the notice, notwithstanding the defect found in it, was not so bad as to disentitle the plaintiffs to maintain a suit in ejectment upon the basis thereof.

We are of opinion that the plaintiffs' contention is sound. The notice requires the defendant to give up possession of 1 bigha [38] and 5 chittacks of homestead land with tank, situate in the Bazar of Diamond Harbour, Pergunnah Mooragacha, Zillah 24 Pergunnahs, held under the plaintiffs as tenant-at-will. The notice does not set out the boundaries of the land. The only defect that has been found in the notice

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* Appeal from Appellate Decree, No. 1884 of 1895, against the decree of Babu Shyam Chand Dhur, Subordinate Judge of 24-Pergunnahs, dated the 8th of August 1895, reversing the decree of Babu Hur Mohun Bose, Munsif of Diamond Harbour, dated the 31st of August 1894.

is that, whereas it states the area of the defendant's holding to be 1 bigha and 5 chittacks, the true area is $1\frac{3}{4}$ cottahs less. And the question is whether that is a defect in the notice sufficient to justify our holding that the notice is bad in law. Considering that the error is only one in relation to the area, and is a very small error, and considering that the defendant never took any objection that he was misled by reason of this defect in the notice, we think it would be wrong to hold that a defect like this is sufficient to vitiate the notice. To hold that any trifling error in the statement of the area vitiates a notice to quit, would be to throw an unnecessary difficulty in the way of parties seeking ejectment upon service of notice, and to require them to measure their lands and to set out the areas with a degree of accuracy which the ordinary purposes of life do not render it necessary for them to observe. As was remarked by Mr. Justice Patteson in *Doe d. Williams* v. *Smith* (1) it is not required that a notice should be worded with the accuracy of a plea. The view we take is supported also by the cases of *Doe d. Cox* (2) and *Doe, Lessee of Rodd* v. *Archer* (3).

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The judgment of the lower appellate Court is, upon the question of the validity of the notice, therefore, in our opinion, wrong in law, and must be set aside, and the case sent back to that Court in order that the other questions raised in the appeal of the defendant before that Court may be disposed of. Costs will abide the result.

S. C. G. *Appeal allowed, case remanded.*

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25 C. 39.

[39] APPELLATE CIVIL.

Before Mr. Justice Trevelyan and Mr. Justice Stevens.

RAM NARAIN JOSHY (*Plaintiff*) *v.* PARMESWAR NARAIN MAHTA AND OTHERS (*Defendants*).* [20th July, 1897.]

High Court, Jurisdiction of—District Judge, Jurisdiction of—Appeal—Appeal withdrawn from the District Court—Civil Procedure Code (Act XIV of 1882), *s.* 25.

An appeal, the subject-matter of which was over Rs. 5,000 in value was wrongly presented and filed in the District Judge's Court, and was subsequently upon application by the appellant withdrawn by the High Court under s. 25 of the Civil Procedure Code, and registered as an appeal to that Court. The order of withdrawal left it open to the respondent to raise objection on the score of want of jurisdiction of the District Court at the time of hearing of the appeal.

Held, that when an appeal is transferred under s. 25 of the Civil Procedure Code, it must be heard subject to all the objections which could be taken before the Court from which it has been transferred. The High Court, therefore, had no jurisdiction to hear the appeal.

Peary Lall Mozoomaar v. *Komal Kishore Dassia* (4) and *Ledgard* v. *Bull* (5), referred to.

[R., 2 L.B.R. 117.]

THE facts material to this report sufficiently appear from the judgment of the High Court. The only question argued was whether the appeal could be heard by the High Court.

Mr. *Jackson* and Babu *Lalmohan Das*, for the appellant.

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* Appeal from Original Decree, No. 304 of 1895, against the decree of Babu Chandra Kumar Roy, Officiating Subordinate Judge of Tirhoot, dated the 25th of June 1894.

(1) (1836) 5 A. & E. 350. (2) (1803) 4 Esp. 185; 6 Revised Rep. 850.
(3) (1811) 14 East. 245; 12 Revised Rep. 509.
(4) 6 C. 30. (5) 9 A. 191 = 13 I. A. 134.

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APPELLATE CIVIL.

25 C. 39.

Mr. *W. C. Bonnerjee*, Babu *Saligram Singh*, Babu *Lakshmi Narayan Singh* and Babu *Debendra Chandra Mallik*, for the respondents.

Mr. *Bonnerjee*, on behalf of the respondent, took a preliminary objection to the hearing of the appeal. He argued that the case transferred was the appeal to the District Judge, but the Judge had no jurisdiction to try the appeal. The High Court could not, therefore, hear the appeal—*Peary Lall Mozoomdar* v. *Komal Kishore Dassia* (1), *Ledgard* v. *Bull* (2).

[40] Mr. *Jackson*, for the appellant.—The case was not tranferred; properly speaking the records were transmitted, and the appeal is one properly before this Court. The Judge in his order says that the appeal should be brought before the High Court; he should not have admitted it at all. The cases cited do not apply, and this Court has jurisdiction to hear the appeal. The learned counsel then discussed the effect of the order of Beverley and Ameer Ali, JJ., and cited *Aukhil Chunder Sen Roy* v. *Mohini Mohun Dass* (3).

The judgment of the High Court (TREVELYAN and STEVENS, JJ.) was as follows :—

JUDGMENT.

In this case an objection has been taken by the learned counsel for the respondent to the hearing of the appeal. He contends that as the Court in which the appeal was originally filed had no jurisdiction, the value of the appeal being in excess of Rs. 5,000, this Court, in which the same appeal is, by virtue of an order made under s. 25 of the Civil Procedure Code, now pending, cannot hear it. It is with extreme regret that we find ourselves compelled to give effect to this objection.

The facts shortly stated are these: Two suits were decided at the same time by the Subordinate Judge of Mozufferpore. This case, which was an appeal from the judgment in one of those suits, was filed on the 3rd of September 1894 in the Court of the District Judge of Tirhoot. The appeal in the other suit was filed here, and has been heard by a Division Bench of this Court. When this appeal was filed in the District Judge's Court an officer of the Court made the following note: "Filed, value of claim is not mentioned in the memorandum, but it appears from the certified copy of the decree filed along with the memorandum that the value of claim amounts to Rs. 9,855. Thus this appeal should be filed in the High Court." We may mention here that it is admitted by the learned counsel for the appellant that as a matter of fact the subject of the dispute in this appeal was over Rs. 5,000 in value, and that the appeal was filed in the wrong Court. But he contends that it was so [41] filed in consequence of an error which we will refer to hereafter. On the 4th September 1894, that is a day after the appeal was filed, there was an order made by the District Judge in these words: "Admit, as an application will be made for the transfer of this appeal to be tried along with the analogous appeal about to be filed in the High Court. No date need be fixed." That order was signed by the District Judge and also by Pitamber Chatterjee, the pleader for the appellant, who signed the memorandum of appeal. It does not, however, really matter, for the purpose of our decision, whether Pitamber Chatterjee, the pleader for the appellant, at that time knew that the value of the claim really was over Rs. 5,000, and that the District Judge of Tirhoot had no jurisdiction in the matter, because, as we shall presently point out, the question as to

(1) 6 C. 30. (2) 9 A. 191=13 I.A. 134. (3) 4 C.L.R. 491 (496).

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25 C. 39.

how far the mistake made by the appellant is capable of being remedied has already been dealt with by a Division Bench of this Court on an application in this particular appeal. The next event which happened was that on the 10th January 1895, a Division Bench of this Court issued a rule at the instance of the appellant calling upon the respondent to show cause why this appeal should not be transferred to the file of this Court and be heard and disposed of by this Court with appeal from original decree No. 275 of 1894 now pending in this Court, and with which it is analogous. The terms of the rule are in accordance with the prayer of the petition of the appellant. The word "transfer" is used. It has been said that if the terms of the Procedure Code had been strictly followed the word ought to have been "withdrawn." The application could have been made only under one section, namely, s. 25 of the Civil Procedure Code, which authorises the High Court and the District Court to allow the parties to withdraw a suit whether pending in a Court of first instance or in a Court of appeal subordinate to such High Court or District Court, as the case may be, and try the suit itself or transfer it for trial to any other such subordinate Court competent to try the same. It does not matter whether "transfer" was the proper word to use in the rule or not. The meaning of the rule is obvious. It was a rule to show cause why an order should not be made under s. 25 withdrawing the appeal from the lower [42] Court and empowering the High Court to try it. This rule came on for hearing on the 9th August 1895 before a Division Bench consisting of Prinsep and Ghose, JJ. They made the rule absolute, but in their judgment they left it open to the parties at the hearing of the appeal to raise the objection which was then raised before them, and which was to the effect that the District Judge had no jurisdiction to try the appeal. Thus the making of that rule absolute has no effect upon the right of the respondent to raise this objection now.

One of the chief difficulties in this case arises from an application which was presented to this Court on the 16th September 1895, and was moved on the 25th November 1895. That application was based upon the fact that the appellant's vakil, Babu Lalmohan Dass, for the first time on the 9th August 1895, when the rule came on for hearing, discovered that the appeal ought to have been valued at more than Rs. 5,000; and the petition goes on to submit that "the facts and circumstances stated above constitute sufficient cause for admitting the said appeal after the prescribed period," and asks "that the aforesaid memorandum of appeal (that is the one filed in the District Judge's Court) be admitted in this Court and be duly registered, or such further order made as to the Court may seem meet." That really, as far as we can see, is an application made under s. 5 of the Limitation Act for the admission of the appeal after time, but with this difference, that instead of a fresh memorandum of appeal being put in, it is asked that the same memorandum of appeal be allowed to be used in this Court. Upon that application a rule was issued calling upon the other side to show cause why the memorandum of appeal should not be registered as an appeal to this Court. The rule came on for hearing on the 19th January 1897 before a Division Bench consisting of Beverley and Ameer Ali, JJ. They discharged the rule. First of all they say in their judgment: "This is not an application for the admission of an appeal after time which is being presented in proper form to this Court. There is no fresh memorandum of appeal now before us. What we are asked to do is to treat an appeal which was presented to the District Judge and which was called up for trial to this Court, as an appeal to this Court direct,

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[43] and that in the face of the order of the Division Bench which called up the appeal for hearing. We are of opinion that we cannot do that. The appeal as presented to the District Judge has been called up to this Court, and is now an appeal to this Court numbered 304 of 1895, and we are at a loss to see how we can interfere in any way with the order made as regards that appeal." The learned Judges then consider that if they were to make an order in terms of the application, they would be interfering with the order which transferred to this Court an appeal pending in another Court. Their reason, as we understand it, was that there could not be on the file of the same Court two appeals from the same judgment, one on the footing that this Court had jurisdiction, and the other on the footing that the other Court had no jurisdiction. That, as far as we understand it, is what the learned Judges meant. They go on to say that even supposing that a fresh memorandum of appeal had been presented, they could not admit it because of the delay in its presentation, and they give other reasons, that is, they treat the application as if it were one under s. 5 of the Limitation Act, and as if the memorandum of appeal was ready to be filed. Whether the learned pleader offered to file a fresh memorandum of appeal it does not appear; but the learned Judges go into the question whether, if a fresh memorandum was filed, it was competent to them to admit the appeal, and, considering that no good reason was shown for the delay, they come to the conclusion that they could not admit it, and they discharge the rule. These are all the facts which are now before us.

On the appeal being called on, Mr. Bonnerjee for the respondent contended that we have no power to hear it. There is no doubt that this Court can only hear appeals which are properly before it, and the only way in which appeals can be brought before it are by a memorandum of appeal being filed in this Court in accordance with the provisions of the Civil Procedure Code, or when an appeal has been brought up to the file of this Court by an order made by this Court in the exercise of its powers under s. 25 of the Civil Procedure Code. So far as s. 25 is concerned, there can be no doubt that we cannot help the appellant. When a case is transferred to this Court under that section, it must be heard [44] subject to all the objections which could be taken if the case had been heard in the Court from which it has been transferred. The jurisdiction given by s. 25 does not clothe this Court with greater powers than that which the lower Court had so far as the question of jurisdiction is concerned. If the lower Court had no jurisdiction to try the case, be the defect in jurisdiction with reference to the value or with reference to the situation of the property in dispute or with regard to any other matter which concerns jurisdiction, this Court could have no jurisdiction. Although the cases cited, namely, *Peary Lall Mozoomdar* v. *Komal Kishore Dassia* (1), and the case of *Ledgard* v. *Bull* (2) are not on all fours with the present case, still we think that the reasons given there are applicable. If this Court could not try a suit which was transferred from a Court which had no jurisdiction to try it, it is difficult to see how it can hear an appeal transferred from a Court which had no jurisdiction to hear such appeal. It is admitted that the District Judge's Court had no jurisdiction to hear this appeal. Therefore we think it follows that we cannot hear the appeal as an appeal which has been withdrawn from that Court and placed on the file of this Court by the order to which we have referred.

(1) 6 C. 30.

(2) 9 A. 191 = 13 I.A. 134.

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With regard to the other question it is contended that the appeal is now on the file of this Court, and we can hear it as an appeal to this Court. As we have pointed out we could only hear it as an appeal to this Court, if it had been filed here, and this has not been done. We think it is quite clear, having regard to what has taken place, that it would be incompetent to us to allow a memorandum of appeal to be filed now. It might happen in many cases that an appellate Court, on finding that the parties have erred as to jurisdiction, would under s. 5 of the Limitation Act allow the appeal to be filed. But here we are precluded from assenting to such an application, even if a memorandum of appeal had now been tendered to us. We may assume for the purposes of argument that the appellant is willing to tender a fresh memorandum of appeal. As a matter of fact the learned counsel for the [45] appellant says his client is willing to do so. The Division Bench of this Court in this case held that the 16th of September 1895 was a date too late for an application under s. 5 of the Limitation Act. It, therefore, follows that the 20th of July 1897 is very much too late. No fresh fact has intervened. In our opinion the decision of the Division Bench is binding upon us. It is a decision really upon s. 5 of the Limitation Act in the same case, where a Division Bench has declined to act under that section; it is not competent to any other Bench of this Court to act under it either at the hearing or at any other time. The only way in which that decision could be got rid of would be by review or by appeal. An appeal does not lie to this Court and no application for a review has been made.

It has been contended that these observations of Beverley and Ameer Ali, JJ., are mere *obiter dicta.* But they were observations directed expressly to the application made by the appellant; and although it may have been competent to the Court to stop short at the expression of its opinion to which we have first referred, still their decision on the other matters do not amount only to an *obiter dictum.* It is an express decision upon a matter which they were invited to decide by the appellant.

We conclude, as we began, by expressing our regret that we are obliged to give effect to the objection of Mr. Bonnerjee to the hearing of this appeal.

We are in the same position as the District Judge would have been if the appeal had not been withdrawn from his file. He had no jurisdiction; we must hold we have none.

The appeal is dismissed with costs.

Preliminary objection allowed. Appeal dismissed.

1897 JULY 22.

APPELLATE CIVIL.

25 C. 46.

25 C. 46.

[46] APPELLATE CIVIL.

Before Mr. Justice O'Kinealy and Mr. Justice Hill.

RAM NARAIN SINGH AND ANOTHER (*Defendants*) v. MINA KOERY (*Plaintiff*).* [22nd July, 1897.]

Sale in execution of decrees—Civil Procedure Code (Act XIV of 1882), *ss.* 15, 285—*Sale in execution by inferior Court of property already under an attachment by a superior Court—Jurisdiction—Preferential right of purchasers in execution-sale—Concurrent execution of decrees.*

A obtained a decree against *B* in the Court of the Munsif of Jamui, and in execution thereof attached *B's* property on the 16th March 1891; the property was sold on the 20th April 1891 and purchased by *C* who obtained possession of it on the 3rd of August 1891, and then sold his interest to the plaintiff. At the same time the defendant *R* had a decree for costs against *B* and his heirs in the Court of the Subordinate Judge of Monghyr, and in execution thereof attached the same property on the 4th February 1891, and sold it on the 24th August 1891, *i.e.*, about four months after the sale of the property by the Munsif. The plaintiff sued for possession on the ground that, having purchased the property of *B* before the second sale by the Subordinate Judge, she was entitled to the property. The defendant contended that the sale by the Munsif of the property under attachment by a Court of a higher grade was absolutely void, and the Munsif had no jurisdiction to sell the property under s. 285 of the Civil Procedure Code.

Held, that the sale by the Munsif was not without jurisdiction, and that it conveyed to the plaintiff a valid title to the property.

Section 285 of the Civil Procedure Code is merely a section for procedure to prevent different claims arising out of the attachment and sale of the same property by different Courts.

Bykant Nath Shaha v. *Rajendra Narain Rai* (1), *Dwarka Nath Das* v. *Banku Behari Bose*, (2) and *Patel Naranji Morarji* v. *Haridas Navalran* (3), referred to.

[R., 34 C. 837=6 C.L.J. 130; 22 M. 295 (297)=9 M.L.J. 1; 13 C.P.L.R. 145 (150).]

THE facts of this case sufficiently appear from the judgment.

Babu *Umakali Mukerji* (for Babu *Saligram Singh*) and Babu *Mahabir Sahai*, for the appellants.

[47] Babu *Saroda Charan Mitter* and Babu *Promotho Nath Sen*, for the respondent.

The judgment of the High Court (O'KINEALY and HILL, JJ.) was as follows :—

JUDGMENT.

In this case the property in dispute was held in *zarpeshgi* by Ramdhan Singh, father of the defendants Sib Shewak Singh and Sadu Shewak Singh. In December 1874, Dhanpat Singh, the defendant No. 17, purchased the right of the mortgagor, Koer Ganpat Singh, and he brought a suit against the *zarpeshgidars* in the Court of the Munsif of Jamui for arrears of rent, attached the property on the 16th March 1891, and sold it on the 20th of April of that year. It was purchased by Puran Singh, who obtained possession of it on the 3rd August 1891, and then sold his interest to Rani Mina Koery, the plaintiff in this case. At the same time one Raja Ram Narain had a decree for costs against the same Ramdhan Singh and

* Appeal from Appellate Decree, No. 1858 of 1895, against the decree of C. M. W. Brett, Esq., District Judge of Bhagalpore, dated the 15th of July 1895, affirming the decree of Babu Abinas Chunder Mitter, Subordinate Judge of Monghyr, dated the 14th of January 1895.

(1) 12 C. 333. (2) 19 C. 651. (3) 18 B. 458.

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his heirs in the Court of the Subordinate Judge of Monghyr, and in execution of it he attached the property on the 4th February 1891, and sold it on the 24th August 1891. The plaintiff sued for possession of the property on the ground that, having purchased at an auction-sale the right of Ramdhan Singh and his heirs before the second sale, which took place in the Court of the Subordinate Judge of Monghyr, she was entitled to the property.

It was urged in the Court below that under s. 285 of the Code of Civil Procedure, the sale by the Munsif of the property under attachment by the Subordinate Judge, which was a Court of a higher grade, was absolutely void, or, in other words, that the Munsif had no jurisdiction to sell the property.

This question came before this Court in the case of *Bykant Nath Shaha* v. *Rajendra Narain Rai* (1) in which all the cases of the different High Courts were reviewed. It was there pointed out that the object of that section was to prevent a confusion in the execution of decrees and where the execution sale has been held by an inferior Court at the instance of the decree-holder, the Court itself, the decree-holder, and the auction-purchaser being without any information of any objection to the exercise of a jurisdiction **[48]** which that Court would ordinarily be competent to exercise, and the sale had been confirmed without any objection raised, it gives a valid title.

In the case of *Dwarka Nath Dass* v. *Banku Behari Bose* (2) the same property was attached by the Courts of the first and second Munsifs, and it was contended that the sale by the second Munsif was absolutely void, inasmuch as the property had been attached by the first Munsif. The Divisional Bench, following the case of *Bykant Nath Shaha* v. *Rajendra Narain Rai* (1) decided that this was not so.

All these cases have been reviewed in the case of *Patel Naranji Morarji* v. *Haridas Navalram* (3), and there it has been held that neither the language of the section, nor the object with which it may be supposed to have been introduced, made it necessary to hold that the sale by the second class Subordinate Judge was a nullity, when the property sold had been attached by a Court of a superior grade in execution of a decree before the actual sale took place.

So far as we can see, s. 285 is merely a section for procedure to prevent different claims arising out of the attachment and sale of the same property by different Courts. If we look at s. 15 of the Code and consider the words regarding the Courts in which suits shall be instituted, we find that the words there are as strong, if not stronger, than the words of s. 285, and yet that section from the very beginning has been held to be only a section regarding the procedure of the Courts and not affecting the jurisdiction.

We think the decision of the Court below is right and we dismiss the appeal with costs.

B. D. B. *Appeal dismissed.*

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(1) 12 C. 333. (2) 19 C. 651. (3) 18 B. 458.

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JULY 12.

APPELLATE CIVIL.

25 C. 49 = 2 C.W.N. 76.

25 C. 49 = 2 C.W.N. 76.

[49] APPELLATE CIVIL.

Before Mr. Justice Banerjee and Mr. Justice Stevens.

GOUR MOHUN GOULI AND ANOTHER (*Defendants*) *v.* DINONATH KARMOKAR, AFTER HIS DEATH RAM CHUNDER KARMOKAR AND OTHERS (*Plaintiffs*).* [12th July, 1897.]

Declaratory decree, suit for—Specific Relief Act (I of 1877), s. 42—Suit for declaration that the defendant is a mere benamidar for the plaintiff—Limitation Act (XV of 1877), sch. II, arts. 95 and 120—Code of Civil Procedure (Act XIV of 1882), s. 244.

A suit brought by *A* to obtain a declaration that a decree originally obtained by *B* against C and another, which had been purchased in the name of *D*, had really been purchased by the plaintiff for his own benefit, the cause of action alleged being the wrongful execution of the decree by *D*, is not a suit for relief on the ground of fraud within art. 95 of sch. II of the Limitation Act; but is governed by art. 120 of that schedule. Under the circumstances the suit was held not to be barred by limitation.

Such a suit was held not to be barred by s. 244, cl. (c) of the Civil Procedure Code, as the question raised was not one arising between the parties to the suit in which the decree was passed, or their representatives, but one that arose between two parties each of whom claimed to be the representative of one of the parties to the suit, *viz.*, *B*, the party in whose favour the decree was passed.

Held, further, that inasmuch as it was not necessary to ask for an injunction, the suit was not barred by the proviso to s. 42 of the Specific Relief Act.

[F., 8 C.L.J. 485 (487); R., 21 M. 388 (390); 37 B. 158=15 Bom. L.R. 192=19 Ind. Cas. 406; 17 C.L.J. 30=18 Ind. Cas. 633; 22 T.L.R. 172 (174); D., 9 Ind. Cas. 673=1 P.R. 1911=47 P.L.R. 1911=22 P.W.R. 1911.]

THE facts of the case for the purpose of this report are sufficiently stated in the judgment of the High Court.

Babu *Sharat Chunder Roy Chowdhry*, for the appellants.

Babu *Mohendra Nath Roy*, for the respondents.

The judgment of the High Court (BANERJEE and STEVENS, JJ.) was as follows:—

JUDGMENT.

BANERJEE, J.—This appeal arises out of a suit brought by one Dinonath Karmokar to obtain a declaration that a decree originally obtained by the defendant No. 4 against the defendants Nos. 2 and 3, which had been purchased in the name of defendant No. 1, had really been purchased by the plaintiff for his own benefit.

[50] The plaintiff, in his plaint, stated that execution had been taken out by him in the name of his *benamidar*, the defendant No. 1, but that subsequently a dispute having arisen between him and the defendant No. 1, the latter wrongfully, against his consent, took out execution in the year 1892, and that this was his cause of action for bringing the present suit.

There was a further relief asked for relating to certain immoveable property, but that was subsequently given up, and the suit proceeded only with reference to the first mentioned relief, namely, the relief by way of

* Appeal from Appellate Decree No. 1859 of 1895, against the decree of Babu Beni Madhub Mitter, Subordinate Judge of Hooghly, dated the 14th of June 1895, affirming the decree of Babu Raj Krishna Banerjee, Munsif of Howrah, dated the 14th of September 1893.

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a declaration that the decree in question had been purchased by the plaintiff in the name of the defendant No. 1.

The defence was that the suit was barred by limitation, that it was barred also by s. 244 of the Code of Civil Procedure, and that the defendant No. 1 was not a *benamidar* for the plaintiff.

The first Court found for the plaintiff upon all the questions raised in the case. Upon appeal by the defendant No. 1 or rather, I should say, by the purchasers of his interest, the objection under s. 244 of the Code of Civil Procedure seems not to have been pressed, but an objection under s. 42 of the Specific Relief Act was substituted in its place; and the other two objections—the one of limitation and the other on the merits raised in the first Court—were again urged before the lower appellate Court.

The learned Subordinate Judge decided all the three points, against the defendants-appellants, and confirmed the decree of the first Court.

In second appeal, it is contended for the defendants-appellants, *first*, that the Courts below were wrong in holding that the suit was not barred by limitation, whereas they ought to have held that it was so barred; *secondly*, that the Court of Appeal below ought to have held that the suit was barred by s. 244 of the Code of Civil Procedure; and, *thirdly*, that the Court of Appeal below ought to have held that the suit was barred by the proviso to s. 42 of the Specific Relief Act.

Upon the first point we are asked to hold that the suit is governed by art. 95 of the second schedule of the Limitation Act, and that if that article applies, art. 120 of that schedule which has been applied by the lower appellate Court cannot [51] have application. On the side of the respondents it is contended that art. 95 does not apply to this case, and it is further contended, that, having regard to the facts found by the first Court, no question of limitation can arise in this case, as the suit was brought within three years from the date of the cause of action alleged in the plaint, that cause of action being the wrongful execution of the decree by the defendant No. 1 in the year 1892, the earlier execution proceedings being found by the Munsif to have been taken out really by the plaintiff, though in the name of his *benamidar*, the defendant No. 1.

The finding of the Munsif upon this question has not in any way been interfered with by the lower appellate Court; but then it is open to the appellants to contend that the appellate Court has not confirmed the view of the first Court, it having overruled the plea of limitation on the ground that the suit was governed by art. 120, and was not barred by limitation, as it was brought within six years of the date of the institution of the first execution proceedings.

If it was not clear that art. 120 applied to the case, then perhaps it would have been necessary to send the case back to the lower appellate Court. But in our opinion the lower appellate Court was quite right in holding that the case was governed by art. 120, because we think that art. 95 of the second schedule of the Limitation Act, the only other article under which it has been contended, and it could possibly have been contended, that the case can come, has really no application to this case. Article 95 applies to a suit to set aside a decree obtained by fraud, or for other relief, on the ground of fraud. The present suit is not one to set aside a decree obtained by fraud. The question is whether it is one for other relief on the ground of fraud.

We are clearly of opinion that this question ought to be answered in the negative.

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As has been pointed out by the learned vakil for the respondents, the plaintiff is entitled to the relief he asks for, namely, a declaration that he was the real purchaser of the decree, and that the defendant No. 1 was only a *benamidar* for him, quite irrespective of any fraud on the part of the defendant. This suit [52] cannot, therefore, be said to be one for relief on the ground of fraud. That being so, art. 95 cannot have any application to this case. As that article does not apply, and as no other article expressly provides for this case, art. 120 must apply to it.

We may here notice a case which was relied upon by the learned vakil for the appellant, namely, the case of *Chunder Nath Chowdhry* v. *Tirthanund Thakoor* (1). That case really goes against the appellant's contention; for it shows that art. 95 does not apply to every case in which fraud enters as an element in the conduct of the defendant, but it is limited in its application to cases where relief is claimed on the sole ground of fraud.

As to the second contention, it is enough to say that the question raised in this case is not one arising between the parties to the suit in which the decree was passed, or their representatives, but is one that arises between two parties, each of whom claims to be the representative of one of the parties, to the suit, namely, the party in whose favour the decree was passed.

That being so, cl. (*c*) of s. 244 does not cover this case. And this appears clear upon a reference to the last paragraph of s. 244, which relates to a case in which the question arises as to who is the representative of a party for the purpose of this section. In such a case as provided by the section the Court may either stay execution of the decree until the question has been determined by a separate suit, or may itself determine the question by an order under this section.

It is not suggested that the Court of execution was ever called upon to decide the question that is now raised, and therefore there can be no doubt that a separate suit would lie for the determination of that question.

As to the last point, the question was not raised in the first Court. If it had been raised in the first Court, and if the objection was well founded, the plaintiff could have amended the plaint by asking for an injunction which, it is suggested in the appellant's argument, the plaintiff ought to have asked for. It is true that the question was allowed to be raised by the lower appellate [53] Court, but that Court decided the question against the defendants-appellants. If the objection had been well founded, we should have followed the course that was followed by the Bombay High Court in the case of *Sardar Singji* v. *Ganpat Singji* (2), But we do not think it necessary to take that course for two reasons: in the first place, we do not think that the objection is well founded. We do not think that any injunction was necessary to be asked for in this case. The plaintiff's case is that he is the real purchaser of the decree, and that the defendant No. 1 was merely a *benamidar* for him. If he succeeds, as he has succeeded in the Court below, in obtaining a declaration that he is the real purchaser of the decree, no further proceedings can be taken in execution, and no multiplicity of proceedings can arise for the avoiding of which a prayer for an injunction might have been needed, because an application by him to the Court of execution to place him on the record as the real representative of the decree-holder, will have the effect of putting an end to all further proceedings antagonistic to him.

(1) 3 C. 504.

(2) 14 B. 395.

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The learned vakil for the appellant, in support of his contention that, in cases like this, a prayer for an injunction ought to be made, relied upon the case of *Kunhamed* v. *Kutti* (1). That case was of a very different nature from the one now before us. There the plaintiff asked for a declaratory decree that a certain decree had been obtained against him by fraud, and it was held that the plaintiff ought to have prayed for a perpetual injunction restraining the decree-holder from executing his decree. In that case, the prayer for an injunction was necessary, because it was by an injunction only that the plaintiff could really protect himself from execution proceedings being taken against him by the decree-holder, who had obtained the decree by fraud. Here, as I have pointed out above, it was open to the decree-holder to put an end to all further execution proceedings by an application under s. 232 of the Code of Civil Procedure.

But granting that there was any difficulty in obtaining a cessation of execution proceedings by an application for substitution under s. 232 of the Code, there is a second reason why, as I said, it was unnecessary to remand the case after giving leave **[54]** to the plaintiff to amend the plaint. This is the position of affairs. The defendant did not raise any objection under s. 42 of the Specific Relief Act in the first Court; if he had done that, the plaintiff might have prayed for such amendment of his plaint as was then necessary. As matters now stand, it appears on the appellant's own showing that the rights of the plaintiff have become vested in the defendant No. 2, one of the judgment-debtors under the decree, the purchase of which has given rise to this litigation.

If then it is declared that originally the plaintiff was the real purchaser of the decree, and not the defendant No. 1, the result would be this, that the decree would now, in the course events have taken, be transferred to defendant No. 2, one of the judgment-debtors, and by s. 232 of the Code of Civil Procedure, cl. (*b*) of the proviso, it cannot be executed against any of the other judgment-debtors. Thus, even if the objection of the appellants had been well founded, having regard to the change in the circumstances, we do not think that there would have arisen any necessity for remanding the case after giving the respondents leave to amend their plaint. The grounds urged before us, therefore, all fail, and the appeal must be dismissed with costs.

S.C.G. *Appeal dismissed.*

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25 C. 54.

ORIGINAL CIVIL.

Before Mr. Justice Sale.

OMRITA NATH MITTER *v.* ADMINISTRATOR-GENERAL OF BENGAL.*
[19th May, 1897.]

Interest Act (*XXXII of* 1839), *s.* 1—*Certificate of the Administrator-General registering a debt*—"*Written instrument*"—*Administrator-General's Act* (*II of* 1874), *s.* 35—*Right of creditors to immediate payment in full if assets sufficient*—"*Rateable payment,*" *Meaning of*—*Meaning of* "*shall be liable to pay*"—*Succession Act* (*X of* 1865), *s.* 282—*Probate and Administration Act* (*V of* 1881), *s.* 104.

A certificate of the Administrator-General admitting a debt to be due is not such a "written instrument" as is contemplated by the Interest Act

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* Original Civil Suit No. 845 of 1896.

(1) 14 M. 167.

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[55] (XXXII of 1839), because the amount mentioned therein is not payable by virtue of the certificate which merely purports to certify the registration of the amount of the admitted debt for the purposes of convenience in administering the estate.

In a suit by a creditor if his demand be uncontested or proved and the executor admits assets, the plaintiff is entitled at the hearing to an order for immediate payment without taking the accounts. The admission of assets for the payment of a debt is also an admission of assets for the purposes of the suit and extends to costs if the Court thinks fit to give them. There is nothing in s. 35 of the Administrator-General's Act (II of 1874) which qualifies or restricts or otherwise interferes with the right of a creditor to demand immediate payment of his claim in full when the realizable assests in the hands of the Administrator-General are sufficient for the immediate payment of all claims in full. The "rateable payment" referred to in the above section, as well as in s. 282 of the Succession Act (X of 1865), and in s. 104 of the Probate and Administration Act (V of 1881), is rateable payment *out of the assets*; it is nowhere provided that it shall be made out of the nett income of the estate or any other specific part of the assets.

The language ("shall be liable to pay the costs") used in cl. 1 of s. 35 of the Administrator-General's Act (II of 1874) shows that it was intended not to impose upon a creditor to whom the condition of exemption was inapplicable, an absolute obligation to pay the costs of the suit, but to leave a discretion to the Court to relieve him of the obligation if the circumstance of the case required it. *James* v. *Young* (1), referred to.

[R., 16 C.L.J. 288=16 C.W.N. 1042=16 Ind. Cas. 414; 22 Ind. Cas. 262.]

THE facts of the case appear fully from the judgment.

Mr. *Palit* and Mr. *J. G. Woodroffe*. for the plaintiff.

The Advocate-General (Sir *Charles G. Paul*) and Mr. *Henderson*, for the defendant.

JUDGMENT.

SALE. J.—Kumar Indra Chundra Singh of Paikparah died on the 14th of May 1894, leaving a will whereof he appointed the Administrator-General of Bengal the executor, and leaving also a very large estate valued for the purposes of probate duty at over 38 lakhs of rupees. It appears that at the time of his death the testator was indebted to the extent of about 14 lakhs of rupees, a very large portion of this sum, *viz.*, 12 lakhs, being due to Maharajah Doorga Churn Law, a secured creditor.

On the 30th June 1894 the Administrator-General obtained probate of the will of the testator and has since been engaged in the administration of his estate. On the 2nd October 1894 the [56] plaintiff gave notice to the Administrator-General of a claim against the estate for principal and interest due on a promissory note executed in his favour by the testator dated the 2nd April 1892. The principal sum secured by the note is Rs. 50,000 carrying interest at the rate of 7½ per cent. per annum. The plaintiff, however, claimed that, under an oral arrangement come to with the testator, he was entitled to interest at 9 per cent. A correspondence ensued between the plaintiff and the Administrator-General as to the rate of interest chargeable, and eventually an arrangement was come to, and, as appears from the Administrator-General's certificate dated the 8th June 1895, the plaintiff's claim was admitted and registered for the sum of Rs. 55,988-14-8 carrying interest on Rs. 50,000 at 8 per cent. per annum from the 1st June 1895.

The Administrator-General then, out of the income of the estate, as it was realized, proceeded to declare dividends in favour of the creditors who had registered their claims and tendered the proportion payable

(1) (1884) L.R. 27 Ch.D. 662.

to the plaintiff in part satisfaction of his claim. The first of those dividends was declared on the 30th June 1895, and the last on the 20th of January 1897, and the total sum thus set apart for payment of the plaintiff's debt and which the Administrator-General now holds for this purpose amounts to Rs. 52,144-14-7. The plaintiff declined to accept payment of his debt by instalments and claimed to be paid the whole amount due to him in one sum with interest on the entire principal sum. The Administrator-General, on the other hand, insisted that the plaintiff was bound to accept payment of his debt by instalments, and denied that the plaintiff was entitled to interest on the dividends tendered to him and set apart to his credit.

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It appears that in the year 1895 the Administrator-General proposed to raise a sufficient sum to pay off the creditors of the estate by selling a portion of the estate; but the beneficiaries under the will of the testator were opposed to any scheme of payment which would necessitate either a sale of any portion of the estate or even a fresh charge being created for that purpose. In the course of that year two suits were instituted in this Court against the Administrator-General, one by Sreemutty Saraswati, the daughter, and other by Sreemutty Mrinalini, [57] the widow, of the testator, praying for administration of the estate. In the one suit the plaintiff Saraswati asks that the Administrator-General may be restrained from raising a loan to pay off the creditors, while in the other suit the plaintiff Mrinalini seeks to restrain the Administrator-General from resorting to a sale of any portion of the estate for the purpose of satisfying the debts due thereon.

On the 6th of December 1895 the plaintiff gave notice in writing to the Administrator-General that he would claim interest at 8 per cent. on the sum of Rs. 55,988-14-8, being the sum admitted to be due to him by the certificate of the 8th of June 1895, including interest due on the principal sum up to the 1st of June 1895.

On the 7th of December 1896 the plaintiff instituted the present suit against the Administrator-General claiming payment of the following sums:—

(1) Rs. 62,055-9-4, being the sum of Rs. 55,988-14-8 representing the original registered claim, and a further sum of Rs. 6,066-10-8 representing interest at 8 per cent. per annum calculated on the principal amount of the debt from 1st June 1895 to the date of the institution of the suit;

(2) Rs. 599, being the interest at 8 per cent. calculated on the sum of Rs. 5,988-14-8 from the 6th of December 1895; and

(3) Rs. 300, representing the damages alleged to have been sustained by the plaintiff by reason of his having been put to proof of his original claim. The last of these claims has not been pressed and it is not necessary therefore to refer to it further.

As regards the claim to interest on the sum of Rs. 55,988-14-8 the plaintiff relies on the provisions of s. 1 of the Interest (Act XXXII of 1839). It is suggested that the sum of Rs. 55,988-14-8 is a sum "payable by virtue of a written instrument" within the meaning of the section, inasmuch as it is the total sum admitted to be due by the certificate of the 8th June 1895. But in my opinion the certificate of the Administrator-General is not a "*written instrument*" such as is contemplated by the Act, because the amount mentioned therein is not payable by *virtue of the certificate*, which merely purports to certify the [58] registration of the amount of the admitted debt for the purposes of convenience in administering the estate. In any case the sum claimed represents interest

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upon interest, and as such ought not I think to be allowed under the discretionary powers vested in the Court.

The main object of the suit is, however, to establish the plaintiff's right to immediate payment of his claim with interest on the entire principal sum from the 1st of June 1895.

The general principle applicable to a creditor's suit against an executor is clear. If the plaintiff's demand be uncontested or proved, and the executor admits assets, the plaintiff is entitled at the hearing to an immediate order for payment without taking the accounts, and, moreover, the admission of assets for the payment of a debt is also an admission of assets for the purposes of the suit, and extends to costs if the Court thinks fit to give them—Williams on executors, 9th Edition, Vol. II, pp. 1892-93.

The term "assets," thus employed, has a wide signification, and means the property of a deceased person chargeable with and applicable to the payment of his debts. An admission of assets in this sense therefore means an admission of the sufficiency of the realizable property of the deceased available for the immediate payment of his debts. An admission of assets may be made by the executor or proved against him in various ways; Seton on Judgments and Orders, 5th Ed., Vol. II, p. 1253. In the present case there is no question, but that the assets in the hands of the defendant are and have always been amply sufficient to pay in full all the debts of the deceased. Nor is it suggested that a sufficient portion of these assets could not immediately be realized and applied in satisfaction of the entire amount of the liabilities of the estate.

The difficulties that exist in the administration of the estate are created only by the beneficiaries who object to any portion of the estate being charged or sold for the immediate payment of the creditors' claims. But as between the beneficiaries and the creditors, the rights of the creditors to immediate payment, if the assets are sufficient for the purpose, are paramount. It is clear from the defendant's written statement that, though there were sufficient realizable assets in his hands for the payment in **[59]** full of all the creditors of the estate, the course he proposed to adopt in the administration of the estate was to pay the creditors rateably out of the surplus income of the estate.

In the 4th paragraph of the written statement the defendant states as follows:—

"Kumar Indra Chundra Singh in the plaint mentioned was at the time of his death heavily indebted—his debts amounting to nearly 14 lakhs of rupees, and the income of the estate not being sufficient to enable the defendant thereout to pay all the debts at once, he proposed to sell off a portion of the estate.

In the 6th paragraph there is this statement: "From time to time, the defendant out of the surplus income of the estate available for the payment of debts declared dividends rateably in respect of the creditors of the estate whose claims had been duly registered."

As regards the 8th paragraph of the written statement it would seem at first sight that it was denied that the realizable assets of the estate were sufficient for the immediate payment of the claims of all creditors in full. The paragraph runs thus:—

"It is not the fact that the defendant is in possession of ample means for the immediate discharge and satisfaction of the amount due to the plaintiff for principal and interest, and of all other claims against the said estate as alleged in the 12th paragraph of the said plaint. So far as funds belonging to the said estate have been available for the payment of debts,

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the defendant has always been ready and willing and has offered to make payments from time to time by way of dividends as aforesaid to the plaintiff in respect of the amount due to him equally and rateably with the other creditors."

Comparing these allegations with those made previously and with what follows in a later paragraph, and with the allegations contained in the correspondence between the parties which has been read, it is quite clear, and it has not been otherwise suggested in argument, that the insufficiency referred to in the 8th paragraph is the insufficiency, not of the realizable assets, but of the annual surplus income. The equal and rateable payment which the defendant offered to make to the plaintiff, and which is referred to in this paragraph, is rateable payment out of the surplus income.

It is only necessary to refer to one other paragraph of the written statement.

[60] In the 12th paragraph the defendant says: "If this Court should be of opinion that the defendant is not bound to accept payment of the amount due to him by instalments or by way of dividends, the defendant states that by reason of the institution of the said administration suits he is unable to pay and discharge the amount so due to the plaintiff, but that he is willing to pay the same in the ordinary course of administration."

What I understand the defendant to convey by this paragraph is that his refusal to accede to the plaintiff's demand for immediate payment of his claim in full has been occasioned, not by the insufficiency of the realizable assets in his hands, but solely by the conduct of the beneficiaries who object to the debts being paid out of the corpus of the estate.

It has been shown that the annual net income of the estate is very large, amounting to two lakhs of rupees or thereabouts, and this would be sufficient in the course of time to provide for the payment of all claims, and no doubt the Administrator-General was acting in the interests of the estate in endeavouring to pay off the claims by instalments out of surplus income, but the question is whether there is any legal warrant for thus postponing the rights of creditors. No real difficulty I apprehend exists or is created by reason of the institution of the two administration suits by beneficiaries. These suits have, I understand, been amalgamated and are now pending, but no order has been obtained restraining the defendant from raising a sufficient sum by sale of a portion of the assets for the purpose of paying off the creditors. Moreover, in the event of a decree for administration being made, the Court would, in the usual course, after proof of claims if a sufficient fund be not then available for payment of the debts in full, direct the required amount to be raised by a sale of a sufficient portion of the assets.

It is contended, however, that s. 35 of the Administrator General's Act has placed a restriction on the rights of creditors, and that the effect of the section is to give the Administrator General the right to insist that creditors of estates in his hands shall accept payment of their claims by instalments out of nett income although there may be ample realizable assets available for immediate payment of all debts in full.

[61] The clause of the section relied on in support of this contention is as follows:—

"If in any such suit (*i.e.*, a creditor's suit against the Administrator General) judgment is pronounced in favour of the plaintiff, he shall nevertheless be only entitled to payment out of the assets of the deceased equally and rateably with the other creditors."

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A similar provision was contained in s. 33 of the Administrator-General's Act of 1867. The right of creditors to rateable payment is also defined in s. 282 of the Succession Act and s. 104 of the Probate and Administration Act.

Section 282 of the Succession Act provides: "Save as aforesaid (*i.e.*, as provided by s. 281) no creditor is to have a right of priority over another, by reason that his debt is secured by an instrument under seal or any other account. But the executor or administrator shall pay all such debts as he knows of, including his own, equally and rateably, as far as the assets of the deceased will extend."

Section 104 of the Probate and Administration Act is, excepting the omission of a clause which is immaterial for the present purpose, in precisely similar terms.

Now the "rateable payment" referred to in all these sections is rateable payment out of the assets. It is nowhere provided that rateable payment shall be made out of the nett income of the estate, or any other specific *part* of the assets. These sections deal with the creditors' rights as regards the general assets of their deceased debtor, and apart from any question of lien, the object is to prevent any one creditor obtaining an advantage over another in respect of the payment of his debt, and to provide for the payment of all claims proportionately out of the assets of the estate. The language of these sections shows that the Legislature was dealing with cases where the general assets or the realizable assets were or might be insufficient for the payment in full of the claims of all the creditors. It would be unnecessary and meaningless to provide for proportionate or rateable payment when the realizable assets are amply sufficient for the immediate payment in full of all claims, nor could in such a case the payment of one creditor in full in any way prejudice or postpone the [62] rights of other creditors. There is, in my opinion, nothing in s. 35 of the Administrator-General's Act which qualifies or restricts or otherwise interferes with the right of a creditor to demand immediate payment of his claim in full, when the realizable assets in the hands of the Administrator-General are sufficient for the immediate payment of all claims in full.

It could not have been intended by this Act any more than by the Succession Act or the Probate and Administration Act to give representatives of deceased persons the power, where assets are admittedly sufficient, to postpone indefinitely the payment of debts. It appears to me that my view of the section is in accordance with the authorities bearing on the question.

In *Haninabalu Sannappa* v. *Cook* (1) property had been attached before judgment, and the Administrator-General before judgment took out letters of administration and was made a party to the suit in the place of the widow, the original defendant, and it was held under s. 33 of Act XXIV of 1867 that under the decree obtained by the plaintiff he was only entitled to rank with other creditors. It does not appear in this case that there were any assets available for distribution amongst the general body of creditors beyond the fund which had been attached before judgment and which was admittedly insufficient to pay all the creditors in full.

In *Nilkomul Shaw* v. *Reed* (2) it was held that when a person obtains a decree against an executor or administrator he is entitled to have his

(1) 6 M. H. C.R. 346. (2) 12 B. L. R. 287.

decree satisfied out of the assets of the deceased, and that s. 282 of the Indian Succession Act does not interfere with that right.

In the case of *Alliance Bank of Simla* v. *Hoff* (which is unreported) execution was issued against the executor of a judgment-debtor for the full amount of the decree, although the testator's estate was not sufficient to pay the full amount of his debts.

The last case is that of *Remfry* v. *DePenning* (1) where the defendant having died after judgment a rule was obtained **[63]** against the Administrator-General as representing his estate to show cause why the decree should not be executed against him. The course pursued in the case of *Alliance Bank of Simla* v. *Hoff* was followed, and it was observed by Pigot, J., that "s. 35 of the Administrator-General's Act is limited to the express purpose for which it was enacted, and there is nothing in that Act or in the Civil Procedure Code to change the position of the Administrator-General or to place him in a better position than an ordinary suitor."

It has been contended next that in any case the plaintiff must bear the costs of this suit, and reference is made to the 1st clause of s. 35.

That clause provides that "if any suit be brought by a creditor against the Administrator-General in his representative character, the plaintiff *shall be liable* to pay the costs of the suit down to and including the decree, unless he is able to show that not less than one month previous to the institution of the suit he had applied to the Administrator-General to register his claim, and that the Administrator-General refused or neglected to do so."

Now, I think the clear object of a provision of this character is to prevent the costs of a suit being unnecessarily incurred by a creditor, who is desirous of proving his claim, and accordingly a creditor who institutes a suit without first submitting his claim to the Administrator-General as provided in that section, renders himself "liable to pay the costs of the suit down to and including the decree."

It is to be observed that what the section says is that a creditor is under certain circumstances to be liable to pay the costs of the suit, not that he *shall* pay the costs. In my opinion the language used shows that it was intended not to impose upon a creditor to whom the condition of exemption was inapplicable an absolute obligation to pay the costs of the suit, but to leave a discretion to the Court to relieve him of the obligation if the circumstances of the case required it.

So, where under s. 136 of the Civil Procedure Code it is provided that under certain circumstances a party, if a plaintiff, shall be liable to have his case dismissed, or if a defendant to have his defence struck out, this Court has invariably exercised a **[64]** discretion as to whether the penalty shall in any given case be imposed or not.

And again in the case of *James* v. *Young* (2) North, J., in considering the meaning to be attached to the words "*shall be liable to forfeiture*" occurring in a certain statutory enactment, made the following observations :—

"It is said that under that section, as soon as there is any default in working under the rules or any non-compliance with the rules, there is an absolute forfeiture, which cannot be got rid of, so that at the end of the five years the gales came to an end without the exercise of any discretion by the gaveller or any other person. But in the first place if the Legislature had intended that, I think it would have said so. Nothing would

(1) 10 C. 929. (2) (1884) L.R. 27 Ch. D. 652.

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have been easier than to have said 'it *shall* be forfeited and come to an end.' I say nothing about the construction of those words if they had been there, but when the words are not *shall be forfeited* but *shall be liable to be forfeited*, it seems to me that what was intended was not that it should be an absolute forfeiture, but a liability to forfeiture which might or might not be enforced."

The present suit is in no sense an unnecessary one. The object of it is not to prove the plaintiff's claim, but to establish his right to immediate payment of the entire sum with interest thereon, which right the defendant has refused to recognise. This is not, therefore, a case where the penalty as to costs provided by the section should be enforced. The result is that there must be a decree in favour of the plaintiff for payment of the sum of Rs. 62,055-9-4, together with further interest at the rate of 8 per cent. on the principal sum of Rs. 50,000 from the date of institution of the suit to the date of the decree.

The plaintiff is also entitled to the costs of this suit, which, together with the decretal amount, the defendant must pay out of the assets in his hands belonging to the estate of Kumar Indra Chandra Singh.

The defendant may also retain his costs as between attorney and client out of the estate; both sets of costs to be taxed on scale No. 2.

Attorney for the plaintiff: Babu *Amar Nath Ghose.*

Attorneys for the defendant: Messrs. *Morgan & Co.*

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[65] TESTAMENTARY JURISDICTION.

Before Mr. Justice Sale.

IN THE GOODS OF COURJON (DECEASED). [14th August, 1897.]

Will—Executor—Administrator-General's Act (II of 1874), ss. 18, 26, 27, 29, 52, 54—*Commission—Collection of assets, Meaning of.*

When a testator has omitted to appoint an executor under his will, the Court will appoint as executor the person whom it would appear from the tenor of the will the testator contemplated should be executor.

In the goods of Punchard (1) and *In the goods of Adamson* (2), followed.

Under s. 54 of Act II of 1874 the Administrator-General is entitled to charge commission on the collection and distribution of all assets. "Collection of assets" implies the doing of some act in connection with such assets.

Where part of the estate consisted of a zemindary of which the testator had granted a *putni* lease subject to payment of a fixed rental, and part of the zemindary had been acquired for public purposes, the compensation money being by arrangement divisible between the estate and the *putnidar* in certain proportions: *Held*,—That the Administrator-General was entitled to charge commission on the rents actually collected by him, and on the amount apportioned to the estate, but not on the *corpus* of the zemindary estate.

In the goods of Simpson (3) followed:

[R., 31 C. 572 (578); 6 Bom.L R. 78 (79); 1 N.L.R. 164 (166).]

ON 20th January 1896 Eugene Courjon, of Chandernagore, died at Paris in the Republic of France, leaving a will, dated 31st May 1895, and two codicils, dated, respectively, 4th of June 1895 and 7th June 1895. By his will the testator appointed his niece Marie Isoline Domitilla Courjon universal legatee to enjoy the usufruct of the estate during her life-time

(1) (1872) L. R. 2 P. & D. 369. (2) (1875) L. R. 3 P & D. 253.
(3) 1 M. H. C. 171.

and bequeathed to his nephew Charles Achillie Edmond Courjon the *corpus* of the estate, together with the usufruct at the death of his niece; whereby the niece took a life-interest in the residuary estate of the testator, and his nephew took a vested interest in remainder to take effect in possession on the determination of the life-interest of the niece.

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[66] In March 1896, his niece, the petitioner in this matter, being then in France, the Administrator-General of Bengal at the request of the testator's nephew applied for and obtained on 19th March 1896 letters of administration in a limited form of the estate of the deceased for the purpose of collecting the assets and paying the debts.

On 2nd May 1896, this grant to the Administrator-General was extended to enable him to pay the legacies mentioned in the will.

The petitioner now contended that according to the true construction of the will and codicils, the functions of executrix, *viz.*, the collection of assets and the payment of general and testamentary expense and debts and of the legacies bequeathed by the said testator devolved upon her under the will and codicils, and that she was executrix according to the tenor thereof, and accordingly asked the Court to grant to her probate of the said will and codicils.

The assets of the estate within the jurisdiction of this Court, at the date of the grant in limited form to the Administrator-General consisted of—

(1) An 8 annas share in certain property leased in perpetuity by the testator at a yearly rent of Rs. 45,000, the estimated value of which at 16 years' purchase was Rs. 7,20,000.

This was, however, subject to a mortgage of Rs. 3,50,000.

(2) Deposited in the Delhi and London Bank, Ld., a sum of Rs. 3,98,726-12-3.

The petitioner contended that the Administrator-General was only entitled to charge commission in respect of the said limited grant at the rate of 1½ per cent. upon the amount of his realization in cash, and that he was not entitled to charge upon the *corpus* or value of the 8 annas share in immoveable property.

The will and two codicils were as follows:—

"In my quality of Frenchman residing in France I am bound to make my testament according to the French laws. The holographic form being mostly used and the most expeditious I give it the preference.

"I undersigned Courjon (Eugene Joseph) have made my testament as follows:—

[67] "I appoint as my universal legatees: 1st—For the usufruct during her life-time and to the day of her death my niece Isoline Courjon.

"2nd—And for the real property to join to it the usufruct at the death of Isoline Courjon my nephew Charles Achille Edmond Courjon.

"I give and bequeath consequently to my niece Isoline the usufruct and enjoyment, and, to my nephew Charles Achille Edmond Courjon the real property of all goods, chattels and immoveables, which will belong to me or will form part of my estate on the day of my death, as well in France as in foreign countries.

"The whole subject to the following private legacies:—

"I give and bequeath to Miss Anna Ferrec a life annuity of 6,000 fcs. (six thousand francs) payable quarterly on the 1st January, April, July, and October of each year in Paris, or in such other chief town which it will please her to designate.

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"I give and bequeath to Madame Horteuse Paillard a life annuity of 2,400 fcs. (two thousand four hundred francs) payable quarterly at the same periods.

"I give and bequeath to Charles Achille Edmond Courjon my nephew for his maintenance untransferable, non-distrainable, an annuity of Rs. 36,000 payable also quarterly at the same periods.

"In the event of the death of Mrs. Paillard prior to Miss Anna Ferrec the annuity of the latter will be increased by 2,400, fcs. (two thousand four hundred francs) and brought to 4,800 fcs. (four thousand eight hundred francs) yearly.

"I appropriate especially to the guarantee of the strict and regular payments of the annuities and pensions abovesaid the immoveable properties which I possess in British India, on which a second mortgage will be written as surety for the annuities or pensions according to the laws which apply to those immoveables.

"In the event of sale or expropriation or alienation by whatever means it be of those properties, a sufficient capital will have to be set aside out of the proceeds of such sales, expropriation or alienation to secure in rents on the French Government the payment of the said annuity or pensions. The stocks thus acquired will have to be registered so as to ensure the execution of my will.

"I express a formal will that the annuities and pensions bequeathed as aforesaid by me shall be paid strictly on due dates, and that in case of delay the amount of each term due shall be increased by a sum equal to 24 per cent. (twenty-four per cent) of the term unpaid from the due date to the payment effective.

"I give and bequeath—

"To my assistant Ernest Berthet the sum of four thousand rupees (4,000 rupees).

[68] "To Madame Berthet his mother the sum of 2,000, rupees (two thousand rupees).

"To Ashuruff Ali (*khansama*) my servant the sum of 1,000 rupees (one thousand rupees).

"To my two servants Altapali and Shama the sum of 1,000 rupees (one thousand rupees) to be divided between them equally.

"I give and bequeath to Madame Horteuse Paillard residing at Baulagnesur Seine Grande Rue No. 101 the sum of rupees 8,000 (eight thousand rupees) and my dog Rajah.

"I give and bequeath to Miss Anna Ferrec the sum of 14,000 rupees (fourteen thousand rupees).

"All these legacies will be taken off first from the funds which I have in deposit in the Delhi, and London Bank at Calcutta, and which amount actually to 50,000 rupees (fifty thousand rupees) plus the interest.

"I give and bequeath to Miss Anna Ferrec one half of the rights, which may revert to me in the inheritance of Madame Fizeaux de la Martel, my sister (which rights amount to a total of about 50,000 fcs. (fifty thousand francs), excepting the jewellery belonging to that estate and the share which may belong to me in sums of which Miss Isoline Courjon my niece may be indebted towards that estate either of one's own account or on account of her father, as I intend to remit fully and entirely to my niece Isoline my share of what she may be owing to that estate.

"I give and bequeath to my niece Isoline the share accruing to me of the jewellery of the estate of Madame Fizeaux de la Martil. I bequeath

to my watcher Leon Rabbufault the sum of 1,000 fcs. (one thousand francs) which will be paid to him by Miss Anna Ferrec as soon as she will be placed in possession of the advantages which I bestow on her by the present testament.

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"I bequeath my two dogs Niran and Chailane to Miss Anna Ferrec. Finally I give and bequeath to Miss Anna Ferrec all the furniture, furnishing, moveable articles, carriages, pictures, jewels, and works of art which may be found at the time of my death either at Paris in my apartment, Avenue de Jourville No. 26, or at Versailles Rue de la Bonne Aventure No. 4. In this legacy are not included the jewellery of the estate of Madame Fizeaux de la Martel, which moreover are not in my possession. All the costs and mutation dues or others occasioned by all the private legacies aforesaid (annuity, pensions, money, furniture) will be borne by my estate. The several legacies which I have made and to which I affect the money in Calcutta amounting to only 30,000 rupees (thirty thousand rupees), the sum which will remain added to the half share which I leave to my niece of my rights in the estate of my sister Madame Fizeaux de la Martel are more than sufficient to meet amply the charges.

[69] "If my brother Edmond Courjon, Zemindar d'Allinagov, does not nullify the renunciation which he made verbally in my favour of his rights in the estate of Madame Fizeaux de la Martel, I bequeath that share to Miss Isoline Courjon my niece.

"Finally I wish to declare that I possess in my house no values either in papers, either in money which may be seized as being a part of my goods; my only jewels are a ring emerald surrounded by four diamonds which I received from my brother Alfred Courjon deceased and a watch in *galutcha* (shark skin).

"I entrusted that ring to Miss Anna Ferrec who will have it remitted to my nephew Charles Achille Edmond Courjon, to whom I give it in remembrance of his father.

"I give him also the watch aforesaid. I revoke expressly all prior testaments. Made in Paris the thirty-first May One thousand eight hundred and ninety-five.

(Signed) Eugene Courjon."

1st CODICIL.

"As my lands, said zemindaries and my house at Chandernagore represent a value far superior to the mortgages by which they are each encumbered. I do not intend that my universal legatees will relieve those mortgages by prejudicing the legacies which I confer by my testament above.

"The sum which will remain in the Delhi and London Bank at Calcutta (after the payment of the private legacies) added to the proceeds of the rich furniture which furnish my house at Chandernagore must exceed by far the mortgages which encumbers that house. Even if it be differently, such consideration will have no weight (considering the value of the house, itself) before the formal will which I express to indemnify my private legatees before my creditors who are already covered by their mortgages. For the payments to be made the order of classification which I give hereafter will be in consequence strictly observed.

"1*st*—Miss Anna Ferrec and Madame Horteuse Paillard must first receive their legacies of 14,000 rupees and 8,000 rupees each of them (fourteen thousand rupees and eight thousand rupees each of them), and that with the shortest delay possible.

"2*nd*—Mr. Ernest Berthet will then be indemnified.

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"*3rd*—His mother.

"*4th*—My servants.

"My object being to place Miss Ferrec and Madame Paillard in a position to provide their personal requirements, also the care they must take of my poor dogs, I insist earnestly that they may be provided with the means to do so in the shortest delay.

"Further on will be found the list of my debts in France. Beside the [70] obligation I contracted towards Monsieur Paittevin whose Villa of the Rue de la Bonne Aventure No. 4 I rented for a period of three years, I have no others. The lease runs from the month of October 1894 to October 1897.

"On these three years the two last terms were enforced and paid in advance, and the two first have been paid on due date. My niece will therefore be debtor to Monsieur Paittevin of the sum of 5000 fcs. (five thousand francs) and for the dues of mutation on the private legacies which I have made. These debts which I impose on her will be easily met with the share which I leave for her in the estate of Madame Fizeaux de la Martel.

"The advantages very distinct which I confer to my niece are in the difference which exists between the amount of revenue of my lands and the several charges imposed on her as well for reason of the mortgages than of the annuities which she will have to serve to the three persons named in this testament. These advantages must increase as the legacies will become extinct.

"I declare, however, that in the event of Miss Ferrec not having received within the six months which will follow my death the 14,000 rupees (fourteen thousand rupees) to be taken out of the funds which I have in Calcutta, my house at Chandernagore and all the furniture it contains will devolve on her in full right as well as that half of my rights in the estate of my sister Madame Fizeaux de la Martel which I have at first destined to my niece Isoline and which I bequeath to her only under that express condition that she will comply with the wish which I express with regard to Miss Ferrec and Madame Paillard. It depends altogether with my niece to avoid any diminution of her inheritance by complying loyally to my last will.

"I forbid my niece to dispose of my house and its contents before she is liberated towards Miss Ferrec and Madame Paillard.

"About six years ago my revenues being much delayed I was obliged to have recourse to my cousin Peter Joseph Dilaney, known by the nickname of Foxy, for a small loan of twelve thousand rupees, which were destined to complete the amount necessary for the purchase of a large property which I wished to acquire.

"It is necessary that my legatees should know that that loan did not succeed, and that the receipt which I have sent in anticipation was never returned to me, no doubt by forgetfulness.

* * * *

"I maintain all the other dispositions of this will.

"Made and written with my own hand the present codicil at Paris on the fourth of June one thousand eight hundred and ninety-five.

(Signed) Eugene Courjon."

2nd CODICIL.

"I want and order by the present codicil that the private legacy which I [71] made in favour of Miss Anna Ferrec by my will above dated thirty-first May one thousand eight hundered ninety-five, be paid in preference to all others.

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"This refers to the donation in money as well as to the annuity.

"I declare that the above testament, dated thirty-first May one thousand eight hundred ninety-five, also the codicils following, were made and written with my own hand in double original, of which one has been deposited by myself in an iron chest belonging to Miss Ferrec (my iron chest being at Versailles) and the other entrusted to the kind care of my notary Monsieur Collin.

Paris the seventh June one thousand eight hundred ninety-five.

(Signed Eugene Courjon)."

The Advocate-General (Sir *C. Paul*), for the petitioner.—There was no actual appointment made under the will of an executor. But according to the tenor of the will and codicils, especially the codicils, the niece of the testator must be regarded as the executrix. She is universal legatee with remainder to the nephew. The will was executed in France, and the testator claims to be a Frenchman. By French Law, s. 109 of the Code Napoleon, she would be the executrix. That this was the testator's intention also appears from the terms of the will. She is entitled to have the grant to the Administrator-General revoked under s. 26 of Act II of 1874 (Administrator-General's Act).

As regards the commission of the Administrator-General he is only entitled to charge on the rents he has received, but not on the *corpus* of the estate. *In the goods of Simpson* (1).

Mr. *Garth*, for the Administrator-General.—The petitioner ought to have applied for revocation of the grant to the Administrator-General within six months under s. 26 of the Administrator-General's Act II of 1874. Besides, there is not sufficient indication in the will that the testator intended her to be the executrix. As regards the commission of the Administrator-General he is entitled to commission at the usual rate on all sums which he has collected. He has reduced the *putni* lease into possession. Certain of the land in this 8 annas share was to be taken up by the Government, and he has fought this question, and arranged the amount of compensation to be taken in cash. In the case of *In the goods of Simpson* (1) the Administrator-General of Madras [72] was allowed commission at the rate of $2\frac{1}{2}$ per cent. on all assets he had collected. Here the Administrator-General may be said to have collected the lease.

JUDGMENT.

SALE, J.—It appears that at the request of a nephew of the testator the Administrator-General applied for and obtained letters of administration with a copy of the will and codicils of the testator annexed "limited" for the purpose of collecting the assets and paying the debts and charges of the interment of the deceased. Subsequently he applied to the Court and obtained also authority to pay the legacies given by the will and codicils. This application for an extension of his authority was made at the request of the present petitioner, who, as universal legatee and executrix according to the tenor, is now applying that the letters of administration granted to the Administrator-General may be revoked, and that probate be granted to her. I think there are sufficient indications in the codicils that the testator intended that the petitioner should administer his estate, and accordingly on the authority of the cases *In the goods of Punchard* (2) and *In the goods of Adamson* (3) the petitioner

(1) 1 M. H. C. 171.
(2) (1872) L. R. 2 P. & D. 369.
(3) (1875) L. R. 3 P. and D. 253.

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is entitled to probate as executrix according to the tenor, and she is also entitled to an order for revocation of the letters of administration granted to the Administrator-General. It appears to me that the period of limitation created by the proviso to s. 26 of the Administrator-General's Act does not apply to the circumstances of the application.

A question also arises as to the commission which the Administrator General is entitled to charge. The grant of letters of administration to the Administrator-General, though limited, does not come within the provisions of s. 18 of the Act. The question as to the commission payable is therefore governed not by that section but by ss. 27 and 52 read together with s. 54.

Section 27 provides that if any letters of administration granted to the Administrator-General be revoked, the Court may order the whole or any part of the commission which would [73] otherwise have been payable under the Act to be paid to or retained by the Administrator-General out of any assets belonging to the estate.

The rule laid down by s. 52 is that the Administrator-General of each of the Presidencies shall be entitled to receive a commission at the following rates respectively, namely, the Administrator-General of Bengal at the rate of 3 *per centum* and the Administrator-General of Madras and Bombay respectively, at the rate of 5 *per centum* upon the amount or value of the assets which they respectively collect and distribute in due course of administration. Section 54 provides that the commission to which the Administrator-General of each of the said three Presidencies shall be entitled is intended to cover, not merely the expense and trouble of collecting the assets, but also his trouble and responsibility in distributing them in due course of administration.

Accordingly it is enacted " that one-half of such commission shall be payable to, and retained by, such Administrator-General upon the collection of the assets, and the other half thereof shall be payable to the Administrator-General, who distributes any assets in the due course of administration, and may be retained by him upon such distribution."

The term "assets" means and includes "property of a deceased person chargeable with and applicable to the payment of his debts and legacies." It would, therefore, include immoveable property. But the commission chargeable under this section is in respect of *the collection and distribution* of assets.

What then is meant by " collection of assets."

This question was considered by the Madras High Court in the case of *In the goods of Simpson* (1). The view of Scotland, C. J., was that the words "collection of assets" as used in ss. 26 and 29 of the Administrator-General's Act (VII of 1855) did not necessarily mean realization by sale or by actual receipt or possession, yet, on the other hand, they implied the doing of some act in connection with the assets, whereby the Administrator-General incurred trouble or expense or responsibility. [74] In the present case the testator was entitled to a certain zemindary property which he had leased in perpetuity. The lessee or *putnidar* is in possession, and has all the rights of ownership subject to the payment of a fixed rental. This rent was payable to and has been collected by the Administrator-General, and these collections are of course chargeable with commission. Moreover, a part of the zemindary estate has been acquired for public purposes, and the compensation money now in deposit in the Bank of Bengal is, under

(1) 1 M. H. C. 171.

an arrangement made by the Administrator-General with the *putnidar*, divisible between the estate and the *putnidar* in certain proportions. The Administrator-General is, therefore, entitled to commission upon the amount apportioned to the estate. But as regards the rest or *corpus* of the zemindary property, the Administrator-General has not, it would appear, done any act which would constitute it an *asset* collected by him. Applying, therefore, the rule laid down by Scotland, C.J., no commission is properly chargeable in respect of this portion of the estate. The deduction claimed in respect of probate duty will be dealt with by the Registrar in the usual way. There will be an order for revocation of the letters of administration granted to the Administrator-General and for the issue of probate to the petitioner as prayed. The Administrator-General may retain his commission out of the estate, subject to the directions already indicated, together with his costs of this application.

1897 AUG. 14. — TESTAMENTARY JURISDICTION. — 25 C. 65.

Attorney for the petitioner: Mr. *C. W. Foley*.

Attorneys for the Administrator-General: Messrs. *Morgan & Co.*

C. E. G.

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25 C. 75.

[75] APPELLATE CIVIL.

Before Sir Francis William Maclean, Kt., Chief Justice and Mr. Justice Banerjee.

GOBURDHONE SAHA AND ANOTHER (*Plaintiffs*) v. KARUNA BEWA AND OTHERS (*Principal Defendants, Nos. 1 to 4*).*
[26th July, 1897.]

Landlord and tenant—Notice to quit—Non-occupancy raiyat—Bengal Tenancy Act (VIII of 1885), ss. 44 and 45—Suit for ejectment by a lessor against another holding over after expiry of his lease.

Certain land was let by the zemindar to the defendants on lease for a term of eight years. After the expiry of the lease the plaintiffs obtained a lease of the land, and, giving a month's notice to quit to the defendants, who had continued in possession after their lease expired, brought a suit to eject them.

Held, that the defendants could not be considered as trespassers, but that s. 45 of the Bengal Tenancy Act applied to the case, and that the plaintiffs, not having complied with its provisions, the suit was rightly dismissed for want of proper notice to quit.

[R., 31 C. 647 = 8 C.W.N. 446.]

THE facts of the case are shortly these: The plaintiffs brought a suit on 6th Pous 1301 (20th December 1894) against the defendants for ejectment, on the allegation that the land in dispute was formerly *chakran* land of the landlord, and that he resumed it, and afterwards it was settled with the defendants Nos. 1 and 2 on the 15th Falgoon 1292 (26th February 1886) for a term of eight years; that after the expiration of the term, the landlord's agent let the said land to the plaintiffs on the 24th Sraban 1301 (8th August 1894); and that they were prevented by the defendants from taking possession of it. The plaintiffs served a notice on the defendants on the 15th Assin 1301 (13th September 1894), asking them to quit the land within one month. The defence, *inter alia*, was that the suit was

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* Appeal from Appellate Decree No. 1942 of 1895, against the decree of Babu Hemango Chunder Bose, Subordinate Judge of Jessore, dated the 30th of August 1895, affirming the decree of Babu Brojesh Chunder Sinha, Munsif of Magura, dated the 23rd of April 1895.

1897 JULY 26. — APPELLATE CIVIL — 25 C. 75.

not maintainable, as the notice was defective and not valid according to law. The Munsif dismissed the suit of the plaintiffs, holding that the notice was not a legal one, not being in accordance with the provisions of s. 45 of the Bengal Tenancy Act. On appeal, the Subordinate Judge in upholding the decision of the Munsif said :—

[76] "In my opinion the view taken by the Munsif is correct. Supposing that the defendants held the lands as *chakran*, they no doubt held them on payment of rent from the latter end of the year 1292. If it be conceded that they were admitted to occuaption as *raiyats* on 15th Falgun 1292, they were undoubtedly non-occupancy *raiyats*, whose tenancy could be terminated only on one of the grounds mentioned in s. 44 and not otherwise. There is no suggestion that cls. (*a*), (*b*) and (*d*) apply to this case; only cl. (*c*) can apply ; but then a notice to quit served not less than six months before the expiry of the year 1300 was an essential requisite, and it was also necessary that the suit should have been instituted within six months from the expiry of the year 1300. Neither of these conditions having been fulfilled in this case, the plaintiffs had no right to obtain *khas* possession by ejecting the defendants.

"It was, however, very strongly pressed in this Court that, as the zemindar had obtained *khas* possession after the expiry of the term, the case is not governed by ss. 44 and 45 of the Tenancy Act. It is not necessary to determine what would have been the legal consequences of such possession because such a case was not set up in the Court below, and the defendants had not any opportunity of meeting such a case. In the plaint in one place we find only the statement that after the expiration of the term the lands became *khas* ; meaning evidently that the lands became *khas* in the eye of the law, and not actually; and that this is the correct view is further evidenced by the fact that in the next paragraph the plaintiffs say that the defendants had no right to retain possession after the expiration of the term. So the case set up by the pleader of the appellants was not set up in the Court below; and the evidence that was read out to me does not prove that the zemindar had ever *khas* possession."

From this decision the plaintiffs appealed to the High Court.

Dr. *Rash Behari Ghose*, Babu *Amarendra Nath Chatterjee*, and Babu *Bidhu Bhusan Ganguli*, for the appellants.

Babu *Boidya Nath Dutt*, for the respondents.

The following judgments were delivered by the Court (MACLEAN, C. J., and BANERJEE, J.)

JUDGMENTS.

MACLEAN, C. J.—On the first question as to whether the land, possession of which is sought to be recovered in this suit, is *khamar* land or not, there was no issue framed as to that before the Munsif, nor was that question gone into as a question of fact before the Subordinate Judge. Under these circumstances I think it is too late to raise it now.

Upon the other point, as to whether the case falls within ss. 44 and 45 of the Bengal Tenancy Act, I see no reason to differ, notwithstanding the ingenious arguments and criticisms of [77] Dr. Rash Behari Ghose upon the language of those sections, from the conclusion at which the learned Subordinate Judge has arrived in the matter. I think that the construction that he has put upon these sections is sound and is the right one. I agree both in the conclusion at which he has arrived and in the reasons for that conclusion. I think the appeal fails and must be dismissed with costs.

1897 JULY 26. — APPELLATE CIVIL. — 25 C. 75.

BANERJEE, J.—I am of the same opinion. I only wish to add a few words with reference to the second contention raised in the appeal, namely, that s. 45 of the Bengal Tenancy Act does not apply to this case, because there is nothing to show that the defendants were tenants of the plaintiffs after the expiry of the term of their lease. It was argued that before s. 45 could apply to the case, it must be shown that the defendants were non-occupancy *raiyats* of the plaintiffs, and this could not be the case unless it was shown that the plaintiffs acquiesced in the defendants' holding over upon the expiry of their lease. No doubt it is an intelligible view of things that a person who enters upon the land of another under a lease for a limited term should be treated as a trespasser the moment the lease expires, unless he obtains his lessor's consent to his holding over. But that does not appear to be the view which the Legislature has taken of the matter when it has provided, as it has done under s. 45, that for the ejectment of a non-occupancy *raiyat* upon the expiration of the term of his lease, there must be a notice to quit, and not only a notice to quit, but a notice served on the *raiyat* not less than six months before the expiration of the term. That shows that in order that the landlord may give effect to the condition that the tenancy should come to an end on the expiry of the term, he must not only not acquiesce in the tenant's holding over, but before the time for such acquiescence can arrive, and whilst the term is yet outstanding, serve a notice on his tenant. The provisions of s. 45, therefore, in my opinion contain a sufficient answer to the argument advanced by the learned vakil for the appellants.

S. C. G. *Appeal dismissed.*

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25 C. 78 (P.C.) = 24 I.A. 186 = 1 C.W.N. 594 = 7 Sar. P.C.J. 247.

[78] PRIVY COUNCIL.

PRESENT:

Lord Hobhouse, Lord Macnaghten, and Sir R. Couch.

[*On appeal from the High Court at Fort William in Bengal.*]

SHAM CHAND PAL (*Defendant*) *v.* PROTAP CHANDRA PAL (*Plaintiff*). [12th and 14th May, and 3rd July, 1897.]

Onus of proof—Deeds of gift between joint brothers of part of the family estate—Subsequent partition between them of the residue.

Two brothers, the only members of a joint Hindu family, executed and registered mutual deeds of gift to one another of their interests in specified portions of their family estate. In after years the younger brother sued the elder for partition of the estate excepting so much of it as had already been the subject of the above gifts. The elder defended on the ground that the deeds of gift had not been intended to operate, not representing any real transaction. To negative their effect, the burden of proving that the transaction was not real, but only a pretence, was laid upon the defendant, who failed to adduce that proof.

[R., 23 B. 146 (169).]

APPEAL from a decree (28th June 1894) of the High Court, reversing a decree (13th June 1892) of the Subordinate Judge of the Hughli District.

This suit was brought on the 11th April 1891 by the present respondent against his brother, now appellant, for a partition of the undivided property belonging to them both as a joint Hindu family. The plaint

1897 JULY 3. — PRIVY COUNCIL. — 25 C. 78 (P.C.) = 24 I.A. 186 = 1 C.W.N. 594 = 7 Sar. P.C.J. 247.

stated that the claim to partition did not include seven lots of house property in Calcutta, already dealt with by two deeds of gift, executed by the brothers to each other on the 30th August 1880, and registered. By one of these deeds (*dan-patro*) the plaintiff had given up to the defendant his interest in one of the seven houses, and by the other, the defendant had made over to the plaintiff his interest in the remaining six.

The defence of Sham Chand Pal in his written statement, admitting the execution and registration of the deeds of gift, but attempting to avoid their effect, is stated in their Lordships' judgment, as well as the purport of the deeds, and all the facts of the case.

The question raised by this appeal was whether each of the [79] two members of the joint family held the house property mentioned in the deeds of 1880 in severalty, this depending on whether the transaction was real, or pretended, as the defendant alleged it to have been.

Having fixed issues as to whether the deeds were *bona fide* and operative or not, and taken the evidence, the Subordinate Judge dismissed the suit. He found that Sham Chand Pal had never delivered his deed of gift to the plaintiff; that the consideration of natural affection stated in the deeds did not exist, as the brothers were not on good terms; and that there was no consideration given. As to the possession of the six houses, he accepted the defendant's assertion that they continued to be treated as joint property down to 1294, or 1887. Separate collections having taken place after that date, demands for partition ensued, which were made on both sides in 1890. On the whole case his view was that Sham Chand Pal was induced to make a *dan-patro* in favour of the plaintiff in case none of his (Sham Chand's) wives should bear a male child. When sons were born to him he changed his mind. The gift of the six houses was treated as invalid for want of transfer of possession, and therein it was held that the whole suit must fail, as some important properties were not included in it.

Against this decision the plaintiff appealed to the High Court, whereof a Bench (TREVELYAN and AMEER ALI, JJ.) reversed the decree of the original Court, and directed a partition of all the property, except such as was comprised in the two deeds of 1880. In their judgment the Court pointed out that, at all events, there should have been a decree for a partition of all the properties which had been admitted to be joint. They considered that the two deeds were executed to carry out an arrangement for the interest of the family, and that there was nothing unreal in the transaction. They were also of opinion that possession was sufficiently given on each side in accordance with the documents.

The defendant, therefore, obtained leave from the High Court to prefer this appeal.

Mr. M. *Crackanthorpe*, Q. C., and Mr. *C. W. Arathoon*, for the appellant, argued that the Subordinate Judge's decision was correct, and that the High Court had not given due weight to material [80] facts which showed, when considered, that the plaintiff had not established his claim. No exclusive possession of the property mentioned in the deeds of gift had followed their execution and registration. The deed executed by the defendant had, after having been registered, remained with the defendant since 1880. No exclusive possession of the property to which either deed referred had passed to the donees. The defendant had put forward a valid reason for his having executed the deed in favour of his brother, that it was to prevent the donor's widows from getting possession of the six houses on his death. The just inference was that no transaction of gift

was intended, and that the gift was in suspense—a state of things resulting in no gift. The burden of proof was thus shifted from the defendant to the plaintiff. Registration gave the donee neither actual, nor constructive, nor symbolical. possession. The plaintiff thus had failed to establish his case. They cited *Dagai Dabee* v. *Mothura Nath Chattopadhya* (1), *Vasudev Bhat* v. *Narayan Daji Damle* (2), *Kishto Soondery Dabea* v. *Kishtomotee* (3), *Kilpin* v. *Batlay* (4), *Cochrane* v. *Moore* (5), *Standing* v. *Bowring* (6).

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Mr. *J. D. Mayne*, for the respondent, argued that the High Court were right in deciding that the object of the two deeds of 1880 was to carry out a transaction then considered to be for the interests of the family, and that the gifts were, as they were intended to be, operative between the parties. To prove what the defendant alleged, *viz.*, that the deeds were not executed and registered as representing a real transaction, but were intended for another purpose, and designed to prevent widows from obtaining possession of the property, was a burden cast upon the defendant, and he had not discharged it. Of the deed of gift executed by the defendant there had been an actual delivery in the act of registering it, and how it had come into his possession [81] had not been satisfactorily explained. Of the house property given by the members of the joint family, *inter se*, which was the severance of undivided interest, the possession had been enough when accompanied by the declaration of the donor. This accorded with what was said in the judgment in *Appoovier* v. *Rama Subba Aiyan* (7). Reference was also made to the judgment of West, J., in *Ibhram* v. *Suleman* (8), regarding the general principles of delivery upon gift, where the donee was in prior possession.

Mr. *C. W. Arathoon* replied.

JUDGMENT.

Afterwards, on the 3rd July 1887, their Lordships' judgment was delivered by

LORD MACNAGHTEN.—The question at issue in this appeal arises in a partition suit in which the respondent was plaintiff and the appellant, who is the respondent's full brother and an older man by about three years, was defendant.

The two brothers, who were for some time engaged in a yarn or twist business on their joint account, had, it seems, acquired a considerable amount of property while they were living together as members of an undivided Hindu family. The plaintiff's case was that part of the joint property consisting of certain houses in Calcutta was divided in 1880 under two instruments described as deeds of gift, both dated the 30th of August in that year, and both duly registered on the following day. He now claimed partition of the rest of the property as specified in a schedule to the plaint.

The defendant in his written statement alleged that the arrangement appearing on the face of the deeds was not a real or *bona fide* transaction. His story was this: There was, he said, some dissension in the family owing to quarrels between his two wives. The result was that his second wife, together with his mother and the plaintiff, left the house No. 16, Baranasi Ghose's Street, which had been the joint residence of the family up

(1) 9 C. 854.
(2) 7 B. 131.
(3) (1863) Marshal, 367.
(4) (1892) L. R. 1 Q.B.D. 582.
(5) (1890) L.R. 25 Q.B.D. 57.
(6) (1885) L.R. 31 Ch. D. 282.
(7) 11 M.I. A. 75 = 8 W.R.P.C. 1.
(8) 9 B. 146.

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to that time. He was very ill himself and he had no male child, and so, fearing lest in the event of his death half the property comprised in the two deeds would fall into the hands of his wives and be wasted, he executed the deed of gift in favour of his brother, and at [82] the same time, in order to give colour to the transaction, the plaintiff executed the other deed in his favour. The property, however, still remained in the joint possession of his brother and himself, and he kept the deed of gift which he had executed in his brother's favour. He had now two sons born to him, and he wished to have the whole property partitioned.

The two deeds which, of course, must be regarded as parts of the same transaction, were both in the same form. Each referred to the other. By the one the defendant purported to give to the plaintiff out and out a moiety of six houses stated to be valued in their entirety at Rs. 25,250. By the other the plaintiff purported to give to the defendant a moiety of No. 16, Baranasi Ghose's Street, which was stated to be valued in its entirety at Rs. 3,500. Both the deeds contained a declaration that the parties would continue to own jointly the rest of their joint property, and that if it became necessary to make a further partition the rest of the property should be divided in equal shares, and that neither of the parties should then claim any thing or raise any objection on the ground of inequality of valuation in respect of the gifts comprised in the two deeds of August 1880.

The only question at the hearing was whether the transaction of August 1880 was a reality or a pretence.

As the deeds were duly executed and duly registered the burden of proving that the transaction was not real lay upon the defendant.

Their Lordships agree with the High Court in thinking that the defendant failed in the proof.

The defendant's case rested merely upon his own testimony. In his examination-in-chief he repeated in substance the story told in his written statement, varying it slightly by stating that the deed of gift in favour of the plaintiff was executed simply to prevent all of his properties from falling after his death into the hands of his two wives in case he died of the disease from which he was then suffering. He said he executed the instrument "only in name," and for that reason he had kept it in his possession.

In his cross-examination, however, he set up a very different case. "Before I signed the deed of gift," he said, "no proposal [83] thereof was made to me and I did not know a bit of it. The plaintiff and Punchanun Banerji"—Punchanun was their manager and received their rents—"having taken me to the registration office when I was out of my senses made me sign the deed of gift. Before I was taken to the said office nobody told me I should have to sign a deed of gift." This story, as the learned counsel for the appellant admitted, was an absolute falsehood. This story told by the defendant in his exmination-in-chief seems hardly more worthy of credence. It is wholly uncorroborated. On the face of it it is extremely improbable. The defendant had only to make a will in order to carry out his alleged intentions. There seems to have been no reason for concocting such an elaborate piece of deception, and it is difficult to understand why the plaintiff should have been a party to the scheme at a time when it is common ground that the two brothers were not on good terms. It was suggested by the learned counsel for the appellant that the deed which he executed was not a mere pretence, but that it was intended to be operative in the event of his having no male

issue. But there is nothing in the deed or in the evidence to support that suggestion. Nor does it account for the execution of the deed of gift in his favour.

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It is undisputed that the defendant was a man of dissipated life and extravagant habits, and that he spent a large amount of the joint property on his vices. The plaintiff's case was that his brother's conduct led to remonstrances and reproaches from his mother and from an uncle who is now dead as well as from the plaintiff himself, and that ultimately the defendant was prevailed upon to come to the arrangement embodied in the two deeds with the view of making some amends and saving the family property.

The fact that the deeds themselves contain a detailed statement as to the values of the respective lots is a circumstance certainly more consistent with the plaintiff's story than with the defendant's. Accept the plaintiff's story and the difference in value is seen to be an important element in the arrangement and one which would naturally find a place in deeds intended to carry it into effect. On the other hand, if the deeds were a mere blind and false in all other respects, why should they contain this one **[84]** unnecessary truth, the record of which seems only calculated to provoke inquiry and to suggest grounds for attacking the arrangement.

The only part of the defendant's case which seems to be true is that he had possession of the deed of gift which he executed in favour of the plaintiff. It is not very clear how he came to have that deed. The plaintiff was the only person who could have obtained it from the Registry office. He says he took it to No. 16 and left it with his brother for safe custody. That may be so, if the defendant is correct in saying, as he does, that the plaintiff continued to live on at No. 16 for about eight months. But after all it is not very material what became of the deed, seeing that it was duly registered.

As regards possession of the property comprised in the deeds of 1880 it is quite clear that the defendant was left in occupation of No. 16 without any interference on the part of the plaintiff, and he has not succeeded in proving that after the execution of the deeds he ever received any portion of the rents of the property comprised in the deed of gift in favour of the plaintiff. The plaintiff avers that that property remained in his sole possession, and that he executed repairs and made additions and improvements to it out of his own monies. There is no evidence to disprove or contradict that assertion.

The Subordinate Judge found in favour of the defendant. The High Court reversed his decision, and their Lordships have no difficulty in affirming the decree of the High Court. The decree as it stands only applies to the property specified in the schedules. Before their Lordships the appellant suggested, and the respondent admitted, that the partition should go to the whole of the undivided property if there be any other property now undivided.

Their Lordships, therefore, will humbly advise Her Majesty that the decree of the High Court with this slight variation ought to be affirmed and the appeal dismissed.

The appellant will pay the costs of the appeal.

Appeal dismissed.

Solicitors for the appellant: Messrs. *T. L. Wilson & Co.*
Solicitor for the respondent: Mr. *W. W. Box.*

C. B.

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[85] APPELLATE CIVIL.

Before Mr. Justice Trevelyan and Mr. Justice Stevens.

MOHIBUL HUQ (*Defendant*) v. SHEW SAHAY SINGH (*Plaintiff*).*
[6th May, 1897.]

Right of suit—Suit to set aside sale for arrears of road and public cesses—Appeal to Commissioner—Act XI of 1859, *s.* 33—*Public Demands Recovery Act* (*Bengal Act VII of* 1880), *s.* 2.

A suit to set aside a sale for arrears of road and public cesses will lie, although no previous appeal to the Commissioner has been made under s. 33 of Act XI of 1859. Such a sale is not one for " arrears of revenue or other demands realizable in the same manner as arrears of revenue are realizable" within the meaning of that section.

[R., 26 C. 414 (427).]

THE facts material to the report in this case appear from the judgment.

The defendant appealed to the High Court.

Moulvie *Mahomed Yusuf* and Moulvie *Serajul Islam*, for the appellant.

Babu *Baikanth Nath Das*, for the respondent, was absent.

The judgment of the High Court (TREVELYAN and STEVENS, JJ.) was as follows:—

JUDGMENT.

This was a suit to set aside a sale for arrears of road and public work cesses on the ground that no notice had been served under s. 10 of Bengal Act VII of 1880, and that no sale proclamation had been published on the land, and that the property had been sold for a very inadequate price. The findings of fact arrived at by the lower appellate Court are in favour of the plaintiff.

The only question before us is whether such a suit would lie without a previous appeal to the Commissioner from the order of the Collector.

It has been contended that s. 33 of Act XI of 1859 applies to cases like the present. Section 2, Bengal Act VII of 1880, says: "This Act, so far as is consistent with the tenor thereof, shall be construed as one with Act XI of 1859."

[86] We think that this contention is not correct. Arrears of road cess are recoverable under s. 98 of Bengal Act IX of 1880, " by any process provided by any law for the time being in force for the realization of public demands;" and it is provided by that section that such arrears " shall be deemed to be a public demand under such law." The law under which public demands are recovered is Bengal Act VII of 1880, and under the provisions of that Act, such demands are realized by the certificate procedure. Section 19 of the Act provides that a certificate under the Act, " may be enforced and executed by all or any of the ways and means mentioned and provided in and by the Code of Civil Procedure for the enforcement and execution of decrees for money."

It thus appears that the sale in the present case for the realization of the arrears of cesses was not a sale for " arrears of revenue and other

* Appeal from Appellate Decree, No. 1444 of 1896, against the decree of Babu Hemangu Chunder Bose, Subordinate Judge of Patna, dated the 1st of June 1896, affirming the decree of Babu Sudhangshu Bhusan Roy, Munsif of Behar, dated the 16th of December 1895.

demands realizable in the same manner as arrears of revenue are realizable" within the meaning of s. 33 of Act XI of 1859, and therefore the provisions of s. 33 can have no application to the sale with which we are concerned. 1897 MAY 6. APPELLATE CIVIL. 25 C 85.

We therefore dismiss this appeal without costs, the respondent's pleader not being present.

S. C. C. *Appeal dismissed.*

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25 C. 86.

APPELLATE CIVIL.

Before Mr. Justice O'Kinealy and Mr. Justice Rampini.

DURGA PRASAD BANERJEE AND OTHERS (*Plaintiffs, Decree-holders*) *v.* LALIT MOHON SINGH ROY (*Defendant, Judgment-debtor*).*
[13th July, 1897.]

Execution of decree—Adjustment or satisfaction of decree—Civil Procedure Code (Act XIV of 1882), *ss.* 257-*A*, 258—*Sanction of Court to agreements for satisfaction of decree—Payments by judgment-debtor under void agreement—Effect of uncertified payments to decree-holder.*

A sum paid under an agreement void under s. 257-A of the Civil Procedure Code cannot be acknowledged or recognized in execution of a decree under s. 258 of the Code, unless it has been certified within the proper time.

Agreements for the satisfaction of a judgment-debt not sanctioned under s. 257-A of the Civil Procedure Code are void; but, if sanctioned, they may be carried out in execution.

[87] *Gajapati Narayana Devu* v. *Chath Venkataramanaya* (1) and *Chedambara Pillai* v. *Ratna Ammal* (2), referred to.

[F., 13 Ind. Cas. 204=22 M.L.J. 166=11 M.L.T. 18=(1912) M.W.N. 9=(1912) M.W.N. 458; Appr., 29 P.R. 1908 (F.B.)=61 P.L.R. 1907=71 P.W.R. 1907; R., 88 P.R. 1904.]

THE decree-holders obtained two decrees for rent, and in execution thereof had the tenure of the judgment-debtor attached and advertised for sale; upon that, on the 2nd of September 1893, the judgment-debtor, with the consent of the decree-holders, presented a petition to the Subordinate Judge, who passed the decree, praying for time, and stating in the petition that the decree-holders had agreed to allow him time in consideration of his agreeing to pay interest at 12 per cent. per annum from the date of the institution of the suits, *i.e.*, at a higher rate than what was allowed in the decrees; and the Court thereupon ordered that "the case be struck off;" and it was further ordered that "the sums paid by the judgment-debtor to the decree-holders on account of the decretal debt in each of the two execution cases respectively be noted in the register." On the 10th of May 1894 the decree-holders again applied for execution, without mentioning the fact of the aforesaid agreement for payment of excess interest, and the tenure of the judgment-debtor was again attached; on which the judgment-debtor filed another petition on the 2nd July 1894 with the decree-holder's consent praying that a further time of six months be allowed him, and the case struck off, as the decree was going to be satisfied amicably. Upon that the Court made the following order: "Case

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* Appeal from Order, No. 343 of 1896, against the order of Babu Kedar Nath Mojumdar, Subordinate Judge of Burdwan, dated the 1st of August 1896.

(1) 1 M.L.J. 332. (2) 3 M. 113.

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struck of as per judgment-debtor's petition filed with the consent of the decree-holders. Attachment to subsist."

On the 14th of April 1896 the decree-holders applied for the third time for execution, to which the judgment-debtor objected, stating that the sums of money paid to the decree-holders as excess interest (the receipts of which had been admitted by the decree-holders) over and above the interest payable under the decree, should be deducted from the decretal amount, as the agreement entered into by the parties with respect to the payment of the excess interest was not sanctioned by the Court as provided by s. 257-A of the Civil Procedure Code, and that the said sums should be applied to the satisfaction of the judgment-debt.

[88] The decree-holders contended that as payment of the aforesaid sums was not certified to the Court under s. 258 of the Civil Procedure Code, the Court executing the decree could not recognize that payment.

The Subordinate Judge observed that when the judgment-debtor applied for time, the Court simply struck off the execution case without directing its attention to the provision, in the judgment-debtor's petition, for payment of the excess interest, and it did not pass any order with respect to it, nor did it consider whether that provision was reasonable or not; and he held that the agreement for payment of the excess interest was therefore void, as it did not receive the necessary sanction of the Court under s. 257-A of the Civil Procedure Code. He further held that the contention of the decree-holders was not a valid one, inasmuch as the provisions of s. 258 of the Code had no application to any payment made in pursuance of an invalid agreement not sanctioned by the Court; and he ordered, relying upon the last clause of s. 257-A of the Code, and also upon the case of *Gajapati Narayana Devu* v. *Chath Venkataramanaya* (1), that the money paid to the decree-holders as excess interest be credited in payment of the decretal amount.

From this order the decree-holders appealed to the High Court.

Dr. *Rash Behary Ghose* and Babu *Nalini Ranjan Chatterjee*, for the appellants.

The Advocate-General (Sir *Charles Paul*) and Babu *Karuna Sindhu Mookerjee*, for the respondent.

The judgment of the High Court (O'KINEALY and RAMPINI, JJ.) was as follows :—

JUDGMENT.

This is an appeal from the decision of the Subordinate Judge of Burdwan, dated the 1st August 1896; and the question we have to determine is whether a sum paid under an agreement void under s. 257-A of the Code of Civil Procedure, can be acknowledged or recognised in execution of a decree under s. 258, unless it has been certified within the proper time.

Section 257-A refers to two kinds of agreement. (*1st*) "agreements [89] to give time for the satisfaction of a judgment-debt," and (*2ndly*) "agreements for the satisfaction of a judgment-debt." If the Court does not sanction them they are void. If the Court sanctions them they may be carried out in execution. For the section states that "any sum paid in contravention of the "provisions of this section," that is, any sums paid under agreements void, shall be applied to the satisfaction of the judgment-debt; and the surplus if any, shall be recoverable by the judgment-debtor."

(1) 1 M.L.J. 332.

The agreement in this case is an agreement between the parties, and its force depends upon the sanction of the Court. It was not sanctioned and is void.

Section 258 says : "If any money payable under a decree is paid out of Court, or the decree is otherwise adjusted in whole or in part to the satisfaction of the decree-holder, or if any payment is made in pursuance of an agreement of the nature mentioned in s. 257-A, the decree-holder shall certify such payment or adjustment to the Court whose duty it is to execute the decree." Then the section goes on to say that, "unless such payment or adjustment has been certified as aforesaid, it shall not be recognised as a payment or adjustment of the decree by the Court executing the decree."

The learned Advocate-General argues that the Judge in the Court below was right in saying that the agreement referred to in s. 258 is a "valid agreement ;" but the section itself makes no reference to validity, and s. 257-A provides for agreements null and void. We are unable therefore to agree with the construction placed upon s. 258. The case of *Gajapati Narayana Devu* v. *Chath Venkataramanaya* (1) cited to us seems to militate against the reasons given in the decision of the case of *Chedambara Pillai* v. *Ratna Ammal* (2).

We think the view taken by the Court below is wrong, and we set aside the decree of the Subordinate Judge with costs in both Courts, and direct that the money allowed by him under that agreement be not allowed in execution of the decree.

B. D. B. *Appeal allowed.*

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25 C. 90.

[90] APPELLATE CIVIL.

Before Mr. Justice Rampini and Mr. Justice Stevens.

PERMA ROY AND ANOTHER (*Plaintiffs*) v. KISHEN ROY AND OTHERS (*Defendants*).* [29th April, 1897.]

Evidence Act (*I of* 1872), *s.* 35—"Butwara khasra"—*Estates Partition Act* (*Bengal Act VIII of* 1876), *s.* 54—*Measurement papers, entry made in*—"*Record.*"

A *butwara khasra* or measurement paper prepared under s. 54 of the Estates Partition Act (Bengal Act VIII of 1876) is not a "record" within the meaning of s. 35 of the Evidence Act (I of 1872). An entry made therein of the name of a tenant in possession is not admissible in evidence under that section.

Mohi Chowdhry v. *Dhiro Misrain* (3), referred to.

[N.F., 19 C.L.J. 5 (7) ; F., 17 C.L.J. 462=17 C.W.N. 779=18 Ind. Cas. 143; 1 Ind. Cas. 807; 8 Ind. Cas. 890 ; R., 30 B. 523 (P.C.)=8 Bom.L.R. 705=4 C.L.J. 181 =1 M.L.T. 301.]

THE plaintiffs in this case claimed to recover possession of a plot of land on the allegation that they took a settlement of it in 1296 and paid rent to the landlords till 1300, when a *butwara* having been effected the land fell to the share of one of them, and rent was paid since then to that person ; that in consequence of certain criminal proceedings at the instance

* Appeal from Appellate Decree, No. 778 of 1896, against the decree of F. H. Harding, Esq., District Judge of Shahabad, dated the 22nd of February 1896, reversing the decree of Babu Debendra Prosad Bagchi, Munsif at Arrah, dated the 28th of May 1895.

(1) 1 M.L.J. 332. (2) 3 M. 113. (3) 6 C.L.R. 139.

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of the defendants, plaintiffs' crops were put under attachment and finally the plaintiffs were forcibly dispossessed from the lands. The defendant No. 1 contested the claim as regards the southern portion only of the plot in question ; he admitted that he had no concern with the northern portion, and that that portion belonged to the plaintiffs and defendants Nos. 2 and 3. Defendants 2 and 3 confessed judgment.

The Munsif decreed the claim, and one of the reasons on which his judgment was based was stated by him as follows :—

"The copy of the *khasra* of the *butwara* measurement of 1891 also shows that the land in suit was then measured in the name of the plaintiffs. This would never have been done unless the plaintiffs were then in possession of it."

On appeal by the defendant the District Judge set aside the **[91]** decree of the Munsif, and held, with reference to the *khasra*, that that paper was not admissible in evidence.

The plaintiffs appealed to the High Court.

Babu *Jogendra Chandra Ghose*, for the appellants.

Babu *Karuna Sindhu Mukerjee* and Babu *Lalmohan Ganguli*, for the respondents.

The judgment of the High Court (RAMPINI and STEVENS, JJ.) was as follows :—

JUDGMENT.

This is a suit in which the plaintiffs seek to establish their title to and to recover possession of certain land. The lower appellate Court has given them a decree for the northern half of the land in suit, but has dismissed their claim to the southern half of it.

The plaintiffs now appeal to this Court, and on their behalf it has been urged that the lower appellate Court has erroneously excluded from evidence three documents, the first being a plaint, the second, an application for the execution of a decree, and the third, a *butwara khasra*. The first two of these documents are said to be admissible in evidence under the provisions of s. 32, cl. 7 of the Indian Evidence Act, read in connection with s. 13, cl. (*a*), inasmuch as it is said that they contain statements by one Gulzar, who is dead, to the effect that the plaintiffs' land is to the west of Gulzar's land and is *bagar* land. It must here be noted that the statement of the land being west of Gulzar's land, and being in possession of the plaintiffs, is only to be found in the second document, the application for execution of a decree. In the other document the land is merely described as *bagar* land.

Now, the learned District Judge has rejected these documents and has excluded them from the evidence in the case on the ground that, although Gulzar may be dead, yet these documents do not come within the provisions of s. 13, cl. (*a*) of the Evidence Act, as they are not transactions in which any right of the plaintiffs has been recognised or asserted. We certainly agree with the learned District Judge in this view of the case. There is no recognition of the plaintiffs' right in any land in these documents, and even if there were any such recognition, **[92]** we do not see how they could have any weight. Such admissions made by a third party as Gulzar was, could have no weight at all.

The third document, which the learned District Judge has excluded from evidence, is a *butwara khasra* prepared under the provisions of s. 54 of the Bengal Act VIII of 1876, that is, the Estates Partition Act. It is

contended that this document is admissible in evidence under the provisions of s. 35 of the Indian Evidence Act, and certain rulings have been cited before us, both for and against this contention, namely, the rulings in the cases of *Gopal Chunder Shaha* v. *Madhub Chunder Shaha* (1), *Mohi Chowdhry* v. *Dhiro Misrain* (2); *Govindrao Deshmukh* v. *Ragho Deshmukh* (3) and *Taru Patur* v. *Abinash Chunder Dutt* (4).

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The only rulings which we think are applicable are *Govindrao Deshmukh* v. *Ragho Deshmukh* (3) and *Mohi Chowdhry* v. *Dhiro Misrain* (2). But the former case is not on all fours with the present case, inasmuch as it relates to statements by Survey Officers contained in an extract from a village register of lands. The document referred to in that case is not of the nature of the *butwara khasra* in dispute here. The other case, however, namely, the case of *Mohi Chowdhry* v. *Dhiro Misrain* (2), seems to us to be exactly in point, and it lays down that measurement papers prepared by a *butwara* Amin deputed by the Collector to make a partition do not come within s. 35 of the Evidence Act.

Applying this ruling to the present case, it is clear that this *butwara khasra* has been rightly excluded from evidence by the learned District Judge, and independently of that ruling we think that the *butwara khasra* in question cannot come within the provisions of s. 35, inasmuch as it is not an official book, register, or record, such as is referred to in that section. The "record," it is clear, must be *ejusdem generis*, or of the same class, with the "official book" and "register" referred to immediately before, and we do not think a *butwara khasra* is such a **[93]** record as is contemplated by s. 35 of the Indian Evidence Act. Moreover, it would also appear that even if it was a record, the entry as to the possession of the plaintiff is not an entry which the Amin had to make under the provisions of s. 54 of Bengal Act VIII of 1876, because all that the Amin, or rather the Deputy Collector, who is referred to in this section, is authorised to make is the measurement of the land comprised in the estate to be divided and a rent roll; but the section, as far as we can see, does not authorize him to make any entry as to the names of the parties in possession of the land which he measures.

For these reasons, then, we think that the learned District Judge has not committed any error in law in excluding these three pieces of documentary evidence, and we accordingly dismiss this appeal with costs.

S. C. C. *Appeal dismissed.*

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25 C. 93.

APPELLATE CIVIL.

Before Mr. Justice Trevelyan and Mr. Justice Stevens.

KUDRATHI BEGUM (*Plaintiff*) v. NAJIBUNNESSA (*Defendant*).*
[16th August, 1897.]

Registration Act (III *of* 1877). *ss.* 35, 73, 76, 77—*Denial of execution—Suit to enforce registration—Right of suit.*

Where the executant of a document did not appear before the Sub-Registrar, although a summons was issued to such executant, and the Sub-Registrar thereupon refused to register the document, *Held*, in a suit under s. 77 of the Registration Act to enforce registration of the document—

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* Appeal from Original Decree, No. 302 of 1896, against the decree of Babu Juggaddurlabh Mozumdar, Subordinate Judge of Tirhoot, dated the 2nd of June 1896.

(1) 21 W.R. 29. (2) 6 C.L.R. 139. (3) 8 B. 543. (4) 4 C. 79.

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(1) That the case was one of "denial" of execution within the meaning of ss. 35 and 73 of the Registration Act (III of 1877). *Luckhi Narain Khettry* v. *Satcowrie Pyne* (1), and *Radhakissen Rowra Dakna* v. *Choone Lall Dutt* (2), referred to.

(2) That an application to the Registrar made under s. 73 of the Act in this case was properly made under that section.

(3) That the order of the Special Sub-Registrar to whom the case was referred, refusing registration of the document, was equivalent to an order by the Registrar.

[94] (4) That the case came under cl. (*a*) of s. 76 of the Act, and the present suit did lie under the provisions of s. 77.

[F., 29 A. 284=4 A.L.J. 171=A.W.N. (1907) 46 ; Rel., 16 Ind. Cas. 614.]

THE facts of this case appear sufficiently from the judgment of the High Court. The plaintiff asked for a decree directing that a deed of sale executed in her favour by the defendant be registered under the provisions of s. 77 of the Indian Registration Act. The Subordinate Judge, before whom the case was brought, held that the suit did not lie, as the case was not one of denial of execution, and the plaintiff in applying under s. 73, instead of appealing under s. 72, mistook her remedy, and virtually did not go to the Registrar as the law required her to do before proceeding under s. 77.

The plaintiff appealed to the High Court.

Dr. *Asutosh Mukerjee*, for the appellant.—The original order was one under s. 35, and a proper order under that section. The order should be construed to be a refusal on the ground of denial of execution. Non-appearance in this case comes within the meaning of denial of execution in ss. 35 and 73, and the present suit was properly brought under s. 77. *Luckhi Narain Khettry* v. *Satcowrie Pyne* (1), and *Radhakissen Rowra Dakna* v. *Choonee Lall Dutt* (2) were cited.

Moulvie *Mahomed Mustafa*, for the respondent, contended that there was no denial in this case, and that the cases cited were not in point. This case really came under s. 72. The Sub-Registrar was the person who passed the order and not the Registrar; ss. 76 and 77 would not apply. All the remedies provided for in the Registration Offices were not here exhausted, and the present action should fail.

Dr. *Asutosh Mukerjee* in reply.

JUDGMENT.

The judgment of the High Court (TREVELYAN and STEVENS, JJ.) was delivered by

STEVENS, J.—This appeal arises out of a suit under s. 77 of the Registration Act. Registration was in the first instance refused by the Sub-Registrar under the following order: "Eight months from the date of execution have passed. Although summons was [95] issued against the executant to appear, she did not appear to admit execution. I refuse registration under s. 35 of Act III of 1877, paragraph 159 of the 'Registration Manual.'" The plaintiff (now appellant) who was the party interested in the deed in question, then presented a petition under s. 73 of the Registration Act to the District Registrar of Mozufferpore, praying that an order for the registration of the document might be made after taking of evidence. The Registrar made over this application to the Special Sub-Registrar for the necessary action and report. The Special Sub-Registrar passed the following order: "This deed, dated the 24th November 1894, was presented by Mahomed Hossein, agent of Kudrathi Begum, before the Sub-Registrar

(1) 16 C. 189.
(2) 5 C. 445.

1897 AUG. 16. — APPELLATE CIVIL. — 25 C. 93.

of Mozufferpore on the 18th March 1895. The executant Najibunnessa did not appear either personally or by her authorized agent within eight months from the date of execution. The Sub-Registrar refused registration under paragraph 159 of the 'Registration Manual' on the 26th July 1895. The appeal does not lie under s. 73 of Act III of 1877. I reject the application accordingly." It was in consequence of this order of the Special Sub-Registrar that the present suit was instituted under s. 77 of the Registration Act.

The learned Subordinate Judge has held that the suit does not lie. He takes the order to be equivalent to an order of the Registrar, which is apparently the correct view, looking to the provisions of s. 7 of the Registration Act, and the first of the rules made by the Inspector-General under the provisions of s. 69 of the Act. Under that rule the Sub-Registrar at the head-quarters of a district, whose office has been amalgamated with that of the Registrar, is authorised to act as the working deputy of the Registrar exercising, as a matter of routine, all the functions of a Registrar, except the powers of supervision and control under s. 68, and that of hearing appeals from orders refusing to register under s. 72. He is authorised to deal with applications under s. 73 of the Act as a matter of course.

The ground on which the learned Subordinate Judge has held that no suit lies in this case is that registration had been refused on a ground other than the denial of execution, and therefore [96] the proper remedy of the plaintiff was an appeal to the Registrar under s. 72 against the order of the Sub-Registrar refusing to admit the document to registration, and not an application under s. 73. He says: "When plaintiff ought to have appealed to the Registrar under s. 72, but mistaking her remedy she made an application under s. 73, it is the same as if she did not at all go to the Registrar. It is thus abundantly clear that the plaintiff has not complied with the provisions of the Registration Act. She is therefore out of Court."

The attention of the learned Subordinate Judge does not appear to have been directed to the case of *Lukhi Narain Khettry* v. *Satcowrie Payne* (1) and the case of *Radhakissen Rowra Dakna* v. *Choonee Lall Dutt* (2) where it has been held that a wilful refusal or neglect to attend and admit execution is equivalent to a denial of execution within the meaning of the Registration Act; and that where such refusal or neglect occurs a suit will lie under s. 77 of the Act for the purpose of having the document registered. In paragraph 146 of the rules made by the Inspector-General, the latter case and another case, *In re Abdul Aziz* (3), are referred to as authority for that proposition, and it is stated that as soon as such refusal or neglect is proved before him, a registering officer may record his refusal to register the document under s. 35. It is remarked that an appeal, by which is apparently meant an application, will then lie to the Registrar under s. 73, who will make inquiry and pass orders under ss. 74 and 75 just as if execution had been specifically denied. We think that in accordance with the rulings to which we have referred and the practice of the Registration Department, the plaintiff did not mistake her remedy in applying in the present case to the Registrar under s. 73. The original order of refusal was on the face of it an order passed under s. 35 of the Act, and it was passed in consequence of the neglect of the executant to attend and admit execution. Taking the

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(1) 16 C. 189. (2) 5 C. 445. (3) 11 B. 691.

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order of the Special Sub-Registrar on the application under s. 73 as equivalent to an order of the Registrar, the case comes under [97] cl. (*a*) of s. 76 of the Act, and, therefore, the plaintiff had a right of suit under the provisions of s. 77.

The decree of the lower Court must be set aside, and the case remitted to that Court for disposal on the merits.

The appellant will get the costs of this appeal.

S. C. C. *Appeal allowed; case remanded.*

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25 C. 97 = 1 C.W.N. 692.

APPELLATE CIVIL.

Before Mr. Justice Macpherson and Mr. Justice Ameer Ali.

RAMI DEKA (*Defendant*) *v.* BROJO NATH SAIKIA AND OTHERS (*Plaintiffs*).* [28th July, 1897.]

Judgment—Form of judgment on appeal—Judgment not in conformity with law—Dismissal of appeal—Civil Procedure Code (*Act XIV of* 1882), *ss.* 551, 574, 584.

The lower appellate Court, in disposing of an appeal from a decree of the Munsif, recorded the following judgment: "Suit laid at Rs. 480, value of buffaloes. Appeal rejected under s. 551 of the Civil Procedure Code."

Held, that this was not a judgment in conformity with law.

The dismissal of an appeal under s. 551 of the Civil Procedure Code by a Court whose decision may be the subject of an appeal, does not relieve the Court from the necessity of writing a judgment which, according to the provisions of s. 574 of the Code, should show the points raised, the decision upon those points, and the reasons for deciding them.

[N.F., 30 A. 319=5 A.L J. 300=A.W.N. (1908) 115; 8 Ind. Cas. 941=4 S.L R. 184; F, 17 M L.J 62 N; 18 M L J. 34=3 M.L.T. 71 (F B.); 9 O.C. 32; R., 36 B. 116=13 Bom. L.R 1002=12 Ind. Cas. 564; 5 Ind. Cas. 397; 8 O.C. 290 (291); 13 C.W N. 1031=2 Ind. Cas. 405; D., 5 C.L J. 348.]

FOR the purposes of this report the facts and points for decision are sufficiently stated in the judgment.

Babu *Basanta Coomer Bose*, for the appellant.

Babu *Mon Mohun Dutt*, for the respondents.

The judgment of the High Court (MACPHERSON and AMEER ALI, JJ.) was as follows:—

JUDGMENT.

The judgment of the lower appellate Court in this case is: "Appeal rejected under s. 551 of the Code of Civil Procedure."

It is contended that this is not a judgment in conformity with law, and that there is an error of procedure, which brings the case under s. 584.

[98] The dismissal of an appeal under s. 551 by a Court, whose decision may be the subject of an appeal, does not, we think, relieve the Court from the necessity of writing a judgment which, according to the provisions of s. 574, should show the points raised, the decision upon those points, and the reasons for deciding them. There was an appeal

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* Appeal from Appellate Decree, No. 314 of 1896, against the decree of M. A. Gray, Esq., Subordinate Judge of Durang, dated the 1st of November 1895, affirming the decree of Babu Prosanno Coomar Ghose, Munsif of Tejpore, dated the 22nd of July 1895.

before the Court, and the judgment disposing of that appeal must, we think, be in conformity with the provisions of the Code. We set aside the decision and remand the case in order that the appeal may be disposed of according to law. The costs of this appeal will abide the result.

B. D. B. *Case remanded.*

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25 C. 98=3 C.W.N. 20.

APPELLATE CIVIL.

Before Mr. Justice Macpherson and Mr. Justice Ameer Ali.

ISSUR CHANDRA DUTT (*Plaintiff*) *v.* GOPAL CHANDRA DAS (*Defendant*).* [30th June, 1897.]

Right of suit—Benamidar—*Suit for ejectment—Parties.*

A mere *benamidar* cannot maintain a suit for ejectment, he having neither title to, nor possession of, the property.

Hari Gobinda Adhikari v *Akhoy Kumar Mozumdar* (1) followed in principle. *Nand Kishore Lal* v. *Ahmad Ata* (2) dissented from.

[**Diss.**, 21 A. 380=19 A W N. 130 ; 13 C.P.L.R. 33 (35); **F.**, 25 C. 874=3 C.W.N. 12; 7 C.W N. 229 (238) ; 7 Ind. Cas. 218 ; **Appr.**, 30 C. 268 (273) ; 30 M. 245 (247) =17 M.L.J. 174.]

FOR the purposes of this report the facts are sufficiently stated in the judgment of the High Court.

Babu *Saroda Charan Mitter* and Babu *Jadub Chunder Seal*, for the appellant.

Babu *Sree Nath Dass* and Babu *Girija Sankar Mozumdar*, for the respondent.

The judgment of the High Court (MACPHERSON and AMEER ALI, JJ.) was as follows :—

JUDGMENT.

The appellant brought this suit to eject the defendant as a trespasser. The defendant contended that the plaintiff had no right to bring the suit, as he is a mere *benamidar* of Guru Churn Dutt, under whom and others the defendant admits that [99] he is a tenant. Both the Courts have found that the appellant is a mere *benamidar* of Guru Churn Dutt, and that he cannot maintain the suit. This is quite in accordance with the decision of this Court in *Hari Gobindo Adhikari* v. *Akhoy Coomar Mozoomdar* (1), in which it was held that a person who was a *benamidar* for one of the defendants could not maintain a suit for a declaration of his right to, and for possession of, immoveable property ; such a person cannot, it seems to us, any the more maintain a suit for ejectment. He has neither title nor possession. Our attention has been called to a recent decision of the Allahabad High Court in the case of *Nand Kishore Lal* v. *Ahmad Ata* (2). In that case it was held, dissenting from the decision of this Court, that a *benamidar* can maintain a suit of the kind mentioned. We cannot follow that decision as we think the case in this Court referred to above was rightly decided, and is in accordance with the

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* Appeal from Appellate Decree, No. 1932 of 1895, against the decree of K. N. Roy, Esq., Officiating District Judge of Pubna and Bogra, dated the 23rd of August 1895, affirming the decree of Babu Sarat Chander Sen, Munsif of Pubna, dated the 22nd of August 1894.

(1) 16 C. 364. (2) 18 A. 69.

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previous decisions on the same point. The only contention raised in this appeal is that the appellant, assuming him to be a *benamidar* for some one else, can maintain the suit, and as that fails, the appeal must be dismissed with costs.

B. D. B. *Appeal dismissed.*

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25 C. 99 = 2 C.W.N. 408.

APPELLATE CIVIL.

Before Mr. Justice Macpherson and Mr. Justice Ameer Ali.

KALI KISHORE DEB SARKAR (*Purchaser*), *Plaintiff v.* GURU PROSAD SUKUL (*Decree-holder*), *Defendant.** [17th June, 1897.]

Appeal—Order under Civil Procedure Code (Act XIV of 1882), *s.* 293, *on defaulting purchaser to make good deficiency on resale—Second appeal—Sale in execution of decree—Civil Procedure Code (Act XIV of* 1882), ss. 244, 313—*Mis-description of property in proclamation of sale.*

Both an appeal and a second appeal lie from an order under s. 293 of the Civil Procedure Code, directing a defaulting purchaser at an execution-sale to make good the deficiency of price happening on a resale owing to his default.

[100] *Sree Narain Mitter* v. *Mahatab Chand* (1), *Sooraj Buksh Singh* v. *Sree Kishen Doss*(2), *Joobraj Singh* v. *Gour Buksh Lall*(3), *Baij Nath Sahai* v. *Moheep Narain Singh* (4), and *Amir Baksha Sahib* v. *Venkatachala Mudali* (5), followed.

Deoki Nandan Rai v. *Tapesri Lal* (6), referred to and discussed.

In this case it was held on appeal, reversing the decision of the lower Courts, that under the circumstances the purchaser was not liable for the deficiency.

[Diss., 12 Ind. Cas. 360 = 7 N.L.R. 134 ; Rel., 2 C.W.N. 411 (412).]

THE facts of the case sufficiently appear from the judgment of the High Court.

Babu *Dwarka Nath Chuckerbutty*, for the appellant.

Babu *Tara Kishore Chowdhry*, for the respondent.

The judgment of the Court (MACPHERSON and AMEER ALI, JJ.) was as follows:—

JUDGMENT.

The appellant having purchased a share of a *taluk* at an execution sale failed to pay the balance of the purchase-money, and there was a resale at which the price realized was much smaller than the price realized at the first sale. Both Courts have held that the appellant must make good the deficiency according to the terms of s. 293 of the Procedure Code. The decree-holder is the person seeking to enforce the payment and the respondent in the appeal.

A preliminary objection is taken that no appeal lies, but there is a current of decisions in this Court dating from 1865, showing that an appeal does lie, and we feel bound to follow them. The cases are *Sree Narain Mitter* v. *Mahatab Chand* (1), *Sooraj Buksh Singh* v. *Sree Kishen Doss* (2), *Joobraj Singh* v. *Gour Buksh Lall* (3), and *Baij Nath Sahai* v. *Moheep Narain Singh* (4). No decision to the contrary has been cited,

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*Appeal from Order, No. 4 of 1897, against the order of W.H. Lee, Esq., Officiating District Judge of Mymensingh, dated the 2nd of October 1896, affirming the order of Babu Krishna Chandra Chatterjee, Subordinate Judge of that district, dated the 6th of August 1896.

(1) 3 W.R. 3. (2) 6 W.R. Mis. 126. (3) 7 W.R. 110.
(4) 16 C. 535. (5) 18 M. 439. (6) 14 A. 201.

although the question has been raised in several other cases but not decided. The first three cases were under the Code of 1859 as amended by Act XXIII of 1861, but there is in this respect no substantial difference between the old Code and the present Code. The Madras Court has taken [101] the same view in *Amir Baksha Sahib* v. *Venkatachala Mudali* (1). The Allahabad Court took a different view in *Deoki Nandan Rai* v. *Tapesri Lal* (2), and held that there was no appeal. But it may be noticed that Mr. Justice Straight dissented, and Mr. Justice Knox seems to have held that an appeal would lie from an adjudication in proceedings to enforce an order under s. 293.

In all the cases in which it was held that an appeal lay the question was regarded as one under s. 244 of the present Code, or the corresponding section of the old Code, so that if there is an appeal at all there is no doubt as to the right of second appeal. It seems that before the resale the appellant applied to have the first sale set aside under s. 313 of the Code on the ground that the judgment-debtor had no saleable interest in the property. It was found that what was sold was the judgment-debtor's interest in a *shikmi taluk* called Radha Govind Biswas with a rental of Rs. 890 odd, and comprising certain *mouzahs*, *kismuts* and *paras*, whereas what was advertized and put for sale was his interest in a *shikmi taluk* called Ram Govind Biswas with a rental of Rs. 495, but comprising the same *mouzahs*, *kismuts* and *paras*. The first Court refused to set aside the sale, holding that the misdescription was immaterial, as the judgment-debtor had no other *shikmi taluk* in those *mouzahs*, and that the appellant, who was his co-sharer, must have known this and understood quite well what he was buying. The order rejecting the application was upheld by the appellate Court on the same grounds. The property was put up at the first sale, realised Rs. 3,200, the next highest bidder being the decree-holder, and when put up at the second sale under precisely the same description, it realised Rs. 850. The decree-holder had obtained leave to bid at the second sale, provided he did not bid less than Rs. 3,100.

The appellant resisted the attempt to make him liable on three grounds: *first*, that there was no such property as the one sold; *second*, that the decree-holder and judgment-debtor had made false representations to him as to the property which was being sold; and, *third*, that the purchaser at the second sale was a mere *benamidar* of the decree-holder. His objections were overruled by both [102] Courts without any inquiry, and an order was made for the realization of the deficiency by the process prescribed for the execution of decrees. We cannot, of course, interfere with the order under s. 313, or with the order confirming the second sale, which it appears has been confirmed, but the question is whether on the facts as stated above the appellant is liable for the deficiency, and we must hold that he is not in any view of the case.

Before the defaulting purchaser can be made liable under s. 293, it must appear that the property which is the subject of the two sales is the same in every respect. If the Courts were right in holding in the proceeding under s. 313, that, notwithstanding the misdescription, the property sold on the first occasion was the judgment-debtor's share in *shikmi taluk*, Radha Govind Biswas, bearing a rent of Rs. 890, it is clear that is not what was put up for sale on the second occasion, ostensibly at least. It may be said that the same property was really sold, but that there was a

(1) 18 M. 439. (2) 14 A. 201

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misdescription on both occasions. Assuming this to be so, it makes no difference. If there was a misdescription on the first occasion the decree-holder was aware of it, and he ought not to have had the property again proclaimed for sale under a description which he knew to be wrong. Having done that he cannot make the defaulting purchaser answerable for the deficiency.

It is not necessary to consider what would have happened if the property, which the Courts considered was the property sold on the first occasion, had been rightly described on the second, as we must deal with the facts as they are. Possibly in that case the decree-holder might have found himself in a difficulty in attempting to realize from the defaulting purchaser any deficiency in the price. He cannot, however, be allowed to evade that difficulty by having the property proclaimed for sale under a description which he knew to be wrong.

We set aside the order of both Courts. The application of the decree-holder fails and must be rejected. The appellant will get his costs in this Court.

B. D. B. *Appeal allowed.*

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25 C. 103.

[103] APPELLATE CIVIL.

Before Sir Francis William Maclean, Kt., Chief Justice and Mr. Justice Banerjee.

SARAT CHANDRA BANERJEE AND ANOTHER (*Plaintiffs*) v. BHUPENDRA NATH BOSU AND OTHERS (*Defendants*).*
[3rd August, 1897.]

Hindu law—Will—Executor—Position of an executor under a Hindu will before the Hindu Wills Act (XXI of 1870) came into force—Difference in position between an executor under a Hindu will and an executor under an English will—Probate and Administration Act (V of 1881), ss. 2, 4 and 90.

An executor under a Hindu will, before the Hindu Wills Act came into force, is not in the same position as an English executor under an English will, and the property does not vest in him; he holds it only as manager.

[F., 32 C. 861 = 1 C.L.J. 270; R., 37 C. 839 = 15 C.W.N. 185 = 8 Ind Cas. 655; D., 36 M. 575 = 17 Ind. Cas. 4 = 23 M. L. J. 306 = 12 M. L. T. 207 = (1912) M. W. N. 1112.]

THE facts of this case are shortly these: One Tituram Haldar died in the month of July 1857, leaving behind him his widow and three daughters. He executed a will on the day of his death, and appointed his widow Ram Kumari Debi and his son-in-law executors. On the 21st January 1864 the executors of Tituram Haldar's will conveyed the property in dispute to one John Bayley, from whom it passed by subsequent assignments until the defendant Troilucko Nath Basu obtained it under a mortgage decree. The plaintiffs, who now represent the entire estate of Tituram Haldar, brought this suit to recover possession of the property sold to John Bayley on the allegation that Tituram Haldar's executors were not competent to give an absolute title. Bhupendra Nath Basu was joined as a defendant because he lived with his brother Troilucko Nath

* Appeal from Appellate Decree, No. 2267 of 1895, against the decree of J. Pratt, Esq., District Judge of zillah 24-Parganas, dated the 16th of September 1895, reversing the decree of Babu Purna Chandra Shome, Subordinate Judge, 1st Court of that District, dated the 30th of August 1894.

1897 AUG. 3. — APPELLATE CIVIL. — 25 C. 103.

Basu. The Court of first instance gave the plaintiffs a decree, holding that the executors did not hold any higher position than that of an ordinary manager; they had not the same power as an executor in England had, and that they could give a title only under circumstances in which an ordinary manager could do so. On appeal, the District Judge of 24-Parganas reversed the decision of the first Court. The material portion of his judgment was as follows:—

"The plaintiffs raise the question of the validity of transfer to John Bayley **[104]** and whether the plaintiffs are entitled to dispute it. It will therefore be necessary here to set down an abstract of the provisions of the will.

Paragraph 1.—Testator's wife Ram Kumari Debi is to remain in possession of and enjoy during her life-time all the testator's moveable and immoveable properties; she shall manage the same as executrix, take care of the testator's daughters, be entitled to institute and defend suits. Testator's son-in-law Umesh Chunder Bandopadhaya, husband of Kadambini, is vested with the same powers as Ram Kumari Debi. Both shall manage with equal rights and with each other's consent. If the son-in-law causes devastation, the testator's widow will henceforth act as sole executrix.

Paragraph 2.—On the decease of the testator s widow the property shall be equally divided between testator's three daughters; but none of the property is to be alienated for the payment of debts that may be incurred by the testator's daughters or their successors.

Paragraph 3.—Testator's wife with the consent of their son-in-law is empowered to pay off the testator's debts by sale, but no transfer shall be valid unless effected with the consent and signature of both of them; and none shall have authority to transfer any property for any reason other than that mentioned above.

Paragraph 4.—During the lifetime of the testator's widow, their three daughters and also the husbands of the two younger ones shall be maintained out of the testator's estate.

Paragraph 5.—Specifies a legacy to testator's nephew.

Now it appears to me clear that the executors had an estate under the will, and they were fully empowered to sell in order to pay off the testator's debts. The sale to John Bayley was made ostensibly for that very purpose. On the principle enunciated in *In re Tanqueray Willaume* (1) the sale conveyed a good title, and it was neither necessary nor prudent for the purchaser to inquire whether there were any subsisting debts. That this principle holds good may be deduced from certain observations of Mr. Justice Phear in the case of *Rooploll Khettry* v. *Mohima Churn Roy* (2)."

From this decision the plaintiffs appealed to the High Court.

Sir *Griffith Evans*, Babu *Girish Chunder Chowdhry*, and Babu *Horendra Nath Mookerjee*, for the appellants.

Mr. *C. P. Hill*, and Babu *Sarada Churn Mitter*, for the respondents.

The following judgments were delivered by the High Court (MACLEAN, C. J. and BANERJEE, J.):—

JUDGMENT.

[105] MACLEAN, C.J.—In my opinion the learned Judge in the Court below has made a mistake in law. In point of fact he holds that an

(1) (1882) L. R. 20 Ch. D. 465. (2) 10 B. L. R. 271, note,

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executor under a Hindu will, before the Hindu Wills Act came into force, is substantially in the same position as an English executor under an English will, in the sense that the property vests in him; and that this is his view is clear from the fact that he relied upon the well-known case of *In re Tanqueray Willaume* (1) decided in the English Courts, which shows that he regarded the property under the will as vested in the executor. I think it is clear from the authorities that have been cited that an executor under a Hindu will is not in that position which the learned Judge in the Court below seems to think, but he practically holds the property as manager, as is stated by Mr. Justice Markby in the case of *Kherodemoney Dossee* v. *Doorgamoney Dossee* (2), where he says: "It has been frequently held that, the mere appointment of a person as executor to a Hindu does not cause any property to vest in him at all; and that if as executor he is entitled to hold the property, he holds only as manager." I think that view of the law is correct as applied to the executors appointed under the particular will in this case; but that does not dispose of this point. Mr. Hill argued ingeniously that, having regard to the provisions of ss. 2 and 4 of the Probate and Administration Act V of 1881, the property vested in these executors under the effect of s. 2 of that Act, which says that s. 4, amongst others, is to apply to the case of every Hindu dying before the 1st April 1881, which is the date on which the Act came into operation. Admittedly, in this case, the testator did die before that date, and Mr. Hill's contention is that, having regard to the language of ss. 2 and 4, the effect of those sections is to vest in these executors, who were appointed, so far back as 1857, under a Hindu will, which it was then not obligatory to prove, the property of the testator. This argument does not commend itself to me as sound; one must look to the whole purview and intention of the Act. If we look to the preamble of the Act, it is there stated that the Act is intended to provide for the grant of probates of wills and letters of administration to the estates of **[106]** deceased persons, in cases to which the Indian Succession Act does not apply; that is the object of the Act—the grant of probates of wills and letters of administration. The Act did not come into force until April 1881, and to my mind it would be a very strong conclusion to draw from the words of s. 2 "dying before the 1st April 1881" that it was intended—this Act having been passed for the purpose which I have stated above—that s. 4 should have a retrospective operation, so as to vest in an executor appointed under a Hindu will an estate which but for that section would admittedly not otherwise vest in him. I think ss. 2 and 4 read together mean that in the case of a Hindu dying before April 1881, where the estate is unadministered, if any one desire to come in and prove the will and get the benefit of the Act in that sense, he may have the opportunity of doing so, and the effect would be that the estate from that time would vest in such executor under s. 4. That view to my mind is strengthened by the consideration that s. 4 comes in under chap. II of the Act, and the heading is "of grant of Probate and Letters of Administration," which to my mind indicates strongly that the vesting was only to follow upon the grant of probate of the will in the one case, or grant of letters of administration in the other. That view is further strengthened by the consideration that the section applies, not only to executors, but to administrators who obtain letters of administration under the Act.

(1) (1882) L. R. 20 Ch. D. 465.

(2) 4 C. 455.

1897 AUG. 3.

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25 C. 103.

But assuming that view of ss. 2 and 4 of the Act to be wrong, it appears to me that Mr. Hill does not carry his case much further by reason of the provisions of s. 90 of the Act, which says that the "power of an executor to dispose of immoveable property so vested in him" under the will "is subject to any restriction that may be imposed by the will appointing him." Now, in this case, the will distinctly states that there was to be no sale and no alienation other than an alienation for the payment of debts. Mr. Hill tries to get out of this difficulty by contending that, once concede that the estate is vested in the executor, the cases in the English Courts show (amongst others that to which I have referred) that where an executor, in whom the estate is vested, has a power to sell for debts, the purchaser need not inquire as to the existence of those debts or the necessity for the [107] sale. But I doubt if the principle of these English cases can apply in the face of the clear statutory provision of s. 90. However, as in my view no estate was vested in this executor, the point becomes immaterial. I think the Judge was wrong on this point of law.

That being so, it appears to me that we must remand the case, and must remand it because the Judge in the Court below has not, as a matter of fact, gone into the question of whether this sale was effected for the purpose of paying the testator's debts. I desire, however, to point out, I hope for the assistance of the learned Judge in the Court below when the case is retried on this remand, that it is not necessary, as a condition precedent to the validity of this transaction, that the defendants should make out the real existence of the necessity for raising this money. Beyond that he will doubtless give every due effect to the lapse of time, which has occurred in this case, for the sale is 30 years old, to the fact that the original vendee is dead, and can give no account of the transaction, to the long possession and enjoyment of which the defendants have had of this property, and to that which looks *prima facie* something like acquiescence on the part of the plaintiffs, and especially to the recital on the face of the *kobala* itself that "according to the provisions of the will made by the deceased Tituram Hàldar, we, to clear the debts and liabilities of his estate, have sold to you the said land with buildings and all interests for a consideration of Rs. 3,000; you are vested this day with the right to dispose of the said property by sale or gift, etc."

Now in the case of *Hunoomanpersaud Panday* v. *Mundraj Koonweree* (1)—the passage which I am about to read is at p. 419—the Privy Council say: "It is to be observed that the representations by the manager accompanying the loan as part of the *res gestæ* and contemporaneous declarations of an agent, though not actually selected by the principal, have been held to be evidence against the heir); and as their Lordships are informed that such *prima facie* proof has been generally required in the Supreme Court of Calcutta between the lender and the heir, where the lender is enforcing his security against the heir, they think it reasonable [108] and right that it should be required." In the present case there was a clear representation by the executors that they were selling the property to clear the debts and liabilities of the estate, and that, in the opinion of the Privy Council, is *prima facie* evidence as to the necessity for the loan. It is, in fact, an admission; it is an admission by a Hindu executor as to the object and necessity for which the money was being raised. We must, therefore, ask the learned Judge to consider whether on the face of these recitals there is not *prima facie* evidence in favour of

(1) 6 M.I.A. 393 (419).

1897 AUG 8. — APPELLATE CIVIL. — 25 C. 103.

the defendant's case, and, if so, that would be sufficient to shift the *onus* and throw it upon the plaintiffs to show that there was no necessity for raising this loan. In remanding this case, we remand it upon the terms that neither party is to be allowed to go into fresh evidence, but the case is to be decided upon the evidence already adduced. Having regard to the length of time during which this case has been going on, we direct that the lower Court should dispose of this matter as soon as conveniently can be. The costs will abide the result.

BANERJEE, J.—I am of the same opinion. I only wish to add one word with reference to Mr. Hill's argument based upon s. 2 read with s. 4 of the Probate and Administration Act. It is quite true that s. 2 of that Act makes chaps. II to XIII, both inclusive, applicable to the case of every Hindu dying before, on, or after, the first day of April 1881; and if the words of the section are to be taken in an unrestricted sense, s. 4, which occurs in chap. II of the Act, would apply to this case, and would have the effect of vesting in the executor in this case the property of the testator. But the provisions of the Act must be taken to be controlled by the preamble of the Act which is very significant, and which runs in these words: "Whereas it is expedient to provide for the grant of probate of wills and letters of administration to the estates of deceased persons in cases to which the Indian Succession Act, 1865, does not apply, it is hereby enacted as follows." The Act then is passed with a view to provide for the grant of probates and letters of administration to the estates of deceased persons in cases to which the Indian Succession Act does not apply, and any provision of the Act which is said to be applicable to **[109]** the case of a Hindu dying before the 1st September 1870, in which the taking of probate is optional [See *Krishna Kinkur Ray* v. *Rai Mohun Ray* (1) and *Moosa* v. *Essa* (2)], must be taken to be applicable to his case only in the event of the Act being resorted to for the purpose of obtaining probate or letters of administration. But where the Act is not availed of for the purpose of obtaining probate or letters of administration, for the granting of which it was passed, I do not think it would be right to hold that the provisions of the Act would apply to such a case.

Granting, however, that s. 4 of the Act was applicable to this case, and that the property of the testator was, therefore, vested in the executor, that would not affect the result, because by sub-s. 2 of s. 90 the power of the executor to dispose of immoveable property so vested in him is subject to the restriction imposed by the will. The question would still remain whether the power of sale was exercised in this case within the limits prescribed.

S. C. G. *Appeal allowed*; *case remanded.*

(1) 14 C. 37. (2) 8 B. 241.

25 C. 109.

1897 JUNE 23. APPEL-LATE CIVIL. 25 C. 109.

APPELLATE CIVIL.

Before Sir Francis William Maclean, Kt., Chief Justice, and Mr. Justice Banerjee.

GOLAM GAFFAR MANDAL AND OTHERS (*Decree-holders*) *v.* GOLJAN BIBI AND OTHERS (*Judgment-debtors*).* [23rd June, 1897.]

Limitation Act (*XV of* 1877), *sch. II, art.* 179—*Meaning of the words "date of the decree"—Execution of decree—Code of Civil Procedure* (*Act XIV of* 1882), *ss.* 205 *and* 235.

The words "date of the decree" in sch. II, art. 179 of the Limitation Act, mean the date the decree is directed to bear under s. 205 of the Code of Civil Procedure, and that is the date on which the judgment was pronounced; therefore an application to execute a decree, if not made within three years from the date when the judgment was pronounced, is barred by limitation.

[110] *Bani Madhub Mitter* v. *Matungini Dassi* (1), referred to.

[R., 23 B. 442 (445); 3 L.B.R. 62 (F.B.)].

THE facts of the case for the purposes of this report appear sufficiently from the judgment of the High Court.

Babu *Nund Lal Sarkar*, for the appellants.

No one appeared for the respondents.

The following judgments were delivered by the High Court (MACLEAN, C.J., and BANERJEE, J.)

JUDGMENTS.

MACLEAN, C.J.—In my opinion these appeals are not susceptible of serious argument. It is clear that the period of limitation began to run from the date of the decree, and the date of the decree was the 14th September 1892. It is quite immaterial on what date the Judge signed it. The appeals must be dismissed but without costs, as the respondents have not appeared.

BANERJEE, J.—I am of the same opinion. The question for decision in this case is what is the meaning of the words "date of the decree" in cl. 1 of art. 179 of the second schedule of the Limitation Act. Do they mean the date that the decree is by s. 205 of the Code of Civil Procedure directed to bear, or do they mean the date on which the Judge actually puts his signature to the decree? I am of opinion that they must mean the date the decree is directed to bear under s. 205, and that is the date on which the judgment was pronounced: and if time runs from that date, this application was clearly out of time. It was argued by the learned vakil for the appellant that the words in question should be construed to mean the date on which the Judge put his signature to the decree, and the only reason assigned in support of this contention was that otherwise the decree-holder would not have the full period of three years allowed him by law for making an application for execution, because it was said that he was required by s. 235 of the Code of Civil Procedure to insert certain particulars in his application for execution, which particulars could be given only after the decree was drawn up. Granting

* Appeals from Order Nos. 134-135 of 1896 against the order of Babu Bulloram Mullick, Subordinate Judge of Khulna, dated the 21st of December 1895, affirming the order of Babu Ashu Tosh Mitter, Munsif, 3rd Court, at Satkhira, dated the 29th of October 1895.

(1) 13 C. 104.

1897 JUNE 23. — APPELLATE CIVIL. — 25 C. 109.

that some of the particulars required by s. 235 could be given only after the decree was drawn up, that does not deprive the decree-holder of the benefit of the full period of three years, if the [111] words in question mean the date that the decree is required by s. 205 to bear. He must have known the date on which judgment was pronounced in his favour, and he could have made all necessary preparations for making an application for execution from that date; and thus he can avail himself of the full period of three years. An extreme case might be put, where the decree is not actually prepared until after the expiry of three years from the date of the judgment. Practically that is an extremely unlikely case. But if such a case were to happen, there would be nothing to prevent the successful party in the suit from making the application for execution within three years, without such of the details required by s. 235 as could not be given by reason of the decree not being ready, representing to the Court that the application was made in that imperfect form to save it from being barred.

I may add that the decision of a Full Bench of this Court in the case of *Bani Madhub Mitter* v. *Matungini Dassi* (1) fully supports the view we take. There the learned Judges had to construe the words "the date of the decree" occurring in art. 152 of the second schedule of the Limitation Act; and Sir Comer Petheram in delivering the judgment of the Court, after referring to s. 205 of the Code of Civil Procedure, observed: "It is provided by that section that the decree shall bear date the day on which judgment was pronounced, and when the Judge has satisfied himself that the decree has been drawn up in accordance with the judgment, he shall sign the decree, so that whatever may be the day on which the actual signature is made, the date of the decree for all purposes is to be the date on which the judgment was pronounced." If then the words "the date of the decree" in art. 152 bear that meaning, there is no reason why those same words occurring in another article of the same schedule should not bear the same meaning.

S. C. G. *Appeal dismissed.*

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25 C. 112.

[112] ORIGINAL CIVIL.

Before Mr. Justice Sale.

BHUGGOBUTTY PROSONNO SEN (*Plaintiff*) *v.* GOOROO PROSONNO SEN AND OTHERS (*Defendants*).* [9th July, 1897.]

Will—Construction of will—Administration suit—Chancery practice—"Living," meaning of—Trust for religious purposes—Perpetuities, rule as to.

A testator by his will devised certain house property, first for the celebration of *pujahs* and the worship of an idol, and then that his children with their families should be allowed to *live* there. One of the sons used the premises for the purpose of his business as a *kabirai*, which was objected to by the other sons as being contrary to the terms of the will. One of the defendants also contended that before the Court could construe the terms of the will to ascertain the meaning of the testator it was necessary to bring a proper administration suit. *Held*, that considering the character of the consequential relief sought the Court could construe the will without an administration suit.

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* Original Civil Suit No. 439 of 1896.

(1) 13 C. 104.

That questions between trustees and beneficiaries and between trustees and strangers requiring the construction of provisions in a trust deed have been determined without the Court being asked to undertake the entire administration of the trust. 1897 JULY 9.

In re Weall (1), approved. ORIGINAL

To ascertain the meaning intended to be applied to a particular phrase, it is necessary first to consider the words of the will and next the surrounding circumstances, which may affect the testator's meaning. *Soorjeemoney Dossee* v. *Denobundoo Mullick* (2). CIVIL. 25 C. 112.

If there is a valid dedication of premises for religious purposes, this is not invalid merely because it transgresses against the rule forbidding the creation of perpetuities.

Under Hindu law an idol, as symbolical of religious purposes, is capable of being endowed with property, but no express words of gift to such idol in the shape of a trust or otherwise are required to create a valid dedication.

Manohar Ganesh Tambekar v. *Lakhmiram Govindram* (3), approved.

[113] *Sonatun Bysack* v. *Juggutsoondree Dossee* (4) and *Ashutosh Dutt* v. *Doorga Churn Chatterjee* (5), distinguished.

[R., 37 C. 128=10 C.L.J. 355=14 C.W.N. 18=3 Ind. Cas. 642; 3 C.L.J. 224; 6 A. L.J. 444=1 Ind. Cas. 666; 24 Ind. Cas. 72.]

GUNGA PROSAD SEN, a *kabiraj* of considerable repute for several years prior to his death, lived with the plaintiff, his eldest son, the defendant Gooroo Prosonno Sen, his youngest son, and another son, who had since died, and their wives and families, in premises Nos. 16 and 17, Kumertolli Street, and carried on and practiced his profession, as a *kabiraj* in another house belonging to him on the opposite side of the street, No. 9/1, Kumertolli Street, where he had established a dispensary. On 9th December 1895 Gunga Prosad died leaving him surviving the plaintiff, his eldest son, the defendant Gooroo Prosonno Sen, his youngest son, and the infant defendants Birressur Prosad and Ramessur Prosad, the sons of his second and predeceased son Hurry Prosad Sen. He also left a will, whereby he appointed the plaintiff, his nephew, the defendant Nishi Kanto Sen, and his brother, the defendant Annoda Prosad Sen, executors, and purported to deal with his family residence as a religious endowment dedicated in perpetuity to the worship of certain *thakurs*, which he had established therein and to other religious purposes, reserving only in favour of his sons and grandsons with their respective families a right of residence therein. His other three residences were specifically devised to his two surviving sons and the children of his deceased son respectively. The testator trained all his sons for the profession or business of a *kabiraj*, and it was admitted in the course of the suit that the plaintiff and his second son Hurry Prosad had started dispensaries on their own account with their father's help; the former in Chitpore Road, and the latter in Burtollah Street. Previous to the testator's death, the plaintiff and the defendant, Gooroo Prosonno Sen, had quarrelled and had separated in mess, and the testator, for the last two or three years of his life, messed alternatively, with them. Shortly after the testator's death, fresh disputes broke out between the two surviving sons. The plaintiff alleged that the defendant Gooroo Prosonno Sen had, after the testator's death and contrary to the wishes of the testator, and in breach of the trust created by his will, taken exclusive possession [114] of two of the rooms on the ground floor of the family residence, and, after making certain structural alterations therein, had established there a dispensary and was practising his profession there as a *kabiraj* to the inconvenience and annoyance of the testator's family. This defendant,

(1) (1889) L.R. 42 Ch. D. 674. (2) 6 M.I.A. 526 (535). (3) 12 B. 247 (263).
(4) 8 M.I.A. 66. (5) 5 C. 438=6 I.A. 182.

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while admitting that he had established a dispensary there and was practising his profession as a *kabiraj*, denied that he had done so contrary to the wishes or directions of the testator, but alleged that the dispensary was started in the lifetime of the testator and with his express sanction and consent.

The plaintiff instituted this suit to have it declared that the defendant Gooroo Prosonno Sen was not entitled to establish a dispensary or practise as a *kabiraj* at the family residence and to restrain him from so doing by a perpetual injunction. The plaintiff also asked that as far as it might be necessary for the purposes of the suit the testator's will might be construed and the rights of all parties thereunder in this behalf ascertained and declared. No relief was asked against the infant defendants or the other executors; although by their written statement the infant defendants supported in the main the case for the defendant Gooroo Prosonno Sen.

The terms of the will were as follows :—

This instrument of will is executed by (me) Sri Gunga Prosad Sen, *kabiraj*, inhabitant of No. 17, Kumertolli, Town of Calcutta, to the following effect: I am far advanced in age and am now attacked with such a disease that it is likely to prove fatal. I have a small ancestral property and I having by my own acquisitions acquired various immoveable and moveable properties have been in possession (thereof). I have several things in contemplation, as specified below, and I desire that all the said contemplated things being mentioned in permanent way my ancestral and self-acquired properties, &c , shall be divided among and received by my heirs as per paragraphs below.

Paragraph 1. I endow my house Nos. 16 and 17, Kumertolli Street, for the celebration of *Durgotsub* every year, and for the worship of the *thakurs* existing in the said house. In the said house the *thakurs* established by me shall for ever remain, and in accordance with the undermentioned rule their worship shall be carried on; and *Sri Sri Issur Durga Pujah* shall be annually celebrated in accordance with the undermentioned rule and every year the annual *shrad* of my Issur *thakur* in heaven (deceased father, shall be performed and on such occasions Brahmins and people of other castes shall [115] be fed, and every year the *Dolejatra* festival shall be celebrated. Besides these my sons and grandsons (son's sons) with their respective families shall live in the said house. In case of disagreement among them the person who would be the cause of disagreement shall leave the said house with his family. I endow (make *urpon*) this house for all these purposes. With regard thereto no right of my heirs shall exist or accrue. They shall simply live (therein) as mentioned above. My furniture, &c., which exist in the said house shall be used for the worship, &c., of the said idols ; my heirs shall get nothing whatever of the same. The said house and the said furniture shall never be partitioned amongst any persons.

Paragraph 2. I give my house No. 9/1, Kumertolli Street and the land thereto appertaining to my eldest son Sriman Bhuggobutty Prosonno Sen in absolute right, that is he being vested with right to make gift and sale shall remain in enjoyment and possession thereof down to son, grandson, &c., in succession. I give my house No. 21, Bonomally Sircar's Street and the land thereto appertaining to my youngest son Sriman Gooroo Prosonno Sen in absolute right, that is, he being vested with right to make gift and sale shall remain in enjoyment and possession thereof down to son, grandson, &c., in succession. I give to two persons Sriman Bissessur Prosad Sen and Sriman Ramessur Prosad Sen, the sons of my

son Hurry Prosonno Sen, deceased, No. 10, Schalch Street or Kumertolli Street and the land thereto appertaining in equal shares in absolute right, that is they being vested with right to make gift and sale shall remain in possession and enjoyment down to son, grandson, &c., in succession.

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Paragraph 3. There is at present a *Shib thakur* in the house which I have at Kashidham (Benares). My executors shall cause a good temple to be built (for it) making an expenditure up to two thousand rupees out of my estate.

Paragraph 4. I give my house No. 179, Chitpur Road and the land thereto appertaining to my eldest son Sriman Bhuggobutty Prosonno Sen in absolute right, that is he being vested with right to make gift and sale shall remain in possession and enjoyment thereof down to son, grandson, &c., in succession.

Paragraph 5. My executors shall realise the rent of my house and lands Nos. 162 and 164, Harrison Road, and out of the same pay at first the tax revenue and cost of repairs of the said house and tax revenue and cost of repairs of my aforesaid house Nos. 16 and 17, Kumertolli Street, and then spend 100 (one hundred) rupees per month for the worship of *Shib thakur* at Kashidham (Benares) aforesaid and for feeding (there) charity at least 10 persons (and) for preserving the said house and temple and for employing servants and others for performing all the acts in respect of the same, and after that my executors shall spend 16 (sixteen) rupees per month for the worship of the *thakurs* established in my aforesaid house Nos. 16 and 17, Kumertolli Street, and for daily recitation of *chundipath* in my aforesaid [116] house. Afterwards out of the said rents (the executors) shall every month save (literally hold in deposit or lay aside) 250 (two hundred and fifty) rupees per month, and thus secure every year 3,000 (three thousand) rupees in a lump and (with the said money secure in a lump) *Durgatsub* and *Dolejatra* shall every year be celebrated in my aforesaid house Nos. 16 and 17, Kumertolli Street, out of the same 2,500 (two thousand and five hundred) rupees shall be spent on *Durgatsub* and 500 (five hundred) rupees on *Dolejatra*. Afterwards out of the said rent 500 (five hundred rupees) shall be annually spent for the annual *shrad* of my *Issur Pita Thakur* (deceased father) and for feeding Brahmins and persons of other castes on the occasions of these *shrads*. The balance left after paying the expenses, specified in this paragraph, out of the rent of this house (these houses) shall be divided in the mode stated below.

Paragraph 6. Out of my estate, that is out of the general estate 10,000 (ten thousand) rupees shall be spent on my first *shrad*, and the said expenditure shall be made through (by) my eldest son Sriman Bhuggobutty Prosonno Sen, and out of my general state my executors shall on my demise pay the costs of (taking out) probate of this will and 5,000 (five thousand) rupees for the marriage of my grand-daughter (by son) Sremutty Indoobala, 6,000 (six thousand) rupees to my youngest brother Sriman Annoda Prosad Sen and my eldest son Sriman Bhuggobutty Prosonno Sen's 7,000 (seven thousand) rupees which is in deposit with me.

Paragraph 7. My remaining properties and goods and effects that may remain and the remaining rent of my aforesaid houses Nos. 162 and 164, Harrison Road, shall be divided into three equal parts. My eldest son Sriman Bhuggobutty Prosonno Sen shall get one of these parts and my youngest son Sriman Gooroo Prosonno Sen the other one part and my two grandsons (by son) Sriman Bissessur Prosonno Sen and Sriman Ramessur Prosonno Sen the remaining one part in equal parts.

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Paragraph 8. I appoint my eldest son Sriman Bhuggobutty Prosonno Sen and nephew (brother's son) Sriman Nisikanta Sen and my brother Sriman Annoda Prosad Sen as executors of this my will. When my eldest son Sriman Bhuggobutty Sen is not available (*i.e.*, dies) my youngest son Sriman Gooroo Prosonno Sen shall become executor of this my will. Be it further declared herein that after the acts of the executors of this will have been finished, that is after all my other properties and things, &c., excluding the properties which I have endowed for the worship and of the above-named idols, have been partitioned among the abovenamed persons, the entire charge and authority for collecting the rent of the said houses Nos. 162 and 164, Harrison Road, and for paying out of the same the expenses specified above in paragraph 5, and of giving by division the remaining rent thereof, and of performing the worship of the idols mentioned in the said paragraph and doing other acts, &c., shall be revived by and devolve on the person who might be senior in age among my lineal descendants and heirs following the Hindu religion.

[117] Paragraph 9. Out of my general estate my executors shall pay 2,000 (two thousand) rupees to my youngest son Sriman Gooroo Prosonno Sen. Finis. Dated the 8th December 1895.

Mr. *Hill* (Mr. *Jackson*, Mr. *Bonnerjee* and Mr. *P. L. Roy* with him), for the plaintiff.—It is not necessary that before the will in this suit is construed, an administration suit should be brought to have the whole will construed and the rights of parties thereunder ascertained. The Court can construe this will to see if defendant should not be restrained from carrying on business in the family residence. That position is not warranted by the practice of this Court. It is an old practice of the Courts of Chancery in England. It is an attempt to get rid of this suit on a mere technicality as to the procedure. *In re Wilson* (1); *In re Davies* (2). If the right exists, the jurisdiction this Court has is that given by s. 11 of the Code of Civil Procedure. Under the will the defendant had only a right of living. What is the meaning of the word "living." There may be an occupation of the house by a tenant; *Mannox* v. *Greener* (3), *Rabbeth* v. *Squire* (4). Again, he may live and carry on business at two separate places. The word "living" does not contemplate the carrying on of a business for the purpose of obtaining a livelihood. *Ex-parte Breull, In re Bowie* (5). There the word "reside" is defined. The plaint discloses a good cause of action and the right to live does not involve the right to practise as a medical man. This was never contemplated by the testator.

The Advocate-General (Sir *C. Paul*) with him Mr. *Mitter* and Mr. *Stephen*, for defendant No. 1.—The right to live includes right to carry on a business and earn a living. It is a part of the man's life. "Living" cannot mean only eating, drinking and sleeping. It is not alleged that I am carrying on a nuisance. "Living" cannot exclude a man from carrying on his profession on the premises. If he was a lawyer could it be said that he was precluded from seeing clients in his study. If the defendant **[118]** wishes to see two patients there per day, it is said the terms of the will preclude him from doing so.

The plaintiff is not competent to sue for the construction of the will without bringing an administration suit—Williams on Executors, p. 1810. The practice which prevails in England now of a suit on an originating

(1) (1885) L.R. 28 Ch.D. 457.
(2) (1888) L. R. 38 Ch.D. 210.
(3) (1872) L.R. 14 Eq. 456 (461).
(4) (1859) 4 De G. and J. 406 (412).
(5) (1880) L.R. 16 Ch.D. 484.

summons does not extend to this Court. This Court must be guided by the old Chancery Court practice. Annual Practice, 1897, p. 998. We have nothing like the originating summons here, but the old Equity practice is retained.

Further, the intention of the will here is to make a perpetuity and tie up the property, which the testator could not do. Bhuttacharjee's Commentaries on Hindu Law, p. 604. *Sonatun Bysack* v. *Juggutsoondree Dossee* (1). The testator granted the property first for the celebration of *pujahs*, then for the worship of an idol, and then that the residence should be occupied by the children. Who was the owner of the house? They would say the idol; but under what words? Where is the grant to the idol? There is a difference between a grant to the idol and a grant to trustees for the benefit of the worship of an idol. The testator would, by this means, be creating a perpetuity and making a permanent provision for the benefit of the children, which he cannot do. *Promotho Dossee* v. *Radhika Persad Dutt* (2); *Shibchunder Doss* v. *Shibkissen Bonnerjee* (3). This is not a proper *debutter* property; the property has not passed out of the heirs-at-law to any one else. They are still tenants in common. If so the defendant is acting lawfully in carrying on his business. *Jacobs* v. *Seward* (4). In *Fillingham* v. *Bromley* (5) the words "live and reside" were held to be incapable of definition.

Mr. *J. G. Woodroffe* (Sir *G. Evans* with him), for the infant defendants.—As regards the preliminary issue dealing with the maintainability of the suit, the Court will not allow the construction of the will to be carried out piecemeal. If there is a suit which illustrates the evil of partial construction and partial administration, it is this. The meaning of the words **[119]** "live in the house" depends on whether the clause in which they occur gives a proprietary interest in the house or not. If a beneficial interest is taken by the heirs, a heavy *onus* will lie on the other side to establish a forfeiture. The clause with regard to disagreement is ancillary to the partition clause. There is besides no warrant or precedent for bringing an action of this kind. It is for the plaintiff to satisfy the Court that it ought to adopt the same practice as in England. Before the system of an originating summons was introduced it was only in a proper administration suit that questions such as these could be dealt with. There is no ground for following the practice under an originating summons in this Court. *Say* v. *Creed* (6).

Can it be contended that the decision in this matter will set aside all questions between the parties hereafter. If the plaintiff withdraws the question relating to the *shebait* in this suit, it still leaves an important question undecided. This does not come within the purview of cases brought on an originating summons in England. *In re Wilson* (7), *In re Lofthouse* (8).

JUDGMENT.

SALE, J. (after stating the facts, continued).—The first objection, which has been urged against the suit, is that it is not maintainable as framed. The objection is thus stated in the 1st paragraph of the written statement of Gooroo Prosonno Sen:—

(1) 8 M. I. A. 66 (83).
(2) 14 B. L. R. 175.
(3) 1 Boul. 71.
(4) (1872) 5 Eng. & Ir. App. 464 (474).
(5) (1823) 1 Turn. & Russ. 530.
(6) (1844) 3 Hare 455.
(7) (1885) L.R. 28 Ch. D. 457 (461).
(8) (1885) L R. 29 Ch. D. 921 (932).

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"This defendant submits that the suit as framed cannot be maintained, inasmuch as it is not competent to the plaintiff to sue for the construction in part only (and not as a whole) of the will of the testator Gunga Prosad Sen, nor for the administration or execution of part only (and not of the whole) of the trusts of the said will, nor for the relief claimed, otherwise than in a suit for general administration of the estate of the said testator."

The argument is that the course which this Court ought to adopt as regards the present suit is the course which the Court of Chancery would have followed in a like case before the practice was introduced of determining on an originating summons isolated questions arising in the course of administration of an estate without taking the accounts of the estate or making a [120] general order for administration. The old and new pratice as regards the question of the necessity of making an administration order before dealing with any point arising in the course of the administration of the estate are contrasted by Pearson, J., in *In re Wilson* (1). In showing how the practice as to administration actions was changed by the rules of the Supreme Court, 1883, the learned Judge makes the following observations :—

"There were formerly in the Court of Chancery numbers and numbers of cases in which an administration suit was necessarily instituted, not because the parties desired the administration of the estate generally, but because there were certain questions—they may have been minute, they may have been limited, they may have been very important—over which the Court would have had no control, without the existence of an administration action. There were no means according to the old practice of bringing isolated questions under a will before the Court for its determination except by an administration suit. It was felt that that very often involved parties in an amount of expense which was unnecessary and which they ought to be relieved from."

Accordingly, in order to avoid this expense, power is expressly given to the Court by the rules of 1883 to determine any question without making a judgment or order for the administration of a trust or of the estate of a deceased person, if the question between the parties can be properly determined without such judgment or order. This power is not confined to cases which can, under Order LV., Rules 3 and 4, be raised by originating summons, but under Order LV., Rule 10, the Court has this power, whether the question arise on summons " *or otherwise,* " and it extends to administration actions commenced before, but tried after, the rule came into operation. Williams on Executors, 9th Edition, Vol. II, 1810-1811.

The question then is whether the Court of Chancery in England would have declined to grant the relief sought in this suit, except in a suit framed for the general administration of the estate of the testator on the ground that it involved the partial construction of the testator's will. This is a question which it [121] is admitted does not affect the jurisdiction of this Court. It is a question of the practice of the Court, and that only. It is undoubtedly the fact that before the Court can determine whether the plaintiff is entitled to the main relief which he seeks, the testator's will must be construed ; for upon the construction of the will of the testator must depend the question whether the trust in fact exists, the breach of which is charged against the defendant Gooroo Prosonno Sen. There is therefore a question of the construction of the testator's will, which arises necessarily, though incidentally in form, in this case. But then this

(1) (1885) L. R. 28 Ch. D. 457 (460).

question has not been raised as an aid to the administration of the testator's estate, nor is the Court being asked to take upon itself the execution of the trusts or the administration of the estate.

The plaintiff claims to be a trustee, who is entitled to ask the Court's assistance in preventing a breach of trust. Is there any reason why in a suit of this character, where all the parties interested in the question of construction are before the Court, the Court should refuse to construe the will of the testator simply because this is not an administration suit?

I have not been referred to any authority, nor am I aware that any such authority exists which establishes the proposition that this Court ought not under any circumstances to consider any question involving the construction of a will or deed of trust, except in a suit for the administration of the trust or for the administration of the estate of the testator. Circumstances might, no doubt, exist which would render it undesirable or improper that the Court should make a mere declaratory order based on a partial construction of a will, or that it should declare the rights of parties at all except in an administration suit. But I am unable to say that any such circumstances exist in the present case.

In the first place it is no mere declaratory decree or order that is sought. The plaintiff seeks consequential relief of a very special kind, and he bases his claim on a cause of action which exists only as against the defendant Gooroo Prosonno Sen, although it indirectly affects the infant defendants as heirs of the testator and beneficiaries under his will.

[122] In the next place there seems to be no reason why the question, whether there has been a valid declaration in perpetuity of the family dwelling house for religious purposes, should not be dealt with in this case separately and apart from any other questions which may arise in the course of the administration of the testator's estate. Assuming, although this is not admitted, that the estate is still unadministered in full, it is said that the infant defendants are interested in the question of the dedication of the house, and that it is inconvenient that this matter in which they are concerned should be disposed of without at the same time, disposing of other questions as to their rights under the will of the testator which remain for determination. They complain that the plaintiff has deprived them of certain accommodation in the family dwelling house to which they are entitled under the will. It is difficult to see how the question of the amount of accommodation, to which the infants may be entitled in the family dwelling-house, depends in any sense on the question whether there has been a valid dedication of the house for religious purposes, or on the question whether the defendant Gooroo Prosonno Sen should be restrained from exercising his profession on the premises. The causes of action in the two cases are distinct and exist, if they exist at all, against different individuals, and no good or convenient purpose would be served by insisting on both being joined together and dealt with in one suit.

Moreover, assuming that the old practice of the Chancery Court as regards administration suits is binding on or ought to be rigidly followed by this Court, it is not clear to my mind that in accordance with that practice the Court of Chancery would have declined to entertain this suit. Having regard to the consequential relief sought, it seems impossible that it could be said that the question of construction, which is raised in this case, is a question over which (to use the words of Pearson, J.) the Court "would have no control without the existence of an administration suit."

On the contrary, questions between trustees and beneficiaries, and between trustees and strangers, necessitating often, it may be presumed,

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the construction of certain provisions of the trust [123] deed have been entertained and determined by both Courts of Law and Equity, without the Court being asked to undertake the entire administration of the trust. The case of *Re Weall* (1) may be cited as an illustration. See also Lewin on Trusts, 9th Ed., p. 246, and also at p. 290, where there occurs this passage: "A trustee is called upon, if a breach of trust be threatened, to prevent it by obtaining an injunction, and if a breach of trust has been already committed, to bring an action for the restoration of the trust fund to its proper condition, or at least to take such other active measures as with a due regard to all the circumstances of the case may be considered the most prudential."

In view of all these considerations, it appears to me that the objection that the present suit cannot be maintained is not sustainable.

The next objection is that the plaint discloses no cause of action. The argument on this point is put in this way. The plaint, it is said, discloses no facts or circumstances which would justify the Court's interference to prevent the defendant Gooroo Prosonno Sen from carrying on his dispensary business and otherwise following and practising his profession as *kabiraj* at the premises Nos. 16 and 17, Kumertolli Street. Admittedly the defendant Gooroo Prosonno Sen has a right under the will to *live* in the premises, and, if he has a right to live there, he has a right, it is argued, to carry on his profession there as a means of livelihood, so long at least as it does not interfere with the rights of the other beneficiaries.

This contention involves, it is obvious, the question of the construction of the will of the testator.

What is included in the right of living in the premises which the testator has reserved to his sons and grandsons and their families? Or to put the question in another way, is the carrying on the business or profession of a *kabiraj* on the premises in question inconsistent with the disposition which the testator has made of the property, so as to constitute the action of the defendant Gooroo Prosonno Sen, a breach of a valid trust created by the testator?

[124] A great deal has been said as to what is the proper definition of the word "living," and as to what are the rights which are comprised within the right of living in any given place. It seems to me impossible to lay down a strict hard-and-fast definition of the word, which shall be applicable under all circumstances. The meaning must vary according to the circumstances under which the word is used, or the purpose or object for which it is employed. It may have a very extended meaning from the point of view of International Law as indicating the country where a son is entitled to exercise all the privileges of a subject or citizen. On the other hand, it has a much restricted meaning when used in Statutes for the purpose of defining the personal jurisdiction of a particular Court. The cases which have been decided in this country under cl. 12 of the Charter, or under s. 16 of the Civil Procedure Code, or under the Insolvent Debtors' Act, and also in England under the County Courts' Acts, show in what different senses the words "living," "residing" or "dwelling" and similar expressions may be used, and that sometimes a very narrow and artificial meaning is applied to them. The question to my mind to be asked in this case is—What is the meaning which the testator intended the word should bear?

(1) (1889) L. R. 42 Ch. D. 674.

Now, when the testator's meaning has to be discovered, the well-known ruling of the Privy Council in *Soorjeemoney Dossee* v. *Denobundoo Mullick* (1) lays it down that primarily the words of the will are to be considered, and next the surrounding circumstances, when the testator's meaning may be affected by them. I turn first to the will itself. 1897 JULY 9. — ORIGINAL CIVIL. — 25 C. 112.

The first question which suggests itself is what was the testator's real object and purpose in dealing with the family residence? Did he really mean to make an absolute dedication of the property to religious purposes, or was this purpose colourable only, and did he really intend to secure to his family a permanent beneficial interest of the nature of a perpetuity?

The right of living, which the testator reserved to the members of his family, must, as the one or the other was the true **[125]** purpose of the testator, receive a wide or a restricted interpretation. Was there then a valid dedication of the premises for religious purposes? If there was this intention on the part of the testator, the dedication will not be invalid merely by reason of its transgressing against the rule, which forbids the creation of a perpetuity. Mayne's Hindu Law, 4th Edition, para. 395.

By para. 1 of the will the testator declares that he *endows* (or as the defendants suggest *assigns*) his house Nos. 16 and 17, Kumertolli Street, for certain specific purposes. These purposes are as follows: For the residence and worship for ever of the *Thakurs* established by him. Next, for the celebration in the house annually of the *Sri Sri Issur Durga Pujah* and the *Dolejatra* festival. Thirdly, for the performance of the annual *shradh* of the testator's father, and for the feeding on such occasion of Brahmins and people of other castes.

After describing these religious purposes for which he desired to dedicate the house, the testator proceeds: "Besides these my sons and grandsons (son's sons) with their respective families shall live in the house. In case of disagreement among them, the person who would be the cause of disagreement shall leave the house with his family. *I endow* (or make over or assign) this house for all these purposes. With regard thereto no right of my heirs shall exist or accrue. They shall simply live therein as mentioned above. My furniture, etc., which exist in the said house shall be used for the worship, &c., of the said idols. My heirs shall get nothing whatever of the same. The said house and the said furniture shall never be partitioned amongst any persons." By this clause of the will the testator prescribes the particular uses to which the house is to be put, and except in the manner expressly provided the testator declares that his heirs shall have no beneficial interest in, or enjoyment of, the property.

Moreover, the testator makes express pecuniary provision for the permanent maintenance of the endowment which he has created. He does not contemplate that the property shall ever be rent-producing, for he provides by para. 5 of the will that "tax revenue and cost of repairs" of the house Nos. 16 and 17 are to be **[126]** paid out of the rents realized by his executors of the testator's house and lands in Harrison Road. The testator then proceeds:—

"My executors shall spend Rs. 16 per month for the worship of the *Thakurs* established in my aforesaid house, Nos. 16 and 17, Kumertolli Street, and for daily recitation of *Chandiput* in my aforesaid house. Afterwards, out of the said rent (*i. e.*, the rent of the property in Harrison Road) the executors shall every month lay aside Rs. 250 per month, and

(1) 6 M.I.A. 535.

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thus secure every year three thousand rupees in a lump and (with the said money secured in a lump) *Durgatsub* and *Dolejatra* shall every year be celebrated in my aforesaid house Nos. 16 and 17, Kumertolli Street. Out of the same Rs. 2,500 shall be spent in *Durgatsub* and Rs. 500 in *Dolejatra*. Afterwards out of the said rent Rs. 500 shall be annually spent for the annual *shrad* of my *Ishur Pita Thakur* (deceased father) and for feeding Brahmins and persons of other castes on the occasion of the *shrads*. The balance left after paying the expenses specified in this paragraph out of the rent of these houses (*i. e.*, the Harrison Road property) shall be divided in the mode stated below.

By para. 7 the testator provides that the residue of his property, including the balance of the rent of the Harrison Road properties, shall be divided into three parts, and given to his two sons and the sons of his predeceased son. The testator having thus provided for the permanent dedication of his family residence for certain particular purposes, and having created a charge on the Harrison Road properties for the maintenance of this endowment, proceeds to say that the person who shall collect the rents of the Harrison Road properties and carry out the trust created for religious worship, and the celebration of the festivals in the house dedicated for this purpose, shall be the senior in age among his lineal descendants and persons, following the Hindu religion.

It is said that there are no express words of gift in favour of the idol, and that failing such words of gift there is nothing more than a trust for worship created by the will, and that subject to such trust the beneficial interest in the property passes to the heirs of the testator or falls into the residue. But no express words of gift to the idol either directly or indirectly in the shape of a trust are required to create a valid dedication; see **[127]** the remarks of West, J., in *Manohar Ganesh Tambekar* v. *Lakhmiram Govindram* (1).

Under the Hindu law an idol as symbolical of certain religious purposes is capable of being endowed or vested with property. But it is not an essential condition of a valid endowment that it should take the form of an express gift to an idol. All that is necessary is that the religious purposes or objects of the testator should be clearly specified, and that the property intended for the endowment should be set apart for or dedicated to these purposes.

In the present case the language of the will shews that the testator intended that the dedication or endowment that he was making should operate so as to cover the whole of the beneficial interest he had in this property. There is no reservation of any proprietory or pecuniary right or interest in the property in favour of his family which could be attached in execution in satisfaction of their debts. His heirs as such are excluded in express terms from all rights to the property. The right of living, which is reserved in favour of his sons and grandsons and their families, is rather of the nature of a personal privilege which the testator intended to continue to certain persons who were in the enjoyment of it, by his permission, during his lifetime. It is noteworthy that the language employed by the testator in making this reservation seems to exclude the idea that he intended to create a heritable right. The words used for sons and grandsons in the vernacular do not convey the idea of a line of succession of heirs, and in this respect this clause of the will differs from the subsequent clauses which deal with the specific gifts to his sons and grandsons. Moreover, the testator himself

(1) 12 B. 263.

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by his will has drawn a marked distinction between the dedication or endowment of a property and a charge or trust to provide for the expenses of religious worship. Paragraph 1 deals with the case of a dedication of property and para. 5 with a charge or trust for religious purposes.

In these respects the case seems distinguishable from the cases of *Sonatun Bysack* v. *Juggutsoonderee Dossee* (1) and of *Ashutosh* **[128]** *Dutt* v. *Doorga Churn Chatterjee* (2). I hold therefore that there has been a valid perpetual endowment or dedication effected by the testator of the premises Nos. 16 and 17, Kumertolli Street, for the religious purposes mentioned in para. 1 of the will.

The question still remains whether the testator, in reserving to his sons and grandsons and their families the right of living in the premises dedicated by him for religious purposes, intended to exclude his sons or grandsons from carrying on or practising therein the business or profession for which they had been or were being trained.

There are certain indications of the testator's mind derivable from the will itself, which are not without a bearing on this question. It is to be remembered the testator himself had kept his place of business separate from his family residence, at all events ever since the premises Nos. 16 and 17, Kumertolli Street, became the family residence. The testator then provides for his family continuing to reside in the same place and proceeds to devise to each of his sons and to his grandsons a separate house suitable (so far as one can judge) for business purposes, and in so doing it seems not improbable that the testator contemplated that his sons and grandsons would carry on their separate businesses in these different houses. Moreover, it is clear that the testator insisted that those of his descendants who chose to live together in the residence he had provided for them should do so amicably and peaceably. If, therefore, the testator was anxious so to arrange that his descendants should live together harmoniously, it seems inconsistent to suppose that he at the same time contemplated the possibility of different members of the family carrying on rival businesses in the common residence, because it is difficult to imagine a state of things which would be more likely to introduce friction and discord. It is reasonable on the other hand to suppose that the testator would be specially anxious to exclude all such disturbing elements as might be likely to induce disputes amongst his heirs in connection with a property he desired should be maintained as a perpetual religious endowment.

Apart from the expressions contained in the will itself, I **[129]** think the case is one where the surrounding facts and circumstances may be fairly looked to, for the purpose of obtaining an indication as to the testator's meaning in respect of the clause in question. I think it may be said that the testator intended that the privilege of living in the family dwelling house should be interpreted with regard to his sons and grandsons after his death in the same way as he interpreted it during his lifetime; that, in other words, his sons and grandsons should use the premises in the same manner and for the same purposes as he used them, or permitted them to be used, in his lifetime. If then this is a test which may be fairly applied for ascertaining the testator's meaning, it is necessary to inquire as to what the mode of living was which the testator adopted during his lifetime for himself and the members of his family at the premises Nos. 16 and 17, Kumertolli Street, from the time it became the family residence.

(1) 8 M. I. A. 66. (2) 5 C. 438=6 I.A. 182.

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[The learned Judge then considered all the evidence on this point and continued—].

All these facts taken together indicate, I think very clearly, that while the testator did not object to his youngest son using his *baitakhana* at No. 17 in a certain limited way for the purposes of his profession as a physician, he did object to the regular business of a medical dispensary being started and carried on in the house in which he and the other members of his family were living.

Another circumstance which may, I think, have affected the testator's meaning is the effect which the carrying on of the business of a medical dispensary at the family dwelling house might be expected to have on the state of comfort and enjoyment which the various members of the family had been previously accustomed to in living together. A large body of evidence has been adduced on the question as to the actual inconvenience occasioned to the female residents of the family dwelling house by the carrying on of the dispensary business by the defendant Gooroo Prosonno. I do not think it is necessary to examine this evidence in detail, because I am not prepared to say that the plaintiff has succeeded in showing that the effect of the defendant's action amounts to a nuisance or such an interference of the rights **[130]** of the plaintiff or his family which, apart from the prohibition to be implied from the testator's will, would justify the issue of an injunction. But on the other hand I think there is sufficient evidence to show that the natural and ordinary incidents connected with the carrying on of a medical dispensary business in accordance with the Ayurvedic system at the family dwelling house, such as the supply of gratuitous medical relief to poor and needy patients, the preparation, storing and sale or other distribution of drugs, and the condition of publicity which must result from all these things, cannot but interfere sensibly and appreciably with that condition and state of comfort and enjoyment and privacy of family life in which the testator maintained the members of his family during his life, and which, it may reasonably be supposed, the testator would, as an orthodox Hindu of wealth and position, be anxious to secure to them so long as they chose to live together in the residence which he provided for them.

All these considerations lead me to the conclusion that the defendant Gooroo Prosonno's action in opening and carrying on the business of a medical dispensary at the premises, Nos. 16 and 17, Kumertolli Street, is contrary to the wishes and intentions of the testator, and is opposed to the disposition which the testator has made in respect of these premises, and amounts to a breach of the trusts created by his will, and that the plaintiff is entitled to have the defendant restrained by the injunction of this Court from continuing so to act in breach of these trusts.

The claim for the relief sought in cl. (*c*) of the prayer of the plaint has not been pressed, and as regards cl. (*d*) the result of the evidence as to the structural alterations in the premises alleged to have been effected by the defendant Gooroo Prosonno Sen since the testator's death is not sufficiently clear to warrant the issue of the mandatory order which the plaintiff seeks.

The result is there will be a decree in terms of the 1st and 2nd paragraphs of the prayer in the plaint, but I think the declaration and injunction therein prayed for should be limited to the dispensary business now carried on in the premises, Nos. 16 and 17, Kumertolli Street, by the defendant Gooroo Prosonno Sen.

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The defendant Gooroo Prosonno Sen must pay the plaintiff's [131] costs of this suit, including the costs of the commission, to be taxed on scale 2. The other defendants must bear their own costs.

Attorneys for the plaintiff: Messrs. *G. C. Chunder & Co.*

Attorney for defendant No. 1: Babu *B. N. Bose.*

Attorneys for other defendants: Messrs. *Dignam & Co.*

C. E. G.

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25 C. 131.

APPELLATE CIVIL.

Before Sir Francis William Maclean, Kt., Chief Justice, and Mr. Justice Banerjee.

MOKBUL HOSSAIN (*Plaintiff*) v. AMEER SHEIKH (*Defendant*).*
[29th June, 1897.]

Landlord and tenant—Suit for ejectment—Service tenure—Bengal Tenancy Act (*VIII of* 1885), *ss.* 89 *and* 181.

Service tenures are excepted from the operation of s. 89 of the Bengal Tenancy Act.

[Appl., 2 C.L.J. 403; **R.**, 26 C. 611 (614).**]**

THE plaintiff brought a suit for recovery of possession of certain land, on the allegation that the land in dispute had been held by him and his ancestors as *halshahanas* of the zemindars; that the zemindars had no right to dismiss him, and that they aided the defendants to oust him. The defence was that the plaintiff had no title to the land in dispute; that he held the land in lieu of wages only, and as he was dismissed for neglect of duty, the land was resumed, and was given to the defendant who was appointed in his place. The Munsif dismissed the suit holding that the plaintiff had failed to prove that the land in dispute was held by him or by his ancestors as *chagran* land, and that the zemindar had a right to resume it. On appeal, the District Judge confirmed the decision of the Court of first instance. From this decision the plaintiff appealed to the High Court, mainly on the grounds that, having reference to the provisions of s. 89 of the Bengal Tenancy Act, he was not liable to be ejected except in execution of a decree; and not without a reasonable notice.

Babu *Pramatha Nath Sen*, for the appellant.

Babu *Karuna Sindhu Mookherjee*, for the respondent.

[132] The following judgments were delivered by the High Court (MACLEAN, C. J., and BANERJEE, J.).

JUDGMENTS.

MACLEAN, C.J.—I think the appeal fails on both grounds. The first ground is, that, under s. 89 of the Bengal Tenancy Act, the plaintiff could not be ejected except in execution of a decree. But this tenure admittedly is a service tenure, and looking at s. 181, I think upon the construction of that section service tenures are excepted from the operation

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* Appeal from Appellate Decree, No. 1801 of 1895, against the decree of F. B. Taylor, Esq., District Judge of Moorshedabad, dated the 20th of June 1895, affirming the decree of Baboo Jogendra Nath Ghose, Munsif of Kandi, dated the 22nd of March 1895.

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of s. 89. If the section does not mean that, I feel a difficulty in appreciating what it does mean. It has been found as a fact in this case that liability to dismissal at the will of the zemindar was incidental to the service tenure in question.

The second point is, that the plaintiff can only be ejected after reasonable notice. That point was not raised in the Court of first instance, but it was raised for the first time in the lower appellate Court. There is nothing, however, in the findings of fact in the Court below which enables us to say whether or not there were reasonable notice. On both points the appeal fails and must be dismissed with costs.

BANERJEE, J.—I am of the same opinion. I only wish to add one word with reference to the first of the two contentions raised before us. The contention was that the plaintiff was not liable to ejectment except in execution of a decree as provided by s. 89 of the Bengal Tenancy Act. I am of opinion that the application of that section to service tenures must be taken to be limited by s. 181 of the Act, which enacts that nothing in this Act shall affect any incident of a *ghatwali* or other service tenure. It has been found as a fact that liability to dismissal at the will of the zemindar is an incident of the particular service tenure now under consideration. That being so, the qustion is whether, notwithstanding that that is an incident of this service tenure, and notwithstanding that s. 181 enacts that nothing in the Act shall affect any such incident, it is still open to the plaintiff to claim the benefit of s. 89. I think the question must be answered in the negative. For if, notwithstanding all this, s. 89 is to have operation, then s. 181 would become so far nugatory, and that could not have been intended by the Legislature.

Appeal dismissed.

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25 C. 133.

[133] APPELLATE CIVIL.

Before Sir Francis William Maclean, Kt., Chief Justice, and Mr. Justice Banerjee.

AKIKUNNISSA BIBEE (*One of the Judgment-debtors*) *v.* ROOP LAL DAS AND ANOTHERA (*Decree-holders*).* [30th April, 1897.]

Civil Procedure Code (*Act XIV of* 1882), *s.* 244—*Question in execution of decree—Order absolute for sale—Transfer of Property Act* (*IV of* 1882), *s.* 88—*Question arising as to the order absolute for sale.*

When an order absolute for sale of mortgaged property has been made, any question that arises as to that order absolute for sale is not a question relating to the execution of the decree within the meaning of s. 244 of the Code of Civil Procedure.

Ajudhia Pershad v. *Baldeo Singh* (1); *Tiluck Singh* v. *Parsotein Proshad* (2); *Tara Prasad Roy* v. *Bhobodeb Roy* (3); and *Ranbir Singh* v. *Drigpal* (4), followed.

Kedar Nath v. *Lalji Sahai*(5), *Oudh Behari Lal* v. *Nageshar Lal*(6), dissented from.

[F., 30 M. 26=16 M.L.J. 545; Rel., 8 C.W.N. 102; R., 29 C. 644; 33 C. 867 (875)= 4 C L J. 141; 37 C. 796 (806)=12 C.L.J. 328=15 C.W.N. 337=6 Ind. Cas. 537; 25 M. 244 (295); 6 Bom. L.R. 1041; 12 C.L.J. 65=7 Ind. Cas. 258; 13 C.L.J.

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* Appeal from Order, No. 174 of 1896 against the orders of Babu Ram Gopal Chuki, Subordinate Judge, First Court of Zillah Dacca, dated the 22nd of February 1896.

(1) 21 C. 818 (823). (2) 22 C. 924. (3) 22 C. 931 (934).
(4) 16 A. 23. (5) 12 A. 61. (6) 13 A. 278.

459=6 Ind. Cas. 323; 12 C.W.N. 1028; 12 C.P.L.R. 73 (75); 12 C.P.L.R. 82 (85); 13 C.P.L.R. 177 (178); 16 C.P.L.R. 111 (113); 5 Ind. Cas. 101; 6 O. C. 114 (115) (B); R. & F., 10 C.L.J. 91=1 Ind. Cas. 677: D., 9 C.L.J. 358=4 Ind. Cas. 121.]

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THE facts of this case were shortly these:—

An application was made by the decree-holders Roop Lal Das and another, on the 10th August 1895, for an order to make absolute the mortgage decree which they obtained against one Golam Mowlah Saheb, after substitution, on the death of the judgment-debtor, of his heirs, *viz.*, his widow Manjura Banu Bibee, his minor sons, and his daughters, in his place. The application was granted, and the Subordinate Judge through inadvertence passed an order making the decree absolute, without making the heirs parties to the case by substituting their names in the place of the deceased judgment-debtor, and without any summons served on the heirs who had attained majority, but only appointing a guardian *ad litem* of the heirs who were minors. On the 18th **[134]** January 1896 another application was made by the decree-holder to the effect that as the decree was made absolute without all the representatives of the deceased judgment-debtor being made parties to the case, and as there were other defects, the previous order making the decree absolute be cancelled, and a fresh order for a decree absolute be made after substituting the heirs of the deceased judgment-debtor. The previous order was cancelled and summonses were issued to the representatives. Some of them objected to the decree being made absolute, on the grounds, amongst others, that notices should issue to all the defendants, that the minors were not the legal representatives of the deceased judgment-debtor, and that Akikunnisa Bibee was owner of a 4-annas share of the properties which Golam Mowlah mortgaged as his own. The Subordinate Judge overruled all the objections, and made the decree absolute.

From this decision the judgment-debtor, Akikunnissa, appealed to the High Court, mainly on the grounds that the Subordinate Judge was wrong in holding that in the present proceedings it was not necessary to decide any dispute as to the representation of the deceased judgment-debtor, and also that the present application of the decree-holder was not an application in execution of the decree, and the question as to the rights and status of the legal representatives ought not to be decided in these proceedings.

Mr. *C. P. Hill*, Moulvi *Syed Samsul Huda*, Moulvi *Abdul Jawad*, and Moulvi *Mahomed Mustapha Khan*, for the appellant.

Babu *Lal Mohun Das*, Babu *Jogendra Chunder Ghose*, and Babu *Satis Chunder Ghose*, for the respondents.

The following judgments were delivered by the High Court (MACLEAN, C. J. and BANERJEE, J.).

JUDGMENTS.

MACLEAN, C. J.—The question we have to decide is whether, when an order absolute for the sale of mortgaged property has been made after an ordinary decree in the mortgage suit has been made, and any question arises as to that order absolute for sale, it is a question relating to the execution of the decree within the meaning of s. 244 of the Code. The point is not *res nova* in this Court. The cases of *Ajudhia Pershad* v. *Baldeo Singh* (1); **[135]** *Tiluck Singh* v. *Parsotein Proshad* (2); *Tara Prosad Roy* v. *Bhobodeb Roy* (3), and that of *Ranbir Singh* v. *Drigpal* (4)

(1) 21 C. 818 (823).
(2) 22 C. 924.
(3) 22 C. 931 (934).
(4) 16 A. 23.

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are to the effect that this question should be answered in the negative. I agree in that view. Two other cases in the Allahabad High Court, the cases of *Kedar Nath* v. *Lalji Sahai* (1) and *Oudh Behari Lal* v. *Nageshar Lal* (2) are authorities the other way. I prefer, however, to follow the previous cases, three of which are in this Court. In matters of procedure, and this is a matter of procedure, it is to my mind very important that the decisions of the various Benches of the High Court should, if possible, be in harmony. Otherwise confusion is created in the minds of the suitors and practitioners, and even of the Judges in the lower Courts who, if they find a conflict of view upon a question of practice in the decisions of the High Courts, are placed in a difficulty as to which course to adopt. I hold that this question is not one relating to the execution of a decree within the meaning of s. 244 of the Code.

Then it is urged by the appellant that before the decree for sale is made absolute, the Court should inquire into the validity of the claim of the appellant to a 4-anna share in the so-called mortgaged property. The appellant is the sister of the deceased mortgagor He has died pending the suit, and she is brought upon the record as party to the suit as one of his heirs. Being brought before the Court, she claims a 4-anna share of the mortgaged property in her own right, and contends that the Court below ought to have gone into that question in this suit, and not have left her to bring another separate suit to establish her right. But I think a claim such as this ought to be raised and decided in a separate suit, and not in the mortgage suit. If the 4-anna share really belong to the appellant, I think she should assert that right in a separate suit, and that the present suit, in its present stage, ought not to be further delayed in order that this **[136]** entirely fresh issue may be decided. There is nothing to prevent the appellant bringing such fresh suit.

Then it is said that the Court below was wrong in allowing both the minor sons of the deceased mortgagor and the present appellant and a daughter of the mortgagor to be placed upon the record as the heirs of the deceased mortgagor. But the position is this. The plaintiff does not know who are the heirs. The guardians for the minors allege that the minors are : the appellant alleges the minors are illegitimate, and that the appellant and the mortgagor's daughter are the heirs. Under the circumstances the plaintiff, to make himself secure, brings both of these contending parties before the Court. If either of them consider they are unnecessary parties, they can disclaim any interest in the property, disclaim any right or title to the heirship and thus be dismissed from the suit. In the meantime, in the face of those conflicting claims, I consider the plaintiff was justified in the course he has taken.

In my opinion this appeal fails, and must be dismissed with costs.

BANERJEE, J.—I concur.

Appeal dismissed.

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(1) 12 A. 61. (2) 13 A. 278.

25 C. 136.

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APPELLATE CIVIL.

Before Mr. Justice Banerjee and Mr. Justice Stevens.

KASISWAR MUKHOPADHYA (*Plaintiff*) v. MOHENDRA NATH BHANDARI AND OTHERS (*Defendants*).*
[14th July, 1897.]

Res Judicata—*Code of Civil Procedure (Act XIV of* 1882), *s.* 13—*Landlord and tenant—Suit for rent—Issue whether land was* mal *or* lakhiraj—*Question raised in a rent suit, whether directly and substantially in issue in that suit—Subsequent suit for* khas *possession.*

In a previous suit brought by the predecessor in title of the plaintiff against the defendants for rent, one of the questions raised was, whether the land, in respect of which rent was claimed, was *mal* or *lakhiraj*, and that question was decided in favour of the defendants. In a subsequent suit by the [137] plaintiff against the same defendants for *khas* possession of certain land, the defence was that the land in dispute was their *lakhiraj* land, and that the judgment in the previous suit operated as *res judicata*.

Held, that though the previous suit was one for rent, yet the issue upon the question whether the land was *mal* or *lakhiraj* was raised directly in that suit, and therefore the subsequent suit was barred as *res judicata*.

Radhamadhub Holdar v. *Monohur Mukerji* (1), followed. *Srihari Banerjee* v. *Khitish Chandra Rai Bahadoor* (2), distinguished.

[F., 18 Ind. Cas. 278=104 P.L.R. 1913=85 P.W.R. 1913; R., 14 C.L J. 220=12 Ind. Cas. 9; 15 C.L.J. 653=13 Ind. Cas. 40; 10 C.W.N. 820 (822); 7 Ind. Cas. 15; 10 Ind. Cas. 363; 19 Ind. Cas. 632; 54 P.R. 1904; 21 T.L.R. 127.]

THE facts of the case and the arguments for the purposes of this report appear sufficiently from the judgment of the High Court.

Babu *Ram Chunder Mitter* and Babu *Dwarka Nath Chuckerbutty*, for the appellant.

Babu *Akhoy Kumar Banerjee*, for the respondents.

The judgment of the High Court (BANERJEE and STEVENS, JJ.) was as follows :—

JUDGMENT.

BANERJEE, J.—The only question raised in this appeal is, whether the Courts below are right in holding that the suit is barred under s. 13 of the Code of Civil Procedure.

The suit was one for *khas* possession of certain plots of land. The former suit, the judgment in which is made the basis of the plea of *res judicata*, was brought by the predecessor in title of the present plaintiff against the present defendants for rent, and one of the questions raised in the case in the first Court, and the only question upon which the decision of the case was made to rest finally in the appellate Court, was whether the land, in respect of which rent was claimed, was the *mal* land of the plaintiff, or the *lakhiraj* land of the defendants. That question was determined by the appellate Court against the plaintiff, and his suit was dismissed. The lower appellate Court has held that the judgment in the former suit operates as *res judicata* upon the question raised in this case, namely, whether the land in dispute is the *mal* land of the plaintiff or the

* Appeal from Appellate Decree, No. 1882 of 1895, against the decree of Babu Beni Madhub Mitter, Subordinate Judge, 3rd Court of Zillah Hooghly, dated the 8th of June 1895, affirming the decree of Babu Upendra Nath Bose, Munsif of Amta, dated the 15th of May 1894.

(1) 15 C. 756=15 I.A. 97. (2) 24 C. 569.

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lakhiraj land of the defendants. There is no dispute here that the question raised in this suit was in issue in the former suit, and [138] was heard and determined in that suit; and the only ground upon which the learned vakil for the plaintiff (appellant) asks us to hold that the judgment in the former suit does not operate as *res judicata* is that, though the matter now in dispute was in issue in the former suit, it was not directly and substantially in issue in that suit within the meaning of s. 13 of the Code of Civil Procedure, because the former suit was one for rent, and the primary question for decision in that suit was whether the relationship of landlord and tenant subsisted between the parties. And, in support of this contention, the cases of *Run Bahadoor Sing* v. *Lucho Koer* (1), and of *Srihari Banerjee* v. *Khitish Chandra Rai* (2) are relied upon.

No doubt there are certain observations in the judgment of their Lordships of the Privy Council in the case of *Run Bahadoor Sing* v. *Lucho Koer*, which apparently lend some support to the plaintiff's contention; but then a subsequent decision of the Privy Council in the case of *Radha Madhub Holdar* v. *Monohur Mukerji* (3) clearly shows that the mere fact of the former suit in which the question of title is determined being a rent suit, does not prevent that determination from operating as *res judicata* in a subsequent suit brought for the establishment of title. Their Lordships in the last mentioned case observed: "Radha Madhab now comes to redeem; but the right to redeem rests on precisely the same ground as the right to rent was rested. In each case the question is equally—who is the true representative of Matangini? Therefore, their Lordships conceive that the matter was expressly decided by the High Court in the rent suit." That being so, we do not think that the plaintiff's contention can be supported to the extent which it goes.

As for the case of *Srihari Banerjee* v. *Khitish Chandra Rai* (2), the facts there were very different from those of the present case. There the issue tried in the fomer suit was, what was the share of the rent to which the plaintiff was entitled; whereas the issue raised in the subsequent suit was, what was the [139] share of the property to which the plaintiff was entitled; and, as is pointed out in the judgment, the two questions were not identical. "And the judgment," the learned Judges in that case say, "of the Court of Appeal rested upon considerations based on the provisions of the Land Registration Act, and on the fact of the purchase of the present plaintiffs being subsequent to that under which the present defendant No. 1 claimed—considerations which were necessary and sufficient for the determination of the rent suit, but which are not conclusive in a suit like the present, which is for determination of title to land as distinguished from title to recover rent, and in which the plaintiffs claim a preferential right, notwithstanding that their purchase was subsequent to that of the defendant No. 1 by reason of that purchase being in satisfaction of a decree on a prior mortgage. Section 78 of Bengal Act VII of 1876, and s. 60 of Act VIII of 1885, bar inquiry in a rent suit into any question of title independently of the Land Registration Record, while cl. (*a*) of s. 89 of the former Act reserves the right to obtain a declaration of title independently of such record by a regular suit."

These then were the grounds upon which it was held that the decision in a rent suit did not operate as *res judicata* in a subsequent suit brought

(1) 11 C. 301=12 I. A. 23. (2) 24 C. 569. (3) 15 C. 756=15 I. A. 97.

for establishment of title. But these considerations have no application to the facts of this case.

It remains then to consider whether there is anything in the circumstances of this case which would warrant our holding that the question heard and determined in the former suit, namely, that relating to the question of *mal* or *lakhiraj*, was not directly and substantially in issue in that suit.

Now the Code of Civil Procedure does not define the expression "matter directly and substantially in issue." The only explanation of the expression that is given is in expl. II of s. 13 of the Code; and that relates to cases where a matter is to be held to have been directly and substantially in issue constructively, though it was not directly and substantially in issue actually. Here there is no question that the matter was in issue actually, and not merely constructively. The only question is whether the matter was directly and substantially in issue. "Substantially," **[140]** evidently, signifies what was indicated by the phrase, "in effect though not in express terms," in Lord Hardwick's statement of the doctrine of *res judicata* in the case of *Gregory* v. *Molesworth* (1), which is cited with approbation by their Lordships of the Privy Council in the case of *Soorjo Monee Dayee* v. *Suddanund Mohapatter* (2). In the present case there can be no question that the issue now raised was raised *substantially* in the former case within the meaning assigned to that word in the cases just referred to. Here the matter was not merely in effect, but also in express terms decided.

Then there remains the question whether the matter was directly in issue. The word "directly" seems to have been used in *contra* distinction to the words "incidentally" and "collaterally" made use of in the statement of the opinion of the Judges in the *Duchess of Kingston's* case (3).

Without attempting to lay down any hard and fast rule for determining when an issue should be considered to have been directly raised, and when incidentally, or collaterally we think it enough, for the purposes of the present case, to say that, whatever meaning may be assigned to the term "directly," it is impossible to avoid the conclusion that the issue upon the question of *mal* and *lakhiraj* was raised directly in the former suit, quite as much as it is in this suit. On referring to the final judgment of the appellate Court in that suit we find that the learned District Judge, after setting out the previous proceedings in the case, observes: For the plaintiff appellant it is urged that his evidence in the lower Court fully established that the land was *mal* and not *lakhiraj* and that the Munsif erred in holding otherwise. This then is the point for determination." And then, after discussing the evidence at some length, the learned Judge concludes with these words: "The point for determination is found against the appellant, and the appeal will be dismissed with costs." It appears clear from this that even if the decision in the former suit, which was one for rent, might have been made to rest upon grounds **[141]** other than that upon which it is actually made to rest, after the first Court had distinctly found the issue upon the question of *mal* or *lakhiraj* against the plaintiff, the plaintiff, who was the appellant, thought it fit to rest his case before the appellate Court upon the sole ground that he was entitled to succeed because the land was proved to be his *mal* land, and not the *lakhiraj* land of the defendant. It is, therefore,

(1) (1747) 3 Atkyns. 626. (2) 12 B.L.R. 304 = I.A. Sup. Vol. 212 = 20 W.R. 377.
(3) (1776) 2 Smith's L.C. (9th Ed.) 812 (814).

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impossible to say that, upon any view of the meaning of the term 'directly.' the issue tried in the former suit, as to whether, the land was *māl* or *lakhiraj*, was anything but a direct issue in the case. The decision in the former case, therefore, has, in our opinion, been rightly held to operate as *res judicata* in this case. That being so, the only contention raised by the appellant fails, and the appeal must be dismissed with costs.

S. C. G. *Appeal dismissed.*

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25 C. 141.

APPELLATE CIVIL.

Before Sir Francis William Maclean, Kt., Chief Justice, and Mr. Justice Banerjee.

KALI PROSANNO GHOSE (*Plaintiff*) *v.* RAJANI KANT CHATTERJEE AND ANOTHER (*Defendants*).* [7th June, 1897.]

Appeal—Arbitration—Validity of award—Judgment in accordance with an award—Code of Civil Procedure (Act XIV of 1882), ss. 521 and 522.

An appeal will lie against a decree given in accordance with an award under s. 522 of the Code of Civil Procedure, when the award upon which the decree is based is not a valid and legal award.

Debendra Nath Shaw v. *Aubhoy Churn Bagchi* (1), *Joy Prokash Lall* v. *Sheo Golam Singh* (2); *Bindessuri Pershad Singh* v. *Jankee Pershad Singh* (3); *Lachman Das* v. *Brij Pal* (4); and *Venkayya* v. *Venkatappayya* (5), referred to.

A Court is justified in holding that an award is not valid and binding upon the defendant, when the arbitrator was the retained pleader of the plaintiff, and no disclosure of this fact was made, before the arbitrator was appointed, to the defendant who was consequently unaware of it.

[Overr., 29 C. 167 (P.C.)=6 C.W.N. 226=29 I.A. 51; N.F., 17 C.W.N. 617=15 Ind. Cas. 519; F., 25 C 757 (F.B.); 6 Ind. Cas. 963=73 P.W.R. 1910; U.B.R. (1897—1901) 14; U.B.R. (1897—1901) 290; R., 29 B. 285; 29 C. 278(280); 33 C. 498 (501); 6 Bom.L.R. 1132; 2 C.L.J. 153=10 C.W.N. 601; 9 Ind. Cas. 173=21 M.L.J. 263=9 M.L.T. 251=(1911) M.W.N. 151 (164); 16 Ind. Cas. 595: 2 L.B.R. 105; 5 O.C. 13; 84 P.R. 1901=112 P.L.R. 1901 (B.); U.B.R. (1897—1901) 13.]

[142] THE facts of the case are shortly these: The plaintiff brought a suit for arrears of rent against the defendants. The matter was referred to arbitration. The arbitrator made his award, but the defendants took exception to it on certain grounds. The Subordinate Judge, before whom the matter came on for hearing, overruled the defendants' objection, and passed a decree in accordance with the award. An appeal was preferred against this decision to the District Judge by the defendants. A preliminary objection was taken to the hearing of the appeal on the ground that no appeal lay to him. The learned District Judge overruled this objection, and upon the merits held that the award was not valid and binding and set aside the decision of the first Court.

From this decision the plaintiff appealed to the High Court.

Babu *Sarada Churn Mitter*, and Babu *Harakumar Mitter*, for the appellant.

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* Appeal from Order, No. 140 of 1896, against the order of G.K. Deb, Esq., District Judge of Zillah Nuddia, dated the 10th of January 1896, reversing the order of Babu Saroda Prosad Chatterjee, Subordinate Judge of that district, dated the 22nd of February 1895.

(1) 9 C. 905. (2) 11 C. 37. (3) 16 C. 482. (4) 6 A. 174. (5) 15 M. 348.

Dr. *Rash Behary Ghosh*, and Dr. *Ashutosh Mookerjee*, for the respondent. 1897 JUNE 7.

The following judgments were delivered by the High Court (MACLEAN, C. J. and BANERJEE, J.). APPELLATE CIVIL.

25 C. 141.

JUDGMENTS.

MACLEAN, C. J.—In this case there was a litigation between the plaintiff and the defendants. The matter was referred to arbitration. The questions submitted to arbitration were inquired into by the arbitrator, who made his award. The defendants objected to that award, and applied to have it set aside. The matter came before the Subordinate Judge who heard the parties and rejected the application to set aside the award, and decided practically in favour of the plaintiff and made a decree in accordance with the award. The defendants dissatified with the ruling of the Subordinate Judge, presented an appeal to the Disrict Judge. Upon the matter coming before the District Judge objection was taken by the plaintiff, the then respondent, that, having regard to the last sentence of s. 522 of the Code of Civil Procedure, no appeal lay from the decree of the Subordinate Judge. Those words are these: "No appeal shall lie from such a decree except in so far as the decree is in excess of, or not in accordance with, the award." The plaintiff contends that those words mean that inasmuch as in this case the decree is not in excess of, [143] but in accordance with, the award, no appeal can lie. But on the other hand the defendants contend that the award there spoken of must be taken to be an award which has been regularly and properly arrived at by the arbitrator who has been appointed arbitrator; in other words it must be a valid and legal award.

In my opinion the contention of the defendants upon this point is sound. The matter has been practically dealt with in various cases. It is sufficient if I refer to the case of *Joy Prokash Lall* v. *Sheo Golam Singh* (1) where it was held that the question under s. 522 of the Code of Civil Procedure whether an appeal will lie against a decree in accordance with the award depends upon whether the award upon which the decree is based is a valid and legal award. There are several other cases which have been referred to in the course of the argument, cases not only in this Court, but in the High Courts of Madras and Allahabad, which appear to me consistent with the view laid down in the case which I have just cited. It appears to me that, if one were to hold the contrary view, the result would be rather startling. It is not difficult to conceive cases, in which the award may be obviously invalid, and where the Judge of first instance, either through misapprehension of the facts, or of the law, has yet made a decree affirming the award. In these cases is there to be no appeal? I think there ought to be, and I concur in those decisions which lay down that there is. In my opinion, therefore, an appeal does lie.

That being so, we have to consider the second point, namely, whether assuming that an appeal lies, the District Judge was correct in his opinion that the award was not valid or binding upon the plaintiff. In my opinion it was not binding upon him, and I base that conclusion upon one fact, and one fact alone, in the case. It is admitted that the arbitrator in this case was the retained pleader of the plaintiff. It is proved that the defendants were not aware of that most important fact until after the proceedings had terminated before the Subordinate Judge. It is

(1) 11 C. 37.

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equally clear that the fact was not disclosed to the defendants. What then is the position of matters? You have a gentleman appointed as arbitrator who had been admittedly retained as the pleader of the plaintiff; you have the fact that there is no [144] disclosure of that fact made by the plaintiff or by the arbitrator himself, to the defendant, and that the defendant goes to arbitration in ignorance of that fact. To my mind that circumstance alone is sufficient to justify the Court in holding that the award is not valid and binding upon the defendant. In cases of arbitration where a person is appointed by two parties to exercise judicial duties there should be *uberrima fides* on the part of all the parties concerned in relation to his selection and appointment, and every disclosure, which might in the least affect the minds of those who are proposing to submit their dispute to the arbitrament of any particular individual, as regards his selection and fitness for the post, ought to be made, so that each party may have every opportunity of considering whether the reference to arbitration to that particular individual should or should not be made. In my opinion, there was such concealment in this case on the part of the plaintiff as to vitiate the award, under the provisions of s. 521 of the Code; and holding that view, and that there was a right of appeal, the appeal must be dismissed with costs.

BANERJEE, J.—I am of the same opinion. The question raised before us, is, whether an appeal lay to the lower appellate Court. The learned vakil for the appellant contends that as the decree of the first Court was made in accordance with the award of an arbitrator, an appeal from that decree was barred by s. 522 of the Code of Civil Procedure. That section, no doubt, provides that where judgment is given according to the award pronounced by an arbitrator, "no appeal shall lie from such decree except in so far as the decree is in excess of, or not in accordance with, the award." But these words have been held in a series of cases in this Court, and in the High Courts of Allahabad and Madras, to refer to a decree made in accordance with a legal and a valid award. See the cases of *Debendra Nath Shaw* v. *Aubhoy Churn Bagchi* (1); *Joy Prokash Lall* v. *Sheo Golam Singh* (2); *Bindessuri Pershad Singh* v. *Jankee Pershad Singh*(3); *Luchman Das* v. *Brij Pal* (4), and *Venkayya* v. *Venkatappayya*(5).

[145] If it were necessary to refer to any reason in support of a view which is so amply supported by authority, I should say that it would be unreasonable to hold that the Legislature intended to make a decree final on the ground of its being in accordance with an award when the validity of the award itself is called in question. What the Legislature meant to declare to be final was the decree, supposing the award to be unassailable on the ground of illegality or invalidity for any of the reasons referred to in s. 521 of the Code of Civil Procedure, such as corruption or misconduct on the part of the arbitrator, or fraudulent conduct on the part of either party. But though the correctness of the award, and therefore of the decree based upon it, may not be open to question by appeal, it does not follow that the *validity* of the award, and the decision of the Court touching the objections to the same as contemplated by s. 521 are intended to be matters beyond question by appeal. It is difficult to suppose that a decision upon such grave and important matters was intended to be final when orders upon comparatively less

(1) 9 C. 905. (2) 11 C. 37. (3) 16 C. 482. (4) 6 A. 174. (5) 15 M. 348.

important matters, such as those referred to in s. 518, are made appealable by s. 588, cl. 26. 1897 JUNE 7.

It was argued by the learned vakil for the appellant that the decisions, which I have referred to above, are intended to apply only to cases where an award was a nullity as distinguished from cases in which the award was liable to be set aside upon some one or other of the grounds mentioned in clauses (*a*), (*b*) and (*c*) of s. 521. I am unable to appreciate the force of this argument. If, as was admitted in the argument, and as has been held by the Privy Council in *Har Narain Singh* v. *Chaudhrani Bhagwant Kuar* (1), an award that is made after the expiry of the period allowed by the Court is an invalid award, and a nullity, as provided by the last paragraph of s. 521, it is difficult to see why an award which is made in contravention of an order superseding the arbitration, as contemplated by clause (*c*) of s. 521, should be regarded as being of a different character, so far as the present question is concerned, or why an award which a party has succeeded in obtaining by fraudulent concealment of facts should be viewed in a different light.

APPELLATE CIVIL.

25 C 141.

[146] Then, as regards the question, whether in the present case the award was really valid or not, I do not think it necessary to say anything in addition to what has been said in the judgment of the learned Chief Justice. The award here, upon the facts found, was clearly invalid under clauses (*a*) and (*b*) of s. 521 of the Code of Civil Procedure.

For these reasons I think that the award in this case was invalid, and that, therefore, an appeal lay to the lower appellate Court.

S. C. G. *Appeal dismissed.*

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25 C. 146=2 C. W. N. 137.

APPELLATE CIVIL.

Before Sir Francis William Maclean, Kt., Chief Justice, and Mr. Justice Banerjee.

ACHHA MIAN CHOWDHRY AND OTHERS (*Defendants*) v. DURGA CHURN LAW AND OTHERS (*Plaintiffs*).* [6th July, 1897.]

Bengal Tenancy Act, (*VIII of* 1885), *ss.* 103, 104, 143—*Rules framed under s.* 189 *of the Bengal Tenancy Act—Whether proceedings under s.* 103 *of the Bengal Tenancy Act are suits between landlord and tenant—Code of Civil Procedure* (*Act XIV of* 1882)—*Review of judgment—Second appeal—Settlement of fair and equitable rent.*

Proceedings under s. 103 of the Bengal Tenancy Act are suits between landlord and tenant within the meaning of s. 143, by virtue of the rules framed under s. 189 of that Act; therefore the provisions of the Code of Civil Procedure relating to review of judgment are applicable to such proceedings.

No second appeal lies to the High Court from a decision of a Revenue Officer settling rents under s. 104 of the Bengal Tenancy Act.

[R., 30 C. 339 (358); 33 C. 837=4 C.L.J.138; 39 C. 353 (373)=14 C.L.J.552=16 C.W.N. 817=13 Ind. Cas. 353; 7 C.L.J. 152 (154); 19 C.L.J. 310=23 Ind. Cas. 12; D., 28 C. 28 (34).]

THE facts of the case and the arguments appear sufficiently, for the purpose of this report, from the judgments of the High Court.

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* Appeal from Appellate Decree No. 1852 of 1895, against the decree of J. Pratt, Esq., District Judge of 24-Pergunnahs, dated the 22nd of August 1895, modifying the decree of Babu Jatindra Nath Gupta, Settlement Officer of Baraset, dated the 21st of August 1894.

(1) 13 A. 300=18 I. A. 55.

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APPELLATE CIVIL.

25 C. 146 = 2 C.W.N. 137.

Dr. *Ashutosh Mookerjee*, and Babu *Janendra Nath Bose*, for the appellants.

Mr. *Jackson*, Babu *Baikanto Nath Pal*, and Babu *Devendra Nath Ghose*, for the respondents.

[147] The following judgments were delivered by the High Court (MACLEAN, C. J., and BANERJEE, J.)

JUDGMENTS.

MACLEAN, C J.—I think we can dispose of these appeals, considering the very full arguments which have been submitted to us by both sides. The real point we have to decide lies in a somewhat narrow campass, and is whether or not the present proceedings are a suit within the meaning of s. 143 of the Bengal Tenancy Act.

The facts are as follows: There were certain proceedings taken under s. 103 of the Bengal Tenancy Act, the practical object of which, as I understand them, was to have a fair and equitable rate of rent in respect of certain premises fixed. It was a question admittedly between landlord and tenant. The matter came before the Settlement Officer at Baraset, who, on the 21st August 1894, decided, in effect, that the rent was not enhanceable. There was an appeal from that decision to Mr. Pratt, the Special Judge under the Act, and he, in the first instance, confirmed this decision of the Settlement Officer and dismissed the appeal. This was on the 30th of May 1895. The plaintiff subsequently applied for a review of the judgment of Mr. Pratt, and on the 22nd of August, 1895 that learned Judge heard the review, and, without admitting any fresh evidence, but upon the old evidence, arrived at the conclusion that he had on the former occasion come to a wrong decision in the matter, and he practically reversed his previous judgment and held that the rent was enhanceable. Whether the present appellants did or did not appear on that occasion before Mr. Pratt is, perhaps, not very clear; at any rate they had notice of the application, and might have appeared and raised the point that they now raise, but they did not do so. The present appeal is then presented, and the main contention of the appellant is that Mr. Pratt had no jurisdiction to review the previous judgment he had delivered. That turns upon whether the proceedings are a suit within the meaning of the Bengal Tenancy Act. This point was not taken when the matter was before Mr. Pratt; it is taken for the first time in this Court; but in the view I take of the real question on this appeal I do not propose to express any opinion as to whether or not the point can now be raised, nor to express any opinion as to whether this appeal is maintainable, [148] having regard to the language of s. 584 of the Code of Civil Procedure. Both these points are to my thinking of no practical importance, as in my opinion the appellant fails on the real merits of his appeal. If these proceedings be a suit within the meaning of the Bengal Tenancy Act, then the provisions of the Code of Civil Procedure would admittedly apply, and Mr. Pratt would have had the power of doing that which he did, *viz.*, reviewing his previous decision.

Is this proceeding then a suit within the meaning of that Act? The documents themselves in the proceedings are such as are usual in a suit. In the paper-book there is a note "Date of institution of suit." There is a plaint, a written statement of the defences, which indicate that it has been treated as a suit, and one to which the Code of Civil Procedure would apply as if it were an ordinary suit.

The sections of the Bengal Tenancy Act which bear upon the matter are these. But before I refer to them, I ought, perhaps, to state what is the argument of the learned vakil who appears for the appellants. His argument is that this proceeding is not a suit, but is a mere application under the Act, and being a mere application under the Act, the provisions of the Code of Civil Procedure do not apply to it. That argument is based to a great extent upon the terms of ss. 143 and 144 of the Act in question, and also of ss. 107 and 108. Section 143 of the Act is in these terms: "The High Court may, from time to time, with the approval of the Governor-General in Council, make rules consistent with this Act, declaring that any portions of the Code of Civil Procedure shall not apply to suits between landlord and tenant as such, or to any specified classes of such suits, or shall apply to them subject to modifications specified in the rules.

If we stop there it is obvious that the High Court may, with the approval mentioned in that section, make rules, the effect of which might be to limit the operation of the Code of Civil Procedure to a certain class of suits. Then it goes on, "subject to any rules so made, and subject also to the other provisions of this Act, the Code of Civil Procedure shall apply to all such suits." In s. 144 there is no doubt a distinction drawn between the term "suit," in the first part of that section, and the term "application" **[149]** in the second part of that section. But there is another section in the Act, which, to my mind, materially bears upon the question we have to decide, and that is s. 189. Section 189 says that "the Local Government may from time to time by notification in the *Official Gazette* make rules consistent with the Act (1) to regulate the procedure to be followed by Revenue officers in the discharge of any duty imposed upon them by or under this Act, and may by such rules confer upon any such officer (*a*) any power exercised by a Civil Court in the trial of suits," and other powers.

What has happened is this. In pursuance of that section, the Local Government has made rules, and there are certain rules which apply to cases of such a class as are now before the Court, and rules 27 and 32 of those rules so apply. Rule 27 says: "If within the period fixed and notified under rule 16, the land lord applies for a settlement of a fair rent (which was the case here) he shall be considered as plaintiff and the tenant as defendant, and the proceeding shall be dealt with as a suit under the Act." Rule 32 is to the same effect. The Legislature then seems to have told us that if a landlord applies for a settlement of a fair rent his proceeding shall be dealt with as if it were a suit under the Act. If then it is to be dealt with, *qua* procedure, as a suit under the Act, it is a suit within the meaning of s. 143, and the Code of Civil Procedure would apply, and if so Mr. Pratt would have power to review his judgment. If the Code of Civil Procedure do not apply, what procedure is to apply? Under what procedure is that, which is to be dealt as a suit, to proceed? It is urged that we are not to take this extremely reasonable view because s. 144 shows a distinction between applications and suits, but as the rules say this is, *qua* procedure, to be dealt with as a suit. I fail to appreciate any real force in the argument.

Then it is urged that ss. 107 and 108 of the Act are inconsistent with this view. It is urged that, inasmuch as s. 108 specifies a particular procedure to be followed, that is inconsistent with the procedure to be followed being that used in the Code of Civil Procedure. I fail to see the inconsistency. It may be superfluous, but I cannot see

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any inconsistency between the two. Those responsible for the Bengal Tenancy Act may have [150] thought it advisable to make it clear that an appeal was to lie, and not leave that point open and resting upon the construction of various sections of the Code. They thought it advisable to make that quite clear. In my judgment, it would be a very narrow construction to place upon this Act, and the rules framed under it, if we were to say that this proceeding is not a suit within the meaning of the Act. Were we to so hold, there would be no procedure applicable to such a proceeding. That practically disposes of the appeal.

The other point is a very small matter. It is said that under sub-s. 3 of s. 104, the Judge in the Court below ought to have presumed, until the contrary was proved, that the existing rent was fair and equitable. I don't know how that may be, or whether the Judge really did not do so, but is pretty clear that having regard to s. 106 the appeal will not lie to this Court on that point. The appeal fails and must be dismissed with costs.

BANERJEE, J.—I concur with the learned Chief Justice in thinking that this appeal ought to be dismissed with costs. It arises out of certain proceedings instituted under s. 103 of the Bengal Tenancy Act. Upon the proceedings being instituted the Revenue Officer found that the tenants were tenure-holders holding at fixed rates of rent, and he, accordingly, recorded a declaration to that effect. Upon appeal to the Special Judge, that officer in the first instance held that the tenants were occupancy raiyats, but on the question of fixity of rent he confirmed the decision of the first Court. But upon an application for review of judgment being made, he granted the application, modified his former decision, and came to the conclusion that the defendants were occupancy raiyats holding at a rent that was enhanceable, and he directed that the rent should be assessed at a certain rate per bigha.

Against this last mentioned decision the present appeal has been preferred, and it is contended, on behalf of the appellants, that the decision of the Court below is wrong in law, *first*, because the learned Special Judge had no power to review his former judgment; and *secondly*, because he was wrong in enhancing the rent without assigning any definite reasons, when under sub-s. 3 of s. 104 of the Bengal Tenancy Act, he was [151] bound to presume, until the contrary was proved, that the existing rent was fair and equitable.

Before dealing with the first of these two grounds, it becomes necessary to consider two questions raised by the learned Counsel for the respondents, namely, first, whether it is open to the appellants to raise the first contention when they did not take any objection in the Court below as to its not having any jurisdiction to entertain the application for review of judgment; and, secondly, whether the ground upon which we are asked to interfere is a ground that comes within the scope of s. 584 of the Code of Civil Procedure which governs second appeals.

As to the first question, I do not think that the mere fact of the appellants not having objected in the Court below to the lower Courts entertaining the application for review of judgment, precludes them from raising the objection now before us, if it is a valid objection. In this view I am supported by the decision of their Lordships of the Privy Council in the case of *Minakshi Naidu* v. *Subramanaya Sastri* (1). It was there held by their Lordships that where there is inherent incompe-

(1) 11 M. 26 = 14 I.A. 160.

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tency in the Court below to deal with the question before it, no consent would have conferred upon the Court below that jurisdiction which it did not possess. Here there was no consent; there was merely an absence of objection. Assuming that the contention of the appellants is right, that the lower appellate Court had no power to grant the application for review, the mere fact of their not having raised that point in the lower Court, ought not, in my opinion, to prevent them from raising it now.

Then, as to the second question, I do not think that the ground raised on behalf of the appellants is outside the scope of s. 584 of the Code. A second appeal is allowed by that section on this, amongst other grounds, namely, that the decision is contrary to some specified law or usage having the force of law; and "specified" as explained by the Judicial Committee, in the case of *Durga Chowdhrani* v. *Jewahir Singh* (1) means specified in the memorandum of appeal. The decision that is appealed against in this [152] case is the decision of the 22nd August 1895. It is one and the same decision that holds that the application for review ought to be admitted, and holds, in modification of the former judgment, that the defendants ought to be recorded as raiyats with rights of occupancy, holding at enhanceable rates. The correctness of that decision is called in question on the ground of its being contrary to law, that is, contrary to law, for this reason, that the decision, in so far as it grants the application for review, is in contravention of the law regulating the procedure on this subject, and is in excess of the power of the Court. That being so, the two preliminary questions raised on behalf of the respondents ought, in my opinion, to be decided infavour of the appellants.

It becomes necessary then to consider the first ground of appeal on its merits. The contention of the appellants is that the Code of Civil Procedure, subject to certain modifications, applies only to suits between landlord and tenant under the provisions of s. 143 of the Bengal Tenancy Act; that proceedings under s. 103 of that Act are not suits, but are initiated by applications; and that a distinction is made between suits and applications in the Act as will appear from s. 144. It is further contended that ss. 107 and 108, which make the provisions of the Code of Civil Procedure applicable to proceedings under chap. X of the Act, such as the one out of which this appeal has arisen, make them applicable only to a limited extent, that is, as regards the trial in the first Court, the appeal to the Special Judge, and a second appeal to this Court. And it is argued that the inference to be drawn from these several provisions of the Bengal Tenancy Act, is that the provisions of the Code of Civil Procedure relating to review of judgment do not apply to proceedings like these.

On the other hand, it is contended, in the first place, that every Court has an inherent power, unless there is any express provision of the law to the contrary, to correct its own errors by review of judgment; and in support of this contention reference is made to certain decisions of this Court and of the Judicial Committee. It is further contended that the proceedings under chap. X, at any rate, in certain cases, and the present case is one of them, should be treated as suits under the Bengal Tenancy Act, as provided by [153] paragraphs 27 and 32 of the rules made by the local Government under s. 189 of the Bengal Tenancy Act.

The question has been very fully discussed on both sides; and after giving my best consideration to the arguments advanced, I am of opinion that the appellant's contention is not sound, and that the view contended

(1) 18 C. 23.

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for by the learned counsel for the respondents that proceedings like these should be regarded as suits is correct.

The local Government is, by s. 189 of the Act, given authority to make rules to regulate the proceedings to be held by Revenue Officers in pursuance of any duty imposed upon them under this Act. Chap. X of the Act, under which this proceeding was instituted, relates to proceedings to be conducted by Revenue Officers under this Act; and in regulating their procedure, the local Government has, under the provisions of s. 189, made the two rules to which reference has just been made, which provide that the proceeding shall be dealt with as a suit under this Act. If, then, as regards procedure, and the question before us is one of procedure, the proceeding is to be dealt with as a suit under this Act, is there any reason why the proceeding should not be treated as a suit within the meaning of s. 143 of the Act, and therefore governed by the Code of Civil Procedure? It was argued that if the Legislature had intended the Code of Civil Procedure to apply to proceedings under chap. X, the language of s. 143, instead of being qualified as it is, would have been to the effect that Code of Civil Procedure shall apply to suits and proceedings between landlord and tenant under this Act.

I do not think that this argument is valid. These proceedings could not have been treated as suits, and could not, so far as this ground of decision goes, have been treated as governed by the review provisions of the Code of Civil Procedure, if the local Government had not thought it fit, the exercise of the power vested in it by s. 189 of the Act, to declare that they should be dealt with as suits. The Legislature, in enacting s. 143 in the way it has done, has left it to the local Government to say, whether certain proceedings which are by the Act to be initiated by applications, should be treated as suits or not. In this particular [154] case, the local Government has determined to say that these proceedings should be treated as suits. In the absence then of any definition of the term "suit" anywhere in the Act, I think it is only right and proper to hold that a proceeding like this comes within the description of a suit between landlord and tenant under s. 143 of the Act.

I may add that it would have been somewhat anomalous if it had been otherwise; for then we should have had the Code of Civil Procedure governing the proceedings down to final judgment in the first Court, and the same Code of Civil Procedure governing the case so far as the first appeal and also the second appeal were concerned, but not so far as an application for review of judgment went. Proceedings like these are not summary proceedings. Decisions passed in them have the force of a decree. An appeal and a second appeal are allowed against those decisions. But if no power of correcting its error by review of judgment were given to the Court, then notwithstanding the provisions as to appeal, grave and irremediable injustice might sometimes result. I think, therefore, that it is consistent with reason and justice to hold that these proceedings ought to be treated as suits within the meaning of s. 143 of the Bengal Tenancy Act, and if they are to be so treated, the Code of Civil Procedure applies to them, and there can be no objection to the Judge entertaining an application for review.

As to the second point, it is enough to say that no second appeal is allowed by s. 108 of the Bengal Tenancy Act upon a point like this. For sub-s. 3 of s. 108 of the Act allows an appeal to this Court from the decision of a Special Judge only in cases coming under s. 106, and

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this last mentioned section relates only to disputes arising as to the correctness of any entry, not being an entry of a rent settled under chap. X, and evidently the second objection relates to an entry of the rent so settled in this case.

S. C. G. *Appeal dismissed.*

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25 C. 155 = 1 C.W.N. 652.

[155] APPELLATE CIVIL.

Before Sir Francis William Maclean, Kt., Chief Justice, and Mr. Justice Banerjee.

MAHOMED HAMIDULLA (*Decree-holder*) *v.* TOHURENNISSA BIBI AND OTHERS (*Judgment-debtors.*)* [5th April, 1897.]

Civil Procedure Code (Act XIV of 1882), *s.* 108—Ex-parte *decree—Effect of a decree set aside at the instance of some only of several defendants against whom the decree passed was* ex-parte—*Meaning of the words "the decree."*

The words "the decree" in s. 108 of the Code of Civil Procedure mean the whole decree made in the suit. Therefore, in a case where a decree has been passed *ex parte* against some only of several defendants, the effect of its being set aside on their application under s. 108 of Code of Civil Procedure is that the whole decree made in the suit is set aside, notwithstanding that some of the defendants had entered appearance at the original hearing.

[**Diss.**, 15 C.P.L.R. 179 (181); **F.**, 5 C.L.J. 202; 5 C.W.N. 58; 10 Ind. Cas. 174; **R.**, 34 A. 592 = 10 A.L.J. 130 = 16 Ind. Cas. 1; 25 C. 175 (177) = 1 C.W.N. 656; **Com.**, 26 M. 604; **Cons.**, 24 A. 383 (399) = 22 A.W.N. 76; **Expl.**, 31 M. 454 = 18 M.L.J. 543 = 4 M.L.T. 230; **D.**, 20 A.W.N. 14; 3 C.L.J. 160; 6 C.L.J. 226; 4 C.W.N. 456.]

THIS was the hearing of a rule granted to show cause why an order of the Munsif of Alipore setting aside a decree on the application of some only of the defendants against whom it had been made *ex-parte.* The facts of the case and the arguments, for the purposes of this report, appear sufficiently from the judgment of the High Court.

Dr. *Ashutosh Mookerjee,* in support of the rule.

No one appeared to show cause.

The following judgments were delivered by the High Court (MACLEAN, C. J., and BANERJEE, J.) :—

JUDGMENTS.

MACLEAN, C. J.—I am for my own part not satisfied that this case comes within s. 622 of the Code of Civil Procedure; but in the view I take of the construction of s. 108 of that Code, to which I will advert in a moment, it becomes unnecessary for me to decide that question. The question we have to decide arises under these circumstances: A suit was brought against two sets of defendants upon a promissory note which had been made by two persons, one of whom died before the suit was brought. The suit was brought against the surviving maker of the note and the heirs of the other maker of the note who had, as I have said, died [156] in the meantime. Two of these heirs were *purdanashin* women and it appears that the necessary summons was not served upon them, and that the decree as against them was made *ex-parte* in these terms: "In the result a decree for Rs. 468 be passed in plaintiff's favour

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* Civil Rule No. 323 of 1897, made against the order passed by Babu Sasi Kumar Ghose, Munsif of Alipore, dated the 16th of January 1897.

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together with costs at *ex-parte* scale. The liabilities of the defendants 1 to 3 shall be to the extent of the property inherited by them from the deceased debtor."

The two defendants against whom the decree had been made *ex-parte* made an application under s. 108 of the Code to have the decree set aside. The application was granted, and the decree not only as against the applicants but also as against the other defendants who had appeared and defended was set aside. The question is whether it ought to have been set aside as against all the defendants, or only as against the applicants, the *purdanashin* women, against whom admittedly the trial had proceeded *ex-parte*. Apparently the point was not mentioned to the Munsif; any way he has not referred to it.

The question turns upon the true construction of s. 108 of the Code, the language of which is, perhaps, not so clear upon the point as it might be. The first clause of the section somewhat favours the present applicant's contention, but then the latter clause, after stating that the applicant must satisfy the Court that he was not properly served, goes on to say, "the Court shall pass an order to set aside the decree" * * *. The language is imperative, "shall set aside the decree." Now what does "the decree" mean? It must, I think, mean the decree, the whole decree, made in the suit. It does not say part of the decree: it does not say that part of the decree which affects the interest of the applying defendant alone, but it uses the words "the decree." Read according to their ordinary signification and natural meaning the words must mean, I think, that the Court shall set aside the *whole decree*; and that view is strengthened, I consider, by the last words of the section, *viz.*, "and the Court shall appoint a day for proceeding with the suit." The suit would appear to mean the *whole suit*, not merely the suit as against or so far as it affected the particular defendants making the application, but the *whole suit*. There seems to me reason in this view of the section. If the original decree was allowed to stand as against the original [157] defendants who had appeared and defended the suit, and the suit were only allowed to proceed on the second hearing, if I may call it so, as against the defendants against whom in the first instance the decree had been made *ex-parte*, I can conceive cases in which complications and possible injustice might result. And it may well be that the Legislature, seeing that difficulties might ensue from making in suits in which there were several defendants a decree against them piecemeal, may have deemed it better that the decree should not be set aside partially, but that the whole decree should be set aside. And I may point out that the plaintiff can hardly be heard to complain, for when the suit came on for hearing he knew perfectly well that he was proceeding against some of the defendants *ex-parte*, and that he was incurring the risk—a fairly certain risk—of having his decree set aside, if he knew, as he must be taken to have known, that he was proceeding against certain of the defendants who had not been served. Nor can the defendants who appeared be heard to complain. They must have known that the other defendants were not in Court to defend, and a very little inquiry would probably have satisfied them that they had not been served. If then those defendants had pointed out to the Court that their co-defendants were not present, and that it was questionable whether they had been served with the requisite summons, and that they were *purdanashin* women, it is highly probable that the Court would have adjourned the case to give the other defendants an opportunity of being present or at any rate of being duly served. If, then,

the whole decree be set aside, I do not think that either the plaintiff or the other defendants have much real ground for complaint.

Holding this view, on the best construction that I am able to place on the language of the section, I think that the Judge in the Court below arrived at a right conclusion, and that the rule must be discharged.

BANERJEE, J.—I also am of opinion that this rule ought to be discharged. We are asked to reverse an order of the Court below made under s. 108 of the Code of Civil Procedure, setting aside an *ex-parte* decree, so far as that order relates to the two defendants who had entered appearance, and against whom it is contended the original decree was not an *ex-parte* decree.

[158] Two questions arise for consideration: *First*, whether the application to this Court comes properly within s. 622 of the Code of Civil Procedure; and *secondly* whether the order made by the Court below is a right order or not.

If the contention of the learned vakil for the petitioner, *viz.*, that the order made by the Court below was wrong, were correct, I am inclined to think that the case would come under that clause of s. 622 of the Code which authorizes this Court to interfere in cases in which a Subordinate Court has exercised a jurisdiction not vested in it by law. For the contention raised on behalf of the petitioner is this, that the Court below, by s. 108 of the Code, was authorized to set aside only that part of the decree which was passed *ex-parte*; and if, in making the order that it has made, it has set aside also that part of the decree that was not passed *ex-parte*, I think that the petitioner may contend that it has, in so doing, exercised a jurisdiction not vested in it by law. This view is in accordance with the decision of the Privy Council in the case of *Brij Mohun Thakur* v. *Rai Umanath Chowdhry* (1) and with the decision of this Court in *Jogodanund Singh* v. *Amrita Lal Sircar* (2).

But, then, is the decision of the Court below wrong, or was the Court below right in reversing the entire decree as it has done, notwithstanding that some of the defendants had entered appearance? Section 108 of the Code says: " In any case in which a decree is passed *ex-parte* against a defendant, he may apply to the Court by which the decree was made, for an order to set it aside, and if he satisfies the Court that the summons was not duly served," as was the case here, " the Court shall pass an order to set aside the decree upon such terms as to costs, payment into Court, or otherwise, as it thinks fit, and shall appoint a day for proceeding with the suit."

The section, therefore, evidently contemplates the setting aside of the decree made in the suit, and it directs the Court to appoint a day for proceeding with the suit.

It was argued that the decree in this case should be treated as a [159] decree partly *ex parte* and partly not an *ex-parte* decree, and that the section authorizes the Court to set it aside only so far as it was an *ex parte* decree. The section, however, makes no such distinction, and as pointed out in the judgment of the learned Chief Justice, there may be very good reason why the section did not make any such distinction. It may often happen that the setting aside of the decree as regards some of the defendants renders it necessary in the interests of justice that the whole decree should be re-opened; and the present case is an instance in point. Here, of the two parties who entered appearance, one was one of

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(1) 20 C. 8 =19 I. A. 154.

(2) 22 C. 767.

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the executants of the promissory note on which the suit is based, and the other was one of the three persons who are now sued as the legal representatives of another executant of the note, now deceased; and if the decree were to stand as against the defendants who entered appearance, and be set aside only as regards the defendants who did not enter appearance, then, in the event of the suit being dismissed as against the latter, the result would be obviously hard as against the defendant who is sued as one of the heirs of the deceased executant of the note and who had entered appearance at the original hearing. It is to avoid complications like this that the Legislature may have thought it fit to allow a decree made *ex-parte* as against some of the defendants to be set aside in its entirety upon their application, if the requirements of s. 108 of the Code are satisfied.

Two cases were relied upon by the learned vakil for the petitioners—*Doorga Pershaud Ghose* v. *Greesh Chunder Bose* (1) and *Brojonath Surmah* v. *Anund Moyee Debia Chowdhrain* (2) as lending support to his contention. They were cases under Act X of 1859, and s. 58 of that Act, which corresponded to ss. 108 of the Code, contained this provision, that if the petitioner "shall show good and sufficient cause for his previous non-appearance and shall satisfy the Collector that there has been a failure of justice, the Collector may, upon such terms and conditions as to costs or otherwise as he may think proper, revive the suit and alter or rescind the decree according to the justice of the case."

That, I think, was different from the provision in the law now [160] under consideration, which is imperative, and requires that the Court shall pass an order to set aside the decree upon such terms as to costs, &c., as it shall think fit, and shall appoint a day for proceeding with the suit. I, therefore, think that decisions under Act X of 1859 cannot be in point in cases coming under s. 108 of the Code, and the view I take receives some support from the decision of this Court in the case of *Dookhee Khan* v. *Rajessuree Ranee* (3), in which it was held that it was competent to the Judge of the Small Cause Court, on hearing the objections by one of the several defendants, to set aside the decree as to all, "if justice seems to require it; as, for instance, if the objection is one which is common to the case of all" . . .

Cases may arise in which a decree, though nominally one, really consists of several decrees against different parties, the relief granted against each being separately specified. In such cases the contention urged by the petitioner's vakil may hold good. But here the decree is one and undivisible, and I think that the Court below was right in setting it aside in its entirety under s. 108 of the Code, notwithstanding that some of the defendants had entered appearance at the original hearing.

S. C. G. *Rule discharged.*

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(1) 1 W. R. 222. (2) 7 W.R. 237. (3) 15 W. R. 371.

25 C. 160 = 1 C.W.N. 660.

1897
JUNE 28.

APPELLATE CIVIL.

25 C. 160 = 1 C.W.N. 660.

APPELLATE CIVIL.

Before Sir Francis William Maclean, Kt., Chief Justice, and Mr. Justice Banerjee.

ESHAN CHUNDER MITTER, CHAIRMAN OF THE HOOGHLY AND CHINSURAH MUNICIPALITY (*Defendant*) *v.* BANKU BEHARI PAL (*Plaintiff*).* [28th June, 1897.]

Bengal Municipal Act (*Bengal Act III of* 1884). *s.* 204—*Projection caused by restoring a portion of an old building which has been pulled down with the object of its being rebuilt—Meaning of the words "which may have been so erected or placed"—Metropolis Management Amendment Act*, 1862 (25 & 26 *Vict.*, *c.* 102), *s.* 75.

[161] Section 204 of the Bengal Municipal Act (Bengal Act III of 1884) does not apply to the case of a projection forming part of a building, which is merely in substitution for an old building which has existed upon the same site before the date on which the District Municipal Improvement Act, 1864, or the District Towns Act, 1868, or the Bengal Municipal Act, 1876, as the case may be, took effect in the Municipality.

The words "which may have been so erected or placed" in s. 204 mean erected or placed for the first time.

[**Appr.**, 23 B. 248 (250); **R.**, 6 Ind. Cas. 431 = 6 N.L.R. 53.]

THIS appeal arose out of a suit brought by the plaintiff for a declaration that the order passed by the Municipal Commissioners of Hooghly, directing the plaintiff to pull down a verandah which projected over a public road, was *ultra vires*, illegal, and without jurisdiction. The allegation of the plaintiff was that the verandah in question existed from time immemorial; that he pulled down the verandah in Choitra 1298 B. S. (April 1892), and in the place of the old beams on which the verandah stood he affixed three brackets for reconstructing the verandah upon them; that the new verandah was to be of the same dimension as the old one; that a notice to remove the brackets having been served upon him, he moved the Chairman of the Municipality, who directed an investigation; that, notwithstanding the report of the investigation being in his favour, the Municipal Commissioners at a meeting passed a resolution ordering the brackets to be removed; that thereupon he removed the brackets, protesting against the order of the Commissioners, and hence the suit was instituted by him.

The defence (*inter alia*) was that the plaintiff had no cause of action; that under the provisions of the Bengal Municipal Act, the suit was not maintainable in the Civil Court; that the projection was to be regarded as a new one, and it was pulled down about ten years ago, and as the plaintiff proceeded to erect the new one without the permission of the Municipal Commissioners they were legally competent to order its removal.

The Munsif found all the facts in favour of the plaintiff and decreed the suit. On appeal to the Subordinate Judge, he confirmed the decision of the first Court, but as to costs the decree was modified. From this decision the defendant appealed to the High Court.

[162] Babu *Lal Mohun Das*, and Babu *Lal Behary Mitter*, for the appellant.

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* Appeal from Appellate Decree, No. 1797 of 1895, against the decree of Babu Beni Madhub Mitter, Subordinate Judge of Hooghly, dated the 5th of August 1895, modifying the decree of Babu Khetra Mohan Mitter, Munsif of Hooghly, dated the 30th of April 1894.

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Dr. *Rash Behary Ghosh* and Babu *Shib Prosanna Bhattacharjee*, for the respondent.

The following judgments were delivered by the High Court (MACLEAN, C.J., and BANERJEE, J.).

JUDGMENTS.

MACLEAN, C.J.—On the 17th December 1892, the Vice-Chairman of the Hooghly and Chinsurah Municipality wrote and sent to the plaintiff in this suit the following notice :—

"SIR,—By a resolution of the Commissioners at a general meeting held on the 9th September last your prayer to allow the *sajah* to be made was disallowed. I therefore request that you will be good enough to remove the iron brackets put up against your house within eight days from the date of receipt of this letter, otherwise necessary steps should be taken for their removal."

I understand and I have specially asked the question that no other notice was sent by the defendants to the plaintiff.

The first question which we have to decide is whether, having regard to the terms of s. 204 of Bengal Act III of 1888, the Municipality were justified, under the circumstances of this case, in giving a notice, which admittedly the above document purported to be, under that section. The Municipality admit that they considered they were entitled to act, and that throughout they have purported to act, under the statutory powers vested in them under that section. I may say, before I refer to the section, that I have entertained grave doubt whether the plaintiff has not been premature in bringing this suit, inasmuch as beyond sending the above notice, the Municipality have done nothing. When he instituted the suit he had suffered no damage. If he had good reason to believe that if he did not remove the brackets, the Municipality would do so, his proper course, to my mind, would have been to have come to the Court and asked for an injunction to restrain them from so acting, upon the ground that their threatened action was *ultra vires*. In such a suit the question of *ultra vires* could have been decided. If the plaintiff's view were correct, the service of the notice was a mere *brutum fulmen*, and he might have put it behind the fire. Inasmuch, however, as in both the [163] lower Courts the Municipality have allowed the question to be fought out upon its merits, and both parties desire to have the decision of this Court upon the point of law involved, by putting, perhaps, a somewhat liberal construction upon s. 42 of the Specific Relief Act, I think that, as the parties desire it, the case ought now to be decided upon its merits, and that exception ought not now to be taken as to whether or not the plaintiff was premature in bringing this suit, or as to its form.

Now s. 204, so far as it is material for the purposes of our decision, provides as follows : "The Commissioners may give notice in writing to the owner or occupier of any house requiring him to remove or alter any projection, encroachment or obstruction erected or placed against or in front of such house which may have been so erected or placed after the date on which the District Municipal Improvement Act, 1864, or the District Towns Act, 1868, or the Bengal Municipal Act, 1876, as the case may be, took effect in the Municipality."

The contention of the plaintiff is, that if the projection be only caused by restoring a portion of an old building, which has been pulled down with the object of its being rebuilt, s. 204 does not apply, and that s. 204 only applies to cases of a new erection causing a new projection and not

to the case of a projection which is merely a substitution for a projection previously existing.

Now the findings of fact in the Court below, so far as they are material for the present purpose, are these: The Subordinate Judge, as to the second point, which was whether the projection which the defendant ordered to be removed was a new one or is to be regarded as such, says this: "I am of opinion that the plaintiff has proved by his own deposition, as well as by the evidence of most of his witnesses, that the old verandah of the plaintiff's house existed for a period of more than thirty years, and it was pulled down about two years ago in order to rebuild it in its former position on iron brackets, and that the iron brackets were affixed in the same month." Again, he says in another part of his judgment: "I am of opinion that the plaintiff has proved that the old and new projections respectively were **[164]** exactly of the same dimensions, and that the old *sajah* was 11 feet and 6 inches in length, and 3 feet 6 inches in breadth;" and again he finds as a fact: "It has been already shown that it has been proved by the evidence of the witnesses of both sides that the projection in question existed since long before any Municipal Act came into operation in this town, and it has been proved by the evidence of the plaintiff's witnesses that the old *sajah* was pulled down about two years ago, and that the iron brackets were affixed within one month from the time the old *sajah* was pulled down for the purpose of rebuilding it in its former position, so the projection was not a new one."

Upon these findings of fact, we, sitting here on second appeal, must take it that the brackets which the Municipality claimed to have removed were placed for the purpose of supporting a new verandah in substitution for the old verandah which had been in existence long before any Municipal Act came into operation affecting this district, and that it was intended to be of the same dimensions as the old verandah.

The point, then, which we have to decide is whether section 204 applies only to the case of a projection which is caused by a building which is new, that is, erected after the passing of the Acts referred to in the section, or whether it applies to the case of a projection forming part of a building which is merely in substitution for an old building which had existed upon the same site before the passing of the Acts mentioned in the section. In my opinion it would be too narrow a construction of the section to hold that it applied to the case of a new building erected in substitution for an old building, which was in existence before the date of the Acts mentioned in the section. If, in point of fact, the new projection is, as in this case, part of a new building erected in the place of an old building which admittedly was in existence before the date of the Acts mentioned in the section, and merely in substitution for that old building, I do not think that the case comes within s. 204 of the Act. I think the words "which may have been so erected or placed," must mean erected or placed for the first time.

This view, I consider, receives support from the provision made **[165]** in s. 233 of the same Act, which provides for compensation being made in the case of a projection ordered to be pulled down by the Municipality in those cases where the projection existed before the coming into operation of the Municipal Acts referred to in that section. Though I am not prone in construing Acts of the Indian Legislature to refer to cases decided in the Courts of England upon the construction of certain English Acts of Parliament, I feel that the view I entertain upon this case receives support, so far as the principle is concerned, from the case of *Lord*

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Auckland v. *Westminster Local Board of Works* (1), which, as I understand that decision, in effect decided that the powers conferred by the 75th section of the Metropolis Management Amendment Act which, in principle, is more or less akin to the sections I have referred to of Bengal Act III of 1888, did not apply to the case of a new building which was merely a substitution for an old building, which had previously existed upon the same site. The authority of that case is not, in my judgment, impaired by the more recent case of the *London County Council* v. *Pryor* (2). The two cases are quite reconcilable.

Upon these grounds I think that the judgment of the Court below was right. There is something in that judgment about "a prescriptive right." I say nothing about that. I do not at present appreciate its bearing upon the question we have to decide. The appeal fails and must be dismissed with costs, but I think the decree—the precise form of which has not been given to us,—ought to be confined to a declaration that the Municipality are not entitled under s. 204 of the Act to require the plaintiff to pull down the brackets in question, and that the plaintiff is entitled to re-erect the same. I understand the plaintiff's claim for damages has been abandoned.

BANERJEE, J.—I am of the same opinion. The question raised before us is, whether the order passed by the Municipal Commissioners upon the plaintiff to pull down a verandah which projected over a public road was illegal and *ultra vires.*

[166] The facts found are, shortly, these—that the verandah in question had been in existence for upwards of thirty years; that it was pulled down by the plaintiffs for the purpose of building a new verandah in its place; and that the verandah intended to be rebuilt was exactly of the same dimensions as the old verandah. And it was admitted in the course of the argument that the Commissioners in issuing notice on the plaintiff had proceeded under s. 204 of Bengal Act III of 1884. That being so, the question reduces itself to this, namely, whether the projection in question was one that was erected or placed in front of the plaintiff's house after the dates mentioned in s. 204 by reason of such projection being the re-erection of an old projection on the site of the old projection. There is no dispute that the old verandah had been in existence from before those dates; but the contention on behalf of the appellant has been that, as the old verandah had been taken down and a new one was going to be erected in its place after the Bengal Municipal Act had come into operation, the case must be held to come within the scope of s. 204.

I do not think that this contention is sound. Though, literally speaking, the new projection was put up after the dates mentioned in s. 204, reading s. 204 with ss 206 and 233 of the Act, I think that the law makes a clear distinction between a new projection or a projection put up for the first time after the dates mentioned in s. 204, and a projection which had been in existence from before, and which was being reconstructed.

In the case of old existing projections, the law in ss. 206 and 233 makes provision for the award of compensation, whereas in the case of projections put up after the dates mentioned in s. 204, no such provision is made; and the intention of the Legislature seems, from a comparison of the three sections to which I have just referred, to be to limit the power

(1) (1872) L. R. 7 Ch. App. 597. (2) L. R. (1896) 1 Q. B. D. 330.

conferred upon the Municipal Commissioners under s. 204 to cases where projections are put up for the first time.

In making this observation I must guard against its being supposed that a projection erected on the site of an old one should [167] always be treated as a continuation of it, notwithstanding that the interval that may have elapsed between the removal of the old structure and the erection of the new one was long enough to raise a presumption that the old structure had been intended to be finally removed, and any intention to rebuild had been abandoned completely at the time.

But it is unnecessary to say more upon this point, because no question as to the abandonment of an intention to rebuild could arise in the present case, it having been found by the Court below that the new structure was put up shortly after the old one had been taken down for the purpose of being rebuilt.

The view I take receives some support from the case of *Lord Auckland* v. *Westminster Local Board of Works* (1).

S. C. G. *Appeal dismissed.*

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25 C. 167.

APPELLATE CIVIL.

Before Sir Francis William Maclean, Kt., Chief Justice, and Mr. Justice Banerjee.

NUFFER CHANDRA PAL CHOWDHRY AND ANOTHER (*Plaintiffs*) *v.* RAJENDRA LAL GOSWAMI (*Defendant*).* [22nd July, 1897.]

Limitation Act (XV of 1877), sch. II, art. 121—Encroachment by a trespasser—Incumbrance—Adverse possession—Purchaser at sale of taluk for arrears of rent.

Adverse possession is an incumbrance within the meaning of art. 121, sch. II of the Limitation Act (XV of 1877).

Lukhmeer Khan v. *Collector of Rajshahye* (2); *Womesh Chunder Goopto* v. *Raj Narain Roy* (3); *Khanto Moni Dasi* v. *Bijoy Chand Mahatab Bahadur* (4); *Karmi Khan* v. *Brojo Nath Das* (5), referred to.

An auction-purchaser of a *putni taluk* in its entirety gets the *taluk* free of all incumbrances; therefore in a suit brought by the auction-purchaser to recover possession of land situated within the *taluk* against a trespasser who [168] alleged to have held the disputed land adversely, the period of limitation would begin to run from the date when the sale becomes final and conclusive.

[F., 13 C.L.J. 293 = 15 C.W.N. 706 = 7 Ind. Cas. 849; R., 37 C. 322 = 11 C.L.J. 209 = 14 C.W.N. 487 = 5 Ind. Cas. 243; 2 C.L.J. 87 = 9 C.W.N. 795; 14 C.L.J. 136 = 11 Ind. Cas. 453 = 15 C.L.J. 436 = 16 C.W.N. 587 = 14 Ind. Cas. 219; 17 C.W.N. 340 = 15 Ind. Cas. 869; D., 26 C. 460.]

THE facts of the case and the arguments, for the purposes of this report, appear sufficiently from the judgment of the High Court.

Babu *Sreenath Das*, Dr. *Rash Behary Ghosh* and Babu *Saroda Prosonno Roy*, for the appellants.

Sir *Griffith Evans*, Babu *Lal Mohun Das* and Babu *Kishori Lal Goswami*, for the respondents.

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* Appeal from Original Decree No. 189 of 1895, against the decree of Babu Saroda Prosad Chatterjee, Subordinate Judge of Zilla Nuddia, dated the 25th of February, 1895.

(1) (1872) L.R. 7 Ch. App. 597. (2) S.D.A. (1851) 116. (3) 10 W.R. 15.
(4) 19 C. 787. (5) 22 C. 244.

1897
JULY 22.

APPELLATE
CIVIL.

25 C. 167.

The following judgments were delivered by the High Court (MACLEAN, C.J., and BANERJEE, J.) :—

JUDGMENTS.

BANERJEE, J.—This was a suit to recover possession, together with mesne profits, of a tract of alluvial land, which is alleged to have re-formed on the original site of the plaintiffs' *putni taluk* Turuf Sagoona, a *taluk* which the plaintiffs have purchased at certain sales, some of which were held under Reg. VIII of 1819, and some in execution of decrees for arrears of rent. The defendant raised the plea of limitation, and various other objections not necessary to be noticed in detail for the purposes of this appeal.

The plaintiffs sought to get over the plea of limitation in two ways, *first*, by showing that as auction-purchasers of the *putni taluk*, or rather *taluks*, at sales in satisfaction of arrears of rent, they were entitled to reckon time from the dates of the auction sales which were all within twelve years before the date of the institution of the suit; and, *secondly*, by showing that the disputed land became fit for cultivation within twelve years before the institution of this suit.

The Court below has held that the plaintiffs are not entitled to reckon limitation from the date of their auction purchase,—*first*, because they were not purchasers of the *putni* tenures free of all incumbrances within the meaning either of Reg. VIII of 1819 or of Bengal Act VIII of 1869; and, *secondly*, because even if they were entitled to claim the position of auction-purchasers of the *putni taluks* free from all incumbrances within the meaning of those enactments, their right, as such auction-purchasers, had become extinguished by reason of the arrangement **[169]** that they entered into with the zemindars under the *ikrarnamas* filed in this case, which had the effect of creating new *putni* tenures in their favour. It has further held that the plaintiffs failed to show that the disputed land became fit for cultivation within twelve years before the suit. And, accordingly, without going into the question of title, the Court below has dismissed the suit as barred by limitation.

Against that decision of the lower Court, the two plaintiffs preferred this appeal. At the hearing it was intimated to the Court that one of the two plaintiffs, Bipro Das Pal Chowdhry, had settled the case between himself and the defendant, and that the appeal, so far as he was concerned, should be dismissed but without costs, the defendant (respondent) not pressing for his costs.

The appeal, therefore, proceeds at the instance of one of the two plaintiffs only, *viz.*, Nuffer Chandra Pal Chowdhry ; and it has been contended on his behalf that the Court below was wrong in holding that the plaintiff is not entitled to claim the benefit of the law relating to an auction-purchaser of a *putni taluk* for arrears of rent under art. 121 of the second schedule of the Limitation Act, and to reckon limitation from the date of the auction sale, the several *putni taluks* purchased by the plaintiffs being distinct *taluks* though they relate to undivided shares in one *turuf*, and the *ikrarnamahs* referred to by the Court below not having the effect attributed to them.

On the other hand, it has been contended by the learned counsel for the respondents, in the first place, that it is difficult to say that an encroachment by a trespasser is an incumbrance within art. 121 of the second schedule of the Limitation Act, and that, in the second place, even if an encroachment by a trespasser can be treated as an incumbrance, the

plaintiffs were not auction-purchasers of a *putni taluk* within the meaning of the article just referred to, as several of the sales at which the plaintiffs made their purchase were not of any of the *putni mehals* in their entirety as originally created, but of portions only of those *putnis*. And it was further contended that the *ikrars* had really the effect which has been attached to them by the Court below.

[170] Before dealing with the question of limitation, it becomes necessary, therefore, to consider how the facts stand. Turuf Sagoona was let out in *putni* under five different engagements, each relating to a different share; and the result was that there were the following five *putnis* created: One by Nocoor Moni Debi, comprising one-third of the zemindari; a second, by Bama Sundari Debi, comprising a one-sixth; a third by Tincowrie, comprising one-twelfth; a fourth by Annoda Prosad Banerjee, comprising a one-fourth; and the fifth and last by Kali Das Banerjee comprising the remaining one-sixth.

Of these five *putnis*, the three that appertained to the shares of Bama Sundari, Tincowrie and Annoda and covered a moiety of the entire estate, were admittedly sold in their entirety. In regard to the remaining moiety belonging to Nocoor Moni and Kali Das, the sales at which the plaintiffs, or rather their predecessors, purchased were not in respect of the entire shares of one-third and one-sixth. The *putni* of the one-third share of Nocoor Moni had subsequently become sub-divided into two equal parts of one-sixth each, one of which was acquired by the plaintiffs at a sale under the *putni* Reg. VIII of 1819, and the other at a sale in execution of a decree for arrears of rent under Bengal Act VIII of 1869. And the *putni* of the one-sixth share of Kali Das was sold at three sales under Reg. VIII of 1819, and purchased separately by the predecessors of the plaintiffs.

I should add here that, in regard to the *putni* of Tincowrie's one-twelfth share, a question was raised as to whether the plaintiffs had acquired any right to the same by the disclaimer of the son and heir of Ram Bux Chetlangi, the auction-purchaser, the disclaimer being of a date subsequent to the date of the institution of the suit. As the question raised is one that relates to the title of the plaintiffs, it should be left to the Court below to determine it after the remand which we propose to direct in this case.

This being the state of the facts, let us now see how the law is applicable to the case as it stands. If the plaintiffs can make out their position as auction-purchasers of a *putni taluk* at a sale [171] for arrears of rent, with a right to avoid incumbrances, it must, I think, upon the authorities, be held that they are entitled to reckon limitation from the date of their auction purchase, either under art. 121 of the second schedule of the Limitation Act, adverse possession against the defaulting *putnidar* being regarded as an incumbrance, or under art. 144, the possession of the defendant being regarded as becoming adverse to the plaintiffs only from the date of the auction purchase.

Article 121 of the second schedule of the Limitation Act no doubt speaks of suits to avoid incumbrances or under-tenures in an entire estate sold for Government revenue, or in a *putni taluk* or other saleable tenure sold for arrears of rent; but it has been uniformly held in a series of cases in this Court that an encroachment by a trespasser comes within the meaning of an incumbrance, and that the cause of action for a suit by an auction-purchaser, at a sale for arrears of Government revenue or for arrears of rent, dates from the time of the auction purchase. The earliest

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of these cases that I shall refer to is the case of *Lukhmeer Khan* v. *Collector of Rajshahye* (1). That was, it is true, a case of an auction-purchaser of a zemindari at a sale for arrears of Government revenue; but the principle of the decision in that case applies equally to this.

The next case, and the most important one upon the present question, is that of *Womesh Chunder Goopto* v. *Rajnarain Roy* (2). That case was decided in 1868, and was the case of an auction-purchaser of an under-tenure suing to recover possession of land claimed to be part of the under-tenure, which had been encroached upon by a trespasser; and it was held by a Bench of three Judges of this Court that limitation ran from the date of the auction purchase. The reasons for the decision are fully set forth in the judgment of Sir Barnes Peacock. This case was followed in *Khanto Moni Dassi* v. *Bijoy Chand Mohatab Bahadoor* (3) in which a purchaser at a sale under Reg. VIII of 1819 was held to be unaffected by any adverse possession of land [172] appertaining to the *putni mehal* which had been encroached upon. And the same view was taken in the case of *Karmi Khan* v. *Brojo Nath Das* (4).

It is unnecessary for us to state at length the reasons for holding that the case should be governed by art. 121, or in other words, that an encroachment by a trespasser should be regarded as an incumbrance; and that even if art. 121 did not apply, and the case came under art. 144, the possession of the defendant became adverse to the plaintiffs only from the date of the auction sale of the *putni*. The reasons in support of this view, as I have already observed, are fully set out in Sir Barnes Peacock's judgment in *Womesh Chunder Gupto* v. *Raj Narain Roy* (2); and we do not think that the grounds urged by the learned counsel for the respondent are sufficient to justify our declining to follow the decisions cited above, which have uniformly held that limitation in such cases should be reckoned from the date of the auction purchase.

That being so, the next question is whether the plaintiffs are auction-purchasers of a *putni taluk* with the right to avoid incumbrances. So far as the *putni taluks* which were originally created by Bama Sundari, Tincowrie and Annoda are concerned, there can be no question that the plaintiffs are auction-purchasers with the right to avoid incumbrances. The only question is whether they can be regarded as occupying the same position with regard to the *putni taluks* that were originally created by Nocoor Moni and Kali Das.

Now, in regard to the *putni taluk* that was originally created by Nocoor Moni, the plaintiff cannot claim the benefit of art. 121, nor can they treat the possession of the defendant as having become adverse to them only from the date of the auction purchase, because what was purchased at the two sales relating to that *putni* was in neither case an entire *putni taluk*, the sale in each case being that of a share in the *putni taluk*.

As regards the *putni* that was originally created by Kali Das, although the sales at which the plaintiffs or their predecessors [173] purchased were three different sales, at which Kali Das's share of one-sixth was sold in three different shares, the learned vakil for the appellant contended that the plaintiffs should be held to be purchasers of an entire *putni taluk* free of all incumbrances, because the three shares were all sold on one and the same day, and were purchased by one and the same person. We

(1) S.D.A. (1851) 116. (2) 10 W.R. 15. (3) 1 C. 787. (4) 22 C. 244.

do not think that the fact of the sale having been held on one and the same day and the purchaser having been one and the same person makes any difference.

The sales were sales of the original *putni* in different shares and not in its entirety. The purchaser at none of these three sales can therefore be considered to have purchased a *putni taluk* free of all incumbrances. That being so, in our opinion the benefit of art. 121, or the right to disregard adverse possession against the defaulting *putnidar*, can be claimed only so far as the eight annas share, made up of the shares of Bama Sundari, Tincowrie and Annoda, is concerned. But as regards the remaining 8 annas, the suit must be held to be barred, unless the second ground is made out, *viz.*, that the land became fit for cultivation within twelve years of suit.

It remains now to consider the effect of the *ikrarnamas* referred to in the judgment of the Court below. Though in certain respects the terms on which the *putnis* had been originally created were altered by these documents, we do not think that had the effect of extinguishing the right of the plaintiffs as auction-purchasers of the *putni mehals* to avoid incumbrances or to recover possession of lands belonging to the *putnis* which had been encroached upon.

The terms of the *ikrarnamas* which were most strongly relied upon by the learned counsel for the respondents as having the effect of extinguishing the rights under the original *putni*, are those relating to the abatement of rent, and to the condition that the lands reformed on the original site of the old *putni*, upon being recovered, should have a new rent assessed upon them; but although that is so, the *ikrarnamas* contain a further condition that the auction-purchasers should institute [174] suits to recover possession of these lands which had been encroached upon, and that if they neglected to institute such suits, the condition relating to the abatement of rent should be cancelled. The terms of the *ikrar*, considered as a whole, do not, therefore, in our opinion, affect the right of the auction-purchasers to avoid incumbrances or recover possession of lands reformed on the original site.

As to the second ground upon which the plaintiffs in the Court below sought to get over the plea of limitation, *viz.*, that the lands reformed or became culturable within twelve years of suit, the learned vakil for the appellants has very properly exercised his discretion in not going into the evidence in detail, as he thought he was not likely to be able to induce us to arrive at a conclusion different from that come to by the Court below.

The result then is, that as regards an eight-anna share of the entire *mehal*, Turuf Sagoona, the suit must be held not to be barred by limitation. But, then a new issue arises for determination by reason of the withdrawal of one of the plaintiffs from the suit, the share of that plaintiff not being admitted. The Court below must therefore determine what the share of Nuffer Chandra Pal Chowdhry is in *putni mehal*, Turuf Sagoona; and then, if he succeeds in establishing his title to the lands in dispute, he will be entitled to recover possession to the extent of one-half of the share which he has in the *putni mehal*, his claim in respect of the other half being barred by limitation. The case will, therefore, go back to the Court below for the determination of the other issues raised in it, together with the additional issues indicated above, as to the extent of the share of Nuffer Chandra Pal Chowdhry, and also as to whether the plaintiff has acquired the interest of Rambux Chetlangi.

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MACLEAN, C.J.—I agree with the view expressed by Mr. Justice Banerjee, and I have but little to add.

Practically the only question we are asked to decide is, whether the suit is barred by the Statute of Limitations. We must take it in the face of the decision in the case of *Womesh Chunder Goopto* v. *Raj Narain Roy* (1), which is now nearly thirty [175] years old, and which has been since followed by other decisions of this Court, that the period of limitation in a case such as the present only begins to run from the date of the sale becoming final and conclusive. That being so, the plaintiff's suit is not barred by the Statute. This view, however, only applies to the auction-purchases by the plaintiff or his predecessors in title of the *putni* tenures, which were sold in their entireties.

It will have to be ascertained what the interest of the now sole appealing plaintiff really is.

With reference to the *ikrarnamas*, I cannot regard the effect of those documents as putting an end to the *putni* tenures. They modify some of its provisions, but proceed upon the footing of its continuance. This seems to me pretty plain when one reads the documents. If so, the plaintiffs, as the auction-purchasers of the *putni* tenures, are still entitled to avoid the incumbrance on the tenure.

With this intimation of our opinion upon the point of the Statute of Limitations, the case must go back to the Court below to ascertain what the precise interest of the present appellant now is, and to try out any other issues of fact which have to be tried.

S. C. G. *Appeal allowed. Case remanded.*

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25 C. 175 = 1 C.W.N. 656.

APPELLATE CIVIL.

Before Sir Francis William Maclean, Kt., Chief Justice, and Mr. Justice Banerjee.

DOYAMOYI DASI (*Judgment-debtor No.* 5) *v.* SARAT CHUNDER MOJUMDAR AND OTHERS (*Decree-holders*).*
[1st June, 1897.]

Second appeal—Order refusing to confirm a sale—Subsisting decree—Code of Civil Procedure (*Act XIV of* 1882), *ss.* 588, 316, 244.

A second appeal lies to the High Court against an order passed by a Judge refusing to confirm a sale, on the ground that there was no subsisting decree at the date when the confirmation of the sale was applied for, the order being not one provided for by s. 588 of the Code of Civil Procedure, [176] and the question raised in the case being a question relating to the execution or satisfaction of the decree within the meaning of s. 244 of the Code.

Prosunno Kumar Sanyal v. *Kali Das Sanyal* (2), referred to.

[F., 26 C. 324 (325); R., 27 C. 810 (813) = 4 C.W.N. 692; 4 Bur. L.T. 28 = 9 Ind. Cas. 472; 15 C.P.L.R. 179 (181); D., 6 C.L.J. 226.]

THE facts of the case are shortly these: One Koilash Chunder Bose obtained an *ex parte* decree against one Doyamoyi Dasi and others on

* Appeal from Order No. 155 of 1896, against the order passed by Babu Debendra Lal Shome, Subordinate Judge of Backergunge, dated the 10th of December 1895, reversing the order of Babu Kalipada Mookerjee, Munsif of Patuakhally, dated the 16th of March 1895.

(1) 10 W.R. 15. (2) 19 C. 683 = 19 I.A. 166.

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the 26th July 1893. One of the judgment-debtors (Doyamoyi Dasi) on the 17th December 1894 applied for a rehearing, and on the 12th January 1895 the application was granted, and the *ex-parte* decree was set aside. Under the *ex-parte* decree a certain property of the judgment-debtors was sold, and was purchased by a third party. The auction-purchaser applied to have the sale confirmed. The judgment-debtors as well as the decree-holder were made parties to the application. The judgment-debtors objected to the confirmation of the sale on the ground that as on the date when the application was made there was no subsisting decree, the sale could not be confirmed. The Munsif refused to confirm the sale and rejected the application of the auction-purchaser. On appeal, the Subordinate Judge set aside the decision of the first Court, and confirmed the sale. From this decision the judgment-debtor No. 5 appealed to the High Court.

Babu *Lal Mohun Das*, for the appellants.

Babu *Jyoti Prosad Sarvadhicary*, for the respondents.

Babu *Jyoti Prosad Sarvadhicary* took a preliminary objection to the hearing of the appeal, on the ground that no second appeal lay to the High Court.

Babu *Lal Mohun Das*, for the appellant, contended that the question raised in the case being a question relating to the execution or satisfaction of the decree within the meaning of s. 244 of the Code of Civil Procedure, a second appeal would lie to the High Court, and he referred to the case of *Prosunno Kumar Sanyal* v. *Kali Das Sanyal* (1). As to the merits he contended that though the *ex-parte* decree was set aside at the instance of one of the judgment-debtors, the whole decree was set aside, and therefore no [177] decree was subsisting at the date when application for confirmation of the sale was made, and the sale could not be confirmed.

Babu *Jyoti Prosad Sarvadhicary* contended that the decree being set aside at the instance of one of the judgment-debtors only, the effect of it was that there was a subsisting decree, and the sale ought to have been confirmed.

The following judgments were delivered by the High Court (MACLEAN, C.J., and BANERJEE, J.) :—

JUDGMENTS.

MACLEAN, C.J.—I think that a second appeal lies in this case upon the short ground that the question to be decided is a question between the parties to the suit relating to the execution of the decree and possibly to the satisfaction of the decree within the meaning of s. 244 of the Code of Civil Procedure. I arrive at this conclusion upon the ground that a sale has been ordered, the sale has been effected, and effected for the purpose of satisfying the decree. If the sale be held to be bad, that is a question which affects the decree-holder, and affects the judgment-debtor, both of whom are parties to the suit. This is a question between the parties to the suit, and the person claiming here is the judgment-debtor; the decree-holder is made a party to the appeal and also the auction-purchaser. The case, therefore, is within s. 244 of the Code of Civil Procedure, and seems to me to come within the principle laid down by the Privy Council in the case of *Prosunno Kumar Sanyal* v. *Kali Das Sanyal* (1). It is conceded that if the case be within s. 244 a second appeal will lie.

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(1) 19 C. 683 = 19 I.A. 166.

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Then as to the merits. The Judge in the Court below proceeded upon the ground that there was a decree, a subsisting decree, in a suit for rent. It was admittedly an *ex-parte* decree. Under that *ex-parte* decree the property was put up for sale, and sold, but one of the parties against whom the *ex-parte* decree had been made was successful in inducing the Court to discharge that decree under s. 108 of the Code of Civil Procedure, the effect of which was, according to a recent decision of this Court—*Mahomed Hamidulla* v. *Tohurennissa Bibi* (1)—to [178] discharge the decree, not only in favour of the particular applicant, but as against all the defendants to the suit in which the decree was made. Therefore, when the *ex-parte* decree was discharged, no decree in the suit remained. There was no decree existing in the suit, and if there were no decree, it is difficult, to my mind, to see how there could be any sale which could be confirmed when the decree under which it was made had ceased to exist; when the decree was discharged, the sale which purported to be made under that decree fell to the ground. The point arises upon an application to the Munsif to confirm the sale, which he refused to do, upon the ground that he should not confirm a sale under a decree which was not subsisting. The latter words of s. 316 of the Code of Civil Procedure tend to show that the sale cannot be confirmed, if the decree under which it was effected has ceased to exist. In my opinion, the Munsif was right and the Subordinate Judge was wrong, and this appeal must be allowed with costs.

BANERJEE, J.—I am of the same opinion. Upon the question whether or not a second appeal lies to this Court, I think it will be enough to say that this is not a case provided for by s. 588 of the Code of Civil Procedure, the order complained of not being one of those that that section contemplates. The order here was an order refusing to confirm a sale, on the ground that the decree, in execution of which the sale took place, was not subsisting at the date when the confirmation of the sale was applied for. Then, I think, the question that was raised in this case may fairly be considered to be a question relating to the execution or satisfaction of the decree within the meaning of s. 244 of the Code of Civil Procedure. Having regard to the observations made by their Lordships of the Privy Council in the case of *Prosunno Kumar Sanyal* v. *Kali Das Sanyal* (2), I think that the order complained of comes under s. 244, and is therefore a decree as defined by s. 2 of the Code; and so a second appeal lies.

Then upon the merits, the appellant contends that the Munsif was right in refusing to confirm the sale, while for the respondent it is said that there is no express provision in the Code directing [179] the Court not to confirm a sale when, at the date when such confirmation is applied for, the decree in execution of which the sale took place, ceases to be a subsisting decree. But the provisions of s. 316 of the Code go to show that the Court ought not to confirm a sale, when at the time such confirmation is asked for, the decree had ceased to be a subsisting decree. In the present case, the decree, which was an *ex-parte* decree, had been set aside by an order under s. 108 of the Code. That being so, and there being no subsisting decree, the first Court was quite right in refusing to confirm the sale; and the Court of Appeal below was wrong in holding that the first Court was bound to confirm it.

S. C. G. *Appeal allowed.*

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(1) 25 C. 155. (2) 19 C. 683 = 19 I.A. 166.

25 C. 179 (P.C.)=24 I.A. 170=1 C.W.N. 639=7 Sar. P.C.J. 222.

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PRIVY COUNCIL.

PRESENT:

Lords Hobhouse, and Macnaghten, and Sir R. Couch.

[*On appeal from the Court of the Judicial Commissioner of Oudh.*]

MOTI LAL (*Defendant*) *v.* KARRABULDIN AND OTHERS (*Plaintiffs.*)
[14th, 18th May and 3rd July, 1897.]

Sale in execution of decree—Rights of Purchasers—Two judicial sales of the same property, each in execution of a separate decree—Conflicting claims thereunder—Purchase, pendente lite.

The same property having been sold in execution of two different decrees, the result was that the two purchasers at the respective sales afterwards contested title to the property. The sale to the first purchaser was confirmed in November 1882. The sale to the second, who upon it obtained possession, took place in October 1884, the property having been attached under the second decree in March 1883. The first purchaser on the 28th July 1884 brought a suit, to which the second purchaser was not a party, to have that attachment declared invalid. By a decree of the 14th November to that effect the second purchaser was bound as a purchaser, *pendente lite*; and his possession was of no avail to him.

Held, that the attachment of March 1883, although it had preceded the institution of the first purchaser's suit of 1884, afforded no support to the second purchaser's claim, attachment under chap. XIX of the Civil Procedure Code merely preventing alienation, and not giving title.

Moreover, after the first sale in 1882 there had been no interest left to be sold to another purchaser, so that, without there having been the decree [180] of 1885, the second purchaser would still have had no title against the first. There was no occasion for the setting aside the second sale within the meaning of arts. 12 and 13 of sch. II of the Limitation Act (XV of 1877); nor was it set aside. That sale was held not to affect the right of the first purchaser, there being a wide difference between setting aside a sale and deciding that a plaintiff's right was not affected by it.

[N.F., 16 M.L.T. 123=24 Ind. Cas. 667; F., 29 C. 428=6 C.W.N. 577; 11 C.L.J. 385 =14 C.W.N. 606=5 Ind. Cas. 341; 11 C.L.J. 528=14 C.W.N. 677=6 Ind. Cas. 40; 11 C.W.N. 44-N; 17 C.W.N. 413=18 Ind. Cas. 177; 8 Ind. Cas. 374=13 O.C. 297; 17 C.W.N. 871=17 Ind. Cas. 432; Appl., 20 C.L.J. 107; Exp., 5 C.L.J. 80=11 C.W.N. 163; R., 25 A. 347 (350)=23 A.W.N. 61; 32 A. 479=7 A.L.J. 409=6 Ind. Cas. 113; 24 B. 435 (455); 26 B. 577; 27 B. 266 (270); 29 B. 480=7 Bom. L.R. 497; 28 C. 23=4 C.W.N. 740; 26 M. 673 (678); 32 M. 429=19 M.L.J. 401=2 Ind. Cas. 18; 8 C.L.J. 470; 12 C.L.J. 545=7 Ind. Cas. 481; 16 C.L.J. 566=17 C.W.N. 80=15 Ind. Cas. 668; 11 Ind. Cas. 76=15 P.R. 1912=203 P.L.R. 1911; 7 O.C. 314 (316); 11 P.R. 1906=4 P.L.R. 1906; 56 P.R. 1903=93 P.L.R. 1903 (F.B); 33 B. 105=15 Bom.L.R. 848 (850)=21 Ind. Cas. 330; D., 24 A. 467=22 A.W.N. 116; 74 P.L.R. 1901.]

APPEAL from a decree (26th May 1891) of the Judicial Commissioner of Oudh, reversing a decree (24th March 1890) of the District Judge of Lucknow.

The suit, out of which this appeal arose, was brought on the 29th June 1889 by the late Nawab Mulka Mukhaddara Usma Badshah Mahal Sahiba, the ex-Queen of Oudh, who died on the 3rd April 1894, and who was now represented by her grandson Mirza Karrab-ul-Din, her daughter Dilband Begum, and her executor the Administrator-General of Bengal.

The issues, and this appeal, raised the question,—which of two purchasers who had each purchased at a separate judicial sale, was entitled to the proprietary possession of village Para Kuru in the Barabanki District. The purchaser at an execution sale, in whose right the plaintfff, and, after her death, her representatives now respondents,

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claimed this property, was one Hakim Mahomed Masih, the ex-Queen's judgment-debtor, by a money decree, whose estate she had after his purchases caused to be attached in execution. The rival purchaser was Moti Lal, now appellant, who had purchased the same village at a sale in execution of another decree, that sale having taken place after the one at which Masih had bought.

On the 2nd November 1880, Mussamat Sahib-un-Nissa obtained a money decree against Ashgar Ali, who was the original owner and mortgagor of village Para. The subsequent charges and decrees, which affected that village, are mentioned in their Lordships' judgment, with all the other facts necessary to be known in this case. In satisfaction of Sahib-un-Nissa's decree, village Para was sold on the 21st August 1882, for Rs. 18,600 to the above-mentioned Masih, on whose title, thus obtained, rested the claim of the present respondents. Masih obtained an order under s. 318 of the Civil Procedure Code. But the proceedings of the second purchaser of Para interfered with him at this point.

[181] On the 3rd March, Para was attached in execution of a decree held by the heirs of Agha Hossein Khan, mortgagee, under one of the incumbrances above referred to; and Masih on the 21st July 1884 brought his suit against them to have it declared that the village was not subject to the attachment so obtained. While Masih's suit was pending, the heirs of Agha Hossein obtained, under the attachment of March 1883, an order for the sale of the village; and it was sold, on the 22nd October 1884, for Rs. 2,400, to the defendant Moti Lal, now appellant, who obtained possession. Masih's suit was dismissed in the Court of first instance, but, on appeal, his heirs, he having died, obtained a decree, made by the Judicial Commissioner on the 4th November 1885, declaring the validity of the sale of the 21st August 1882 to Masih.

The prayer of the plaint in the present suit was for a declaration that the sale of 22nd October 1884 was invalid as against Masih, and his heirs, through whom the plaintiff made title; also for a declaration that the possession held by the defendant Moti Lal was illegal; also, for a declaration that according to the decision of the 4th November 1885, between Masih, on the one side, and the heirs of Agha Hossein on the other, the village Para was the property of Masih; and that it was liable to attachment and sale in execution of the decree held by the plaintiff in this suit, in which execution the village had been attached on the 28th December, 1887, as such property.

Defences, amongst others, were that the property could not be claimed by the plaintiff upon Masih's title, as the sale of it to Moti Lal on the 22nd October 1884 had never been set aside, and could not by this suit be set aside with regard to the law of limitation; and that in effect the suit was barred by arts. 12 and 13 of sch. II of the Limitation Act XV of 1877.

The District Judge upheld this defence, and dismissed the suit.

The Judicial Commissioner, with the Additional Judicial Commissioner, heard an appeal which was preferred by the representatives of the plaintiff from the decree of the District Judge, whose decision they reversed. They granted the decree claimed. In their judgment the suit was not barred by limitation, but was maintainable, without there having been any necessity for any [182] order, or any decree, setting aside the sale to Moti Lal. The main reason for this was that nothing had passed to him as a purchaser at that sale. In their opinion also (both of them delivering separate judgments on these points) the Judicial Commissioner's decree of the 4th November 1885, with regard to the date of the second sale, after

the commencement of the suit in which that decree was made, was binding upon Moti Lal as a purchaser *pendente lite*. The principle was applicable here that a purchaser of the property contended for in a suit pending at the time of his purchase should not be free from the effect of the decision.

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The Judges referred to *Saroda Prosaud Mullick* v. *Lutchmeeput Singh Doogur* (1); *Prangour Mozoumdar* v. *Himanta Kumari Debya*(2); *Lalu Mulji Thakar* v. *Kashibai* (3); *Janki Das* v. *Badrinath*(4); *Gobind Chunder Roy* v. *Guru Charan Kurmokar* (5); and *Saroda Churn Chuckerbutty* v. *Mahomed Isuf Meah* (6).

On this appeal by the representatives of the plaintiff,—

Mr. *J. H. A. Branson*, for the appellant, argued that the purchase by Moti Lal on the 22nd October 1884 ought to have been held in the Court below to have carried the title to the purchaser, Masih's title was already not enforceable when the plaintiff in this suit attached the village as his property on the 28th December 1897. This was so in virtue of art. 13 of the sch. II of Act XV of 1877, no suit having been brought to set aside the sale of the above date within one year. It had been decided below that, as a purchaser *pendente lite*, Moti Lal had been bound by the decree of 1885 in Masih's favour. But the distinction between voluntary alienation, *pendente lite*, and involuntary alienation, or transfer in due course of law, during the pendency of a suit, should be observed. He referred to the judgment in *Sedgwick* v. *Cleveland*(7) and to *Turner* v. *Wight* (8); **[183]** Story's Eq. Pleading, chap. VII, para 351; Mitford on Pleading by Jeremy, 73. But, even if it should be considered that the appellant's right was affected by the decree of the 4th November 1885, notwithstanding that he had not been made a party to it, still the appellant could rely on the attachment of March 1883, which was anterior to the commencement of Masih's suit in July 1884. Regarding arts. 12 and 13, sch. II, Act XV of 1877, reference was made to *Sadagopa* v. *Jamuna Bhai Ammal* (9): *Mahomed Hossein* v. *Purundur Mahto*(10). As to a suit to establish a right being distinct from a suit to set aside a sale, *Ayyasami* v. *Samiya* (11); and *Shivaji Yesji Chawan* v. *The Collector of Ratnagiri* (12) were referred to. Regarding limitation generally in a suit by a purchaser at an execution sale —*Anundo Moyee Dossee* v. *Dhonendro Chunder Mookerjee*(13). As to attachment—*Kishory Mohun Roy* v. *Mahomed Mujaffar Hossein* (14).

Mr. *J.D. Mayne*, and Mr. *A. Phillips*, for the Administrator-General, respondent, were not called upon.

JUDGMENT.

Afterwards, on 3rd July, their Lordships' judgment was delivered by

LORD HOBHOUSE.—The plaintiff in this cause, now dead and represented by the respondents in the appeal, was formerly Queen of Oudh; and she sued to assert her right to a village in Oudh called Para Kuru. The Court of the Judicial Commissioner has maintained her suit, reversing the decision of the District Judge who dismissed it. The village has been the subject of almost incessant litigation, and of numerous judicial orders, during some twenty years, and its legal history is very complicated. But though it has been necessary to examine all the previous proceedings in order to ascertain the true effect of the orders and transactions which now

(1) 14 M.I.A. 529 = 10 B.L.R. 214. (2) 12 C. 597. (3) 10 B. 400.
(4) 2 A. 698. (5) 15 C. 95. (6) 11 C. 376.
(7) (1838) 7 Paige, New York Ch. Rep. 287. (8) (1841) 4 Beav. 40.
(9) 5 M. 54. (10) 11 C. 287. (11) 8 M. 82.
(12) 11 B. 429. (13) 14 M.I.A. 101 = 8 B.L.R. 122. (14) 18 C. 188.

1897 JULY 3.

PRIVY COUNCIL.

25 C. 179 (P.C.) = 24 I.A. 170 = 1 C.W.N. 639 = 7 Sar. P.C.J. 222.

govern the case, it will be sufficient for this judgment to touch only on a few of them.

In the year 1870 a Mahomedan gentleman named Ashgar, being then the sole recorded proprietor of the village, mortgaged [184] it to one who in this discussion has been called Agha. Asghar afterwards granted the village by way of gift to his nephews Yusuf and Nasim, who again mortgaged it to Agha.

In the year 1879 one Sahib-un-Nissa filed a plaint against Agha and Yusuf, claiming to be a creditor of Asghar and to have a charge on the village for her debt: and on the 22nd of November 1880 she obtained a decree to that effect. Under that decree a sale took place, at which Hakim Mahomed Masih purchased the right and interest of the judgment-debtor, who according to the heading of the sale-certificate was Asghar. Nasim was not made a party to the suit. This sale was effected on the 24th August and was confirmed on the 14th November 1882. On it the plaintiff founds her claim. Her right to recover the village if it was, and remained, the property of Masih, is not disputed. What the defendant contends is that Masih's title was destroyed by events subsequent to 1882.

On the 20th March 1883 Agha obtained a decree against Yusuf and Nasim on the mortgage effected by them; and he went on to enforce execution. On the 19th June 1883 Masih put in a claim which, being disallowed in execution, he had to enforce by suit. Accordingly on the 28th July 1884 he instituted a suit against the heirs of Agha who was dead, and against Yusuf and Nasim. He prayed for a decree in these terms:—

"That a decree entitling and declaring the proprietary right of the plaintiff to the village Para Kuru * * * be granted to the plaintiff to the effect that the village aforesaid is not liable to attachment and sale in the decree of Agha Haidar Husain, deceased, dated the 20th March 1883, as the property of defendants Nos. 4 and 5, and that the defendants be made to pay the plaintiff's costs."

On the 4th November 1885 the Judicial Commissioner made an order by which a decree of the District Judge was reversed and the plaintiff's appeal and original claim were decreed. Masih was then dead, but the suit had been continued by his heirs.

In the meantime the heirs of Agha had prosecuted their proceedings in execution of his decree of 20th March 1883. On the 22nd October 1884 the village was put up for sale, and was purchased by the defendant Moti, who either was then in [185] possession or obtained it afterwards. It is contended by the defendant that this sale must be set aside before the plaintiff's right can be established.

It may be as well here to dispose of a very extraordinary contention set up for the defendant. He bought whatever interest belonged to the heirs of Agha who were mortgagees, and to Yusuf and Nasim who were mortgagors. But three months before he bought, Masih had instituted his suit against those very persons to establish his title against them, and it was established by the decree of November 1885. Is it possible for the defendant to allege that, as against Masih or his heirs, the heirs of Agha or Yusuf or Nasim had any interest to convey to him? The District Judge holds that the defendant is free from the decree because he was no party to the suit, and because the transfer to him was made prior to the decree. If that were law, it is difficult to see in what cases a pending suit would be any protection; and Mr. Branson very properly declined to argue in support of that view. But then he could not assign any

reason for avoiding the force of the decree except that Agha's attachment was prior to Masih's suit. Attachment, however, only prevents alienation, it does not confer title; and even if it did, the interest so acquired would be that of Agha or his heirs, who were defendants in Masih's suit. It is too clear for argument that the decree of November 1885 binds the interest of Agha, Yusuf and Nasim, and of all persons claiming under them by transfer subsequent to the 28th July 1884.

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After Masih's death litigation broke out among his heirs, and an order in execution proceedings was made for placing one of them named Amina in possession of one-third of the village. Under colour of that order she disturbed the possession of Moti, and he applied in the execution proceedings to protect it. The District Judge by order, dated 1st November 1886, allowed Moti's application, saying that the decree of 1885 was not binding on Moti, "at any rate in the present execution proceedings in a suit between heirs." His language, though elliptical, points to a sound ground for his decision. It was obviously irregular and illegal for Amina to use an order made as between her and her co-heirs, for the purpose of dispossessing one who was a stranger to Masih's [186] estate and to the litigation between his heirs. The decree of 1885 had nothing to do with the matter.

The cause was heard first before the District Judge who decided adversely to the plaintiff. First he held that the suit is one to set aside the order of November 1886, and that so it falls within art. 13 of the Limitation Act and, not being brought within a year of the order is barred by time. But the suit does not pray, and the plaintiff need not pray, any relief of that sort. The order, remains wholly unaffected. It was quite right to hold in November 1885 that Amina had wrongfully disturbed Moti's possession; but the right of Masih or of anybody claiming under him to bring a suit within any time allowed by law for suits to recover property was quite unaffected by that.

Then the learned Judge holds that the suit is barred by art. 12 of the Limitation Act, because it is, or ought to be, one to set aside the sale of 22nd October 1884. But the suit is founded on the fact that prior to that sale a valid sale of the same interests had been made to Masih, and that Moti took nothing because nothing was left to pass to him. The sale is not set aside, but is found not to affect the rights of the plaintiff derived from Masih. The sale does not purport to pass the rights of Masih or of the plaintiff, but those of the mortgagee Agha and the mortgagors Yusuf and Nasim, against whom Masih established his prior rights. Between setting aside a sale and holding that the plaintiff's rights are not affected by it, there is a wide difference.

The Judicial Commissioner and Assistant Judicial Commissioner have concurred in holding the District Judge's views to be erroneous, and as their Lordships are of the same opinion they will humbly advise Her Majesty to dismiss the appeal. The appellant must pay the costs of the Administrator-General of Bengal who defended this appeal.

Appeal dismissed.

Solicitors for the appellant: Messrs. *Barrow & Rogers.*

Solicitor for the respondent, the Administrator-General of Bengal: Mr. *J. F. Watkins.*

C. B.

1897
JULY 8.

PRIVY
COUNCIL.

25 C. 187
(P.C.)=
24 I.A.191=1
C.W.N.649=
7 Sar. P.C J.
247.

25 C. 187 (P.C.)=24 I.A. 191=1 C.W.N. 649=7 Sar. P.C.J. 247.

[187] PRIVY COUNCIL.

PRESENT:

Lords Hobhouse, Macnaghten, and Morris and Sir R. Couch.

[*On appeal from the High Court at Fort William in Bengal.*]

SUMBHU NATH SANTRA MAHAPATRA AND OTHERS (*Plaintiffs*) *v.* SURJAMONI DEI AND OTHERS (*Defendants*). [8th July, 1897.]

*Privy Council, Practice of—Costs of respondents—Printed cases—*Ex-parte *hearing.*

The respondents in four appeals, which were consolidated and heard as one, filed their printed case, and did not appear at the hearing, which was *ex-parte.*

Held, that the respondents, notwithstanding their non-appearance, were, on the dismissal of the appeal, entitled to the costs thereof up to, and including the filing of their printed case; and also to the cost of applying for those costs.

FOUR consolidated appeals from four decrees (13th September 1890), of the High Court, affirming four decrees (31st December 1887) of the Subordinate Judge of Cuttack.

The questions arising in all the four suits were identical, and in the order of the High Court admitting the last three appeals it was recorded that the plaintiff (appellant) undertook that the decision of them would depend upon the orders passed in the first appeal.

The suits were filed by the same appellant, on dates from 1886 to 1891, to establish his right to the possession of the estate of Bonomali Mahapatra, who died in 1863, the husband of Srimati Surjamoni Dei. Litigation after his death as to that estate took place, and a suit was dismissed, which is reported in L. R., I. A. Sup. Vol. 212, and 12 B. L. R. 205.

In these suits the allegation was that Bonomali, on the day of his death, gave an oral authority to Surjamoni to adopt a son, and that she adopted Sumbhu Nath; but that she afterwards without right made sales of the family estate. The respondents in the last three suits were alleged purchasers of portions.

The three principal issues, relating to the authority to adopt, and the fact of adoption, were treated by the Courts below as questions of fact, and they concurred in holding that the affirmative had not been proved in any one of them.

[188] On this appeal, which was heard *ex parte*, Mr. *C.W. Arathoon*, appeared for the appellant.

The respondents had filed their printed case, which, among other defences, submitted that there was nothing to take the appeal out of the ordinary rule as to the effect of concurrent judgments on questions of fact, and referred to s. 596 of the Civil Procedure Code.

The appeals were dismissed.

Afterwards, Mr. *Herbert Cowell*, for the respondents, applied, on notice to the appellant, that the costs of the printed case should be borne by the appellants. He cited *O'Shanassy* v. *Joackim* (1).

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(1) (1876) L. R., 1 App. Ca. (H. L.) 82 (90).

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JUDGMENT.

Their Lordships' judgment was delivered by

LORD MORRIS.—In this case appeals have been lodged on the part of the appellants although there have been concurrent findings of two Courts in India, the District Court and the High Court, on matters of fact. There were three questions submitted: First whether the widow Sirmati Surjamoni Dei was the donee of a power of appointment by her husband, Bonomali Mahapatra, to adopt a son; second, whether she had adopted a son (that of course was on the assumption that she had a power to adopt, for it must have been a valid appointment); and, thirdly, whether she had treated the appellant as her adopted son. Both Courts have found there was no power of adoption granted by her husband. The alleged power to adopt was said to have been given orally, and the witnesses were examined in support of that allegation, but they were not believed, and consequently it must be taken that the widow had no power. The contentions Nos. 2 and 3 of themselves can give no estate to the appellant, because if this lady had no power to adopt she could not validly adopt. As to the further contention attempted to be raised—namely, that by the lady having treated the appellant for a great many years as an adopted son she is, as it is alleged, estopped from disputing that he is her adopted son and that she had a valid power of adoption—whatever value it may have as regards the question whether she did adopt as a matter of fact, it is no [189] evidence at all to show that she had been entrusted by her husband with a power of adoption; that depended on evidence entirely outside the question of her acts. Otherwise any widow could, by a system of treating an alleged adopted son as such, validate a transaction which she had no power of entering into.

Now at the bar it has been urged that the widow has treated Sumbhu Nath Santra in such a manner that she should be considered during her life to have placed him in her own position as the owner of this property. Supposing it would be so considered (upon which they refrain from giving any opinion) there has been no such allegation made in the plaint. There is no such question indicated either before the District Judge or in the Court of Appeal, and therefore the question cannot be raised here.

Their Lordships must therefore, humbly advise Her Majesty that these appeals should be dismissed with the costs of the respondent Srimati Surjamoni Dei up to and including the lodgment of the case, and the appearance of Mr. Cowell on this occasion to ask for these costs.

Appeals dismissed.

Solicitors for the appellants: Messrs. *T. L. Wilson & Co.*
Solicitors for the respondents: Messrs. *Barrow & Rogers.*

C. B.

1897
JULY 9.

PRIVY COUNCIL.

25 C. 189 (P.C.) = 24 I.A. 183 = 1 C.W.N. 697 = 7 Sar. P.C.J. 249.

25 C. 189 (P.C.) = 24 I.A. 183 = 1 C.W.N. 697 = 7 Sar. P.C.J. 249.

PRIVY COUNCIL.

PRESENT:

Lords Hobhouse, Macnaghten and Morris and Sir R. Couch.

[*On appeal from the High Court at Fort William in Bengal.*]

DHARAM CHAND LAL (*Plaintiff*) *v.* BHAWANI MISRAIN AND ANOTHER (*Defendants*). [9th July, 1897.]

Privy Council, Practice of—Concurrent judgments on fact—Hindu Law—Alienation by one of two co-widows—Want of legal necessity.

Two widows of the same husband, each having inherited her undivided share in the inheritance, disputed as to their rights therein. They then settled their dispute by a compromise, in which it was agreed that each had obtained "absolute proprietary right" in her share as a co-widow, and that division had been made between them. Having no power by this to affect the rights of the successor to the estate, on their deaths, each was entitled to her share for her widow's estate only. Upon a mortgage made by the elder widow before her death, the mortgagee now claimed, not only the interests of **[190]** both the widows, and thus to deprive the younger who had survived the other, of her interest during her life, but also claimed a charge on the estate of inheritance in the land mortgaged.

Against the competency of the elder widow to charge the estate of both and to bind the reversioner, both Courts below had decided. They had found that there had been no justifying necessity established by the evidence for the mortgage.

These concurrent findings having been accepted by the Judicial Committee as correct in regard to the absence of necessity for the mortgage, they saw no occasion to say anything about any other questions, as to the competency of the elder widow to mortgage the whole estate in the way in which she did.

[Rel., 6 C.L.J. 490 (514); Appl., 20 C.L.J. 23 (28) = 25 Ind. Cas. 84.]

APPEAL from a decree (13th June 1893) of the High Court, affirming a decree (26th November 1891) of the District Judge of Purneah.

The appellant, a *mahajan* in Purneah, brought this suit on the 13th April 1891 against Keswanand Misser, executor under the will of Mussamat Saraswati Misrain, who died in 1890. A co-defendant with this executor was Bhawani Misrain, co-widow with Saraswati, of their late husband Sobh Nath Misser, who died in 1870. Keswanand did not appear in this suit, which was defended by Bhawani alone; and she was now sole respondent. After the death of Sobh Nath, who left land in Purneah chiefly held in *putni* tenure, the two widows, disputing as to their rights, were litigants as to whether Saraswati had once borne to her husband a son, who lived but a short time, or not. In the former case, as heir to her son, Saraswati would have taken a life-estate in the whole of her husband's property. In the latter case, which was decided upon by decree on a compromise between them, the widows took shares in the family estate. This was agreed to, while the suit between them was pending in the High Court, which made a decree, in accordance with the terms arranged between the parties, on the 2nd May 1871, Saraswati taking a ten-anna and Bhawani a six-anna share. Each in her share, as far as their agreement could declare, was to have complete proprietary right. Their agreement on this point is set forth in their Lordships' judgment, where all the facts appear.

On the 12th May, 1884, Saraswati executed, and presented for registration by her nephew and agent Bansi Lal Jha, a mortgage **[191]** bond

securing repayment of Rs. 7,000 to Dharam Chand Lal in one year with interest at 12 per cent. mortgaging specified lands of the estate. Again, on the 6th May 1885, she executed a similar mortgage to him for Rs. 4,000. These in identical terms recited the necessity of paying off, out of the money so to be raised, the rent of *putni mehals* for the second period of the Bengali year 1291, and to pay off debts due to *mahajans* at higher rates of interest.

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Saraswati, who died in 1890, had made a will appointing Keswanand Misser her executor. After her death there was a contest between Bhawani Misrain, who, as surviving widow, claimed administration of the share that had belonged to Saraswati, and Keswanand, who claimed it under the will, as part of the estate of Saraswati. This was decided in the District Court of Purneah in a suit brought by Bhawani against Keswanand, which ended in a decree in Bhawani's favour, dated the 25th April 1891. It was decreed that Bhawani was entitled by right of survivorship to succeed to what might be left of the estate that had devolved from their husband Sobh Nath in Saraswati's possession at her death, his property having been inherited by the two widows for their lives. It was also decreed that Bhawani was entitled to a grant of administration of the property left to Saraswati.

In 1891 the plaintiff brought the present suit against Keswanand and Bhawani to enforce his claim for Rs. 22,748, against the property which Saraswati had purported to mortgage. Bhawni Misrain, who alone appeared, filed a written statement, in which she alleged, among other defences, that there were no circumstances of necessity to justify Saraswati's mortgages of her deceased husband's estate.

The issues are stated in the judgment on this appeal.

The District Judge dismissed the suit. He rested his judgment on three grounds: *First*, that the mere existence of a debt would not justify a loan binding the reversionary estate, without evidence of a necessity properly justifying it, or of inquiries made, and representations offered, in which such a case had been put forward and believed. *Secondly*, that the terms of the bonds did not indicate any intention by Saraswati to pledge any estate beyond her own. *Thirdly*, that no act by one widow, without **[192]** the consent of the other, could defeat the survivorship of that other.

On the appeal of Dharam Chand Lal against this decree, the High Court (O' KINEALY and AMEER ALI, JJ.) affirmed the judgment of the Court below, finding as a fact, in concurrence with that Court, that there had been no evidence of any legal necessity, nor of any inquiries by the plaintiff as to the existence of such necessity for the loan.

Dharam Chand Lal appealed.

Mr. *A. Phillips* and Mr. *C. W. Arathoon*, for the appellant, contended that the evidence showed that in advancing the mortgage money the mortgagee had, on reasonable grounds, given credit to the assertion that the money was wanted by the widow Saraswati for one of the recognised necessities, justifying a mortgage by a widow, which therefore became binding on the whole estate mortgaged. The estate of Bhawani for her life was chargeable in respect of any sums that might be found to have been used, after having been raised on Saraswati's mortgages, for paying off rent due on her share of the *putni* tenures, and joint liabilities having been satisfied, the life-estate of Bhawani Misrain was chargeable.

At the conclusion of the argument for the appellant, their Lordships, without calling on Mr. *J. D. Mayne*, who appeared for the respondent Bhawani Misrain, affirmed the judgment of the High Court.

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JUDGMENT.

Their Lordships' judgment was delivered by

SIR R. COUCH.—The facts in this case are that one Sobh Nath Misser. died about twenty years ago—the precise date of his death does not appear—and left two widows, one Saraswati Misrain and the other Bhawani Misrain. After his death disputes arose between the widows as to their rights, and a compromise was come to, the terms of which are stated in a previous judgment which is set out in the proceedings and which seems to have been taken admittedly as correct. The statement is this: "And in respect of our respective shares each party has obtained absolute proprietary right of every sort and division had been made and will be made as below; and, except in respect of the matter noted [193] below, niether party has any claim against any other." This compromise could only apply to the shares to which the two widows were entitled as widows. They had no power, by a compromise between themselves, to affect the rights of the successor to the estate on their death, and so far under the compromise they simply were entitled to their shares as for what is called the widows' estate.

Saraswati died in 1890, and the suit is brought against her executor and the surviving widow Bhawani upon two mortgage bonds amounting together to Rs. 11,000 but the amount now claimed, including the arrears of interest, being Rs. 22, 748. The prayer of the plaint is that an order may be given that if the defendants do not pay within a certain time the properties mortgaged and pledged in the bonds may be sold, seeking to charge, not only the interest of the widows who made these mortgages, but the whole estate, and to affect the right of the persons who on the death of the surviving widow would be entitled to the estate and also to deprive Bhawani, the surviving widow, of her interest during her life.

The issues were framed raising expressly the two important questions in the case. The first was whether the bonds were duly executed, as to which there was no question. The second and third raised the real questions: "Do the bonds, by reason of legal necessity or other cause bind the estate of the late Sobh Nath Misser, or only the personal estate of the executant? Is Mussamat Bhawani Misrain liable for the claim, and to what extent?" Upon these issues the District Judge found very expressly. He says: "Here plaintiff fails to show that there was any real necessity for the advances or that any one told him that there was such real necessity, and that the tenures could not be saved without the loans." Upon that finding he dismissed the suit as against Bhawani and made a decree against the executor of Saraswati, and if Saraswati left any property it may be available to pay the claim of the plaintiff.

From that decree there was an appeal to the High Court, and in their judgment, after saying that it had been urged that legal necessity had been fully established, from which it is plain [194] the learned Judges had that present to their minds, they say: "There is nothing to show that at the time these sums were borrowed there was no money in the coffer or what had become of the large amount Saraswati had admittedly received upon the death of their husband." Then they go on to consider the question whether an inquiry had been made by the plaintiff, and they find that he did not make the inquiry which it was necessary for him to make in order to establish his right to recover the money in case there had been in fact no necessity. Both questions

are distinctly found by the High Court against the plaintiff, and the decree of the District Judge dismissing the suit is affirmed.

That disposes of the whole of the questions in the case. It is unnecessary to say anything about any other question that might arise with regard to the competency of Saraswati to mortgage the whole of the property in the way in which she did. The case is clearly one in which upon the material questions of fact both Courts concur in finding against the plaintiff and very properly dismiss the suit.

Their Lordships will therefore humbly advise Her Majesty to dismiss the appeal, and the appellant will pay the costs of it.

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PRIVY COUNCIL.

25 C. 189 (P.C.) = 24 I.A. 183 = 1 C.W.N. 697 = 7 Sar. P.C.J. 249.

Appeal dismissed.

Solicitors for the appellant: Messrs. *T. L. Wilson & Co.*

Solicitors for the second respondent Mussamat Bhawani Misrain. Messrs. *Miller, Smith & Bell.*

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25 C. 194 (P.C.) = 24 I.A. 177 = 1 C. W. N. 698 = 7 Sar. P. C. J. 226.

PRIVY COUNCIL.

PRESENT:

Lords Hobhouse, Macnaghten and Morris and Sir R. Couch.

[*On appeal from the High Court at Fort William in Bengal.*]

MANMATHA NATH MITTER AND ANOTHER (*Plaintiffs*) v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL AND OTHERS (*Defendants*). [30th June and 24th July, 1897.]

Land Acquisition Act (X of 1870). ss. 13, 24, and 25—Valuation of land acquired for public purposes—Time of acquisition—Award of compensation.

When land has been acquired, under the provisions of the Land Acquisition Act, 1870, changes in its condition, between the time of such acquirement and that of the actual conclusion of the award of compensation, are not to increase, or lessen, the valuation.

[195] The provision in s. 25 points to ascertaining the value at the time when the land is acquired, the right to compensation being simultaneous with the right to the land attaching to the Government.

At the time when, according to the claim, the right to certain plots of land attached to the Government, the sub-soil had no market value, because the surface was in use for public roads, having been so for about half a century.

Held, that, even if the claimants had proved a title in themselves to the subsoil of the plots underneath the roads, still no market value had been shown to belong to that subsoil within the meaning of ss. 13 and 24 of the Land Acquisition Act, 1870, at the time of the right therein attaching to the Government for a public purpose: therefore, compensation had been rightly disallowed.

[R., 31 C. 839 (843); 18 Ind. Cas. 953 = (1913) M.W.N. 275; 13 C. W. N. 1046 (1049); D., 33 C. 1290 = 4 C.L.J. 343 = 10 C.W.N. 1044.]

APPEAL from a decree (8th May 1895) of the High Court, reversing a decree (22nd March 1893) of the First Subordinate Judge of the 24-Pergunnahs.

This suit was brought by the plaintiffs, appellants, upon the refusal by the Commissioner to order compensation to them for four plots of land acquired by the Government under the Land Acquisition Act, 1870, in 1886, for part of the area occupied for the docks at Kidderpore. The defendants, respondents, were: (1) the Government, under their statutory title, and (2) the Commissioners for making Improvements in the Port of

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PRIVY
COUNCIL.
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25 C. 194
(P.C.) =
24 I.A. 177 =
1 C.W.N.
698 = 7
Sar. P.C.J.
226.

Calcutta. The plots aggregating 19 bigahs, 9 cottahs, and 3 chittacks were alleged by the plaintiffs to have originally been part of their *mouza* Dakhin Sherpur, within their zemindari, and within the revenue-paying lands thereof, settled with their ancestor at the Permanent Settlement, they having succeeded to the zemindari under the will of their grandfather. With the exception of about 68 bigahs the whole of the *mouza* had been acquired by the Government for the construction of the docks. The notification issued in 1886, under the Land Acquisition Act, 1870, apparently included the plots now in question. But the surface of these plots at the time of their being thus acquired for the above purpose, had, for at least about fifty years, and one of them for a longer period, formed part of four public roads, respectively, *viz*, of the Sonye, the Jola, the Taligunge, and the Budge-Budge roads. Thus the surface of the plots had been in the possession of the Government. Two [196] or more of them had been in recent years made over to the Suburban Municipality.

In the Courts below, questions of (1) limitation, (2) of the original title in the zemindar to the plots, and (3) of the value to the plaintiffs of the soil under the roads, were raised. On this appeal the principal question was whether the subsoil had any value or had no value at the time of the acquisition by the Government, who were then already possessed of the surface in use for roads. And the decision of this in the negative rendered it unnecessary to decide the other questions.

On the 15th October, 1890, the Commissioner finally rejected the claim for compensation in respect of all the four plots. The plaint, filed on the 4th November 1891, claimed Rs. 11,210 as the value of the land, with Rs. 3,340 for interest.

The answer of the first defendant put the plaintiffs to proof of their titles; and stated that the Sonye, Jola, and Taligunge roads were "Ferry Fund Roads" from an early date in British administration; and had been made over to the Suburban Municipality about the year 1864. That the Budge-Budge road was made about 1835-40. All the plots were handed over to the Port Commissioners between 1886 and 1888. Act XLII of 1850 was referred to as a defence.

The Port Commissioners answered that possession was given to them of the plots, having been public thoroughfares, for fifty years. The plot in the Taligunge road had never been part of the zemindari. They referred to the general law of limitation, and to Acts XLII of 1850 and Bengal Act III of 1890.

The issues related to limitation, title, and value. Those now material were—"Was the Collector under Act X of 1870 justified in refusing compensation,"—and another relating to compensation "for the value of the land."

The Subordinate Judge decreed in favour of the plaintiffs, allowing compensation in respect of the plots in the Sonye and Jola roads only. He was of opinion that the suit was not barred by the general law of limitation, and that the claim in respect of the land in the Budge-Budge road was [197] barred by ss. 9 and 10 of Act XLII of 1850, providing that "when any land has been or shall be taken by the Government for any public work otherwise than according to Reg. I of 1824, such land, after the lapse of five years, without any claim preferred for the recovery thereof in any competent Court, or under the said Reg. I of 1824, or this Act, shall vest absolutely in the East India Company, freed and discharged from all other claims thereto." As regarded the plot in the Taligunge

road the Subordinate Judge held that it had not been shown to lie within the plaintiffs' zemindari. In this finding the High Court concurred. As to the other plots, he decided that only the one in the Budge-Budge road had been brought by the evidence within the Act of 1850, and that, therefore, in respect of the plots in the Sonye and Jola roads there must be a decree for the plaintiffs. The amount he assessed at Rs. 4,112-1-4 being at the rate of Rs. 20 a cottah.

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The Subordinate Judge was of opinion that the plaintiffs as zemindars of Dakhin Sherpur had a *prima facie* title to all the land in that *mouza*, and that the presumption was that it was *mal*, or revenue-paying land, part of the assets of the zemindari. As to this he cited *Perhlad Scin* v. *Durga Pershad Tewari* (1). This case, however, the High Court pointed out, had no application here, relating to a question of intermediate title. On the question as to the property in the soil underneath a highway, the Subordinate Judge pointed out that the decisions were that it remained in the zemindar after the dedication of the surface for public rights of way. He referred to the English cases on this subject (2), and also to those decided in India, which are mentioned below in the argument on this appeal.

From this decree the defendants appealed, on the ground that the entire claim should have been dismissed. The plaintiffs cross-appealed on the ground that their claim as to the plot in the Budge-Budge road should have been decreed, as well as for a larger area in respect of the plots in the Sonye and Jola roads.

On the defendant's appeal, a Division Bench of the High Court [198] (MACPHERSON and BANERJEE, JJ.), dismissed the suit with costs, dismissing the cross-appeal.

Their judgment stated the facts, and continued as follows :—

"The settlement proceeding has not been put in, and there could of course be no evidence as to the possession of the plaintiffs or any one else, for public roads were constructed on the land at a time unknown, but certainly not less than forty or fifty years ago.

"The plaintiffs were put to strict proof of their title, and on the above ground alone their case must fail as regards the whole of the land. It is unnecessary, therefore, to consider the other and more difficult questions raised.

"Assuming, however, that the land is not *lakheraj*, it is by no means clear, in the absence of any proof of the time when the roads were constructed, that the land forms part of the plaintiffs' permanently-settled estate. The survey map of 1841 shows that the three roads were then in existence. There is nothing to show when, by whom, or under what circumstances, the Sonye and Jola roads were constructed. The correspondence put in shows that the Budge-Budge road was part of the main line of communication between Calcutta and Cuttack, the construction of which was sanctioned in 1826, and that the part of the road from Calcutta to Budge-Budge, which was then in existence, was to be utilized. For all that is known, all the three roads may have been constructed as public roads by the ruling power before the Decennial Settlement; and, if so, the mere circumstance that the land lies within their *mouza*, is in itself an insufficient foundation for the assumption that it forms part of their permanently-settled estate. The case might be different if it was proved that the roads were constructed after the Decennial Settlement, or if we knew what the settlement was.

(1) 12 M.I.A. 275 = 2 B.L.R. P.C. 111. (2) Smith's L. C. 6th ed., 136.

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The questions whether the plaintiffs have lost their title to the land, and whether the land, when it ceased to be used as a road, would revert to them, only arise when it is determined that they had a title. It is unnecessary, therefore, to discuss the meaning and effect of ss. 9 and 10 of Act XLII of 1850, and the application of the cases cited. If, however, those sections apply to the Budge-Budge road, it is difficult to see why they should not also apply to the other roads. The difference between them appears to be, that the Budge-Budge road has for many years been what may be called an Imperial road, maintained out of Imperial revenue, while the other roads are what may be called local roads maintained out of local funds; but what they were when constructed it is impossible to say.

"Even if the plaintiffs had succeeded in establishing their title to the land, we should have held that the sum allowed as the value of it was excessive. The Subordinate Judge has valued it at the price fixed for some of the adjoining land. The land as road land had no separate market value; at [199] least no value is proved. The value of the adjoining land was undoubtedly enhanced from its vicinity to the roads, and in that enhanced value it may fairly be considered the plaintiffs have obtained the value of the road land.

"Taking the adjoining land and the road land as one plot, it would be difficult to say that the value of the two together was greater than the value of the former alone, and that the value of the one was not included in that of the other.

"We need not, however, in the conclusion at which we have arrived, consider what the value would be."

The plaintiffs appealed.

Mr. *J. Graham, Q. C.*, and Mr. *J. D. Mayne*, for the appellants, argued that the decision of the High Court against their title was wrong. That Court had also erred in dating the roads from the early period assigned by them; and in throwing upon the plaintiffs, who had shown title as zemindars to the *mouza* Dakin Sherpur, the burden of proving that the plots were an asset of the zemindari, taken by them by devise from their ancestor. The presumption was that the plots were originally part of the permanently-settled lands of the zemindari, and the suggestion that the roads, (1) or some of them, might have existed before the Decennial Settlement, was not supported by any sufficient evidence. The ground taken by the Subordinate Judge should be supported, at all events, as to the conclusion that, as there was no date established for the making of the roads, there was a presumption of a dedication to public use by the original owner; and that when the land was used for purposes other than those of highways, the ownership of the plots reverted to the successors of the grantor. Thus the plaintiffs would be entitled, when this suit was brought, to compensation, the roads having been, at the time of its being awarded in respect of the adjoining land, already broken up, and the plots having been set free from the original dedication. Compensation, refused in the ordinary course, was claimable in this suit, and had been rightly assessed in the first Court, at the same average value as that of the adjoining land. It had been rightly adjudged in the first Court that he who dedicates to the public a way for their use retains to himself the land below the surface, unless the property is vested by some [200] enactment in another person—*The Mayor of Tunbridge* v. *Baird* (1).

(1) (1896) L. R. 4 Ap. Ca. H. L. 434, and in the Court below, 2 Q.B. 867, (883).

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Reference was also made to *Vestry of St. Mary Newington* v. *Jacob* (1); *Vestry of St. George the Martyr* v. *Roll* (2); *Nihal Chand* v. *Azmat Ali Khan* (3); *Tota* v. *Sardul Singh* (4); *Chairman of Naihati Municipality* v. *Kishori Lal Goswami* (5).

Mr. *A. Cohen.*, *Q.C.*, and Mr. *A. Phillips*, for the respondents, supported the decree of the High Court, relying mainly on the construction of the Land Acquisition Act (X of 1870) as to the assessment of compensation upon the value of the property acquired under it. That value should be the market value of such land at the time of the acquisition of the plots. The question was raised by the issues. The value was not to be taken from what the property might have been worth at a date subsequent to its acquirement by the Government, but at the period when the surface was still in use for roads. Of that subsoil, according to the evidence, there was no market value; and, therefore, no compensation could be assessed thereupon. In order to make good their claim, as laid by them, the appellants should have shown that before the acquisition under Act X of 1870, the public use of the roads had been abandoned, so as to have set free, from the dedication of the surface to the use of the public, their original title to the subsoil. There had been no evidence of this having happened before the acquisition. The Act on a true construction of ss. 24 and 25 provided for compensation based upon value at the time of the acquisition, but whatever was done, in the way of the change in the mode of using the plots, was done after they had been acquired by the Government. Reference was made to *Stebbing* v. *The Metropolitan Board of Works* (6).

Mr. *J. Graham*, *Q. C.*, replied.

Afterwards on the 24th July, their Lordships' judgment was delivered by:—

JUDGMENT.

[201] Lord Hobhouse.—The question raised in this appeal is whether the appellants, who were plaintiffs below, are entitled to compensation for land taken by the Government of India for the purpose of making a dock. The land consists of three plots, being respectively portions of three public roads within the ambit of a *mouza* belonging to the plaintiffs. A large quantity of the plaintiffs' land in the *mouza* has also been taken and their compensation awarded. The land now in question is less than 20 bighas. The evidence shows that the roads were in use, two about fifty years ago, and one about 70; how much longer is left to conjecture.

The Subordinate Judge decided partially against the plaintiffs and partially in their favour. As to some 7 bighas in the Budge Budge road, he held there was evidence to show that it was "taken" by the Government within the meaning of Act XLII of 1850, and that the title of the Government became indefeasible five years after the taking. As to the remaining 13 bighas in the two other roads, he held there was no such evidence, and that they formed part of the assets of the village included in the settlement with the plaintiffs' predecessors. He further held that as there is no evidence of the origin of the roads, there must have been a dedication of the land by the owner for the purpose of a highway; and that theory has been supported at this bar by the plaintiffs' counsel. From that he infers that when the land was otherwise used, *viz.*, for the

(1) (1872) L. R. 7 Q. B. 47.
(2) (1880) L. R. 14 Ch. D. 780.
(3) 7 A. 362.
(4) 10 A. 553.
(5) 13 C. 171.
(6) (1870) L. R. 6 Q. B. 37.

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purpose of a dock, it reverted to the grantors, and that they are entitled to recover possession as in fact they ask by their plaint. His decree, however, is not for possession but for the money equivalent of the land. That he assessed at Rs. 4,112, being the same average value as that of the adjoining land, of which the plaintiffs had full enjoyment.

Both parties appealed to the High Court ; the plaintiffs in respect of the Budge-Budge road, and the defendant in respect of the two other roads. The High Court thought that, as there is no evidence that the roads were made subsequently to the Permanent Settlement, the plaintiffs had shown no title, and the speculation of the Subordinate Judge as to dedication and reverter of the land had no foundation. They also held that the Subordinate Judge was wrong in his valuation ; that the land as road [202] had no separate market value, or at all events that none was proved. Reversing the decree, they dismissed the suit with costs.

Their Lordships think the High Court so clearly right on the questions of value that they do not enter into the questions affecting the plaintiffs' title. The land was taken for a public purpose under the provisions of the Land Acquisition Act, 1870, and the plaintiffs' right is not to recover the land but to claim compensation for it. By ss. 13 and 24, the market value of the land at the time of awarding compensation is to be taken into consideration. It is not suggested that there is any market value of these lands as roadways. Mr. Graham argues that when the compensation was awarded in this case the roads had been broken up, and therefore the Subordinate Judge rightly valued the land as belonging absolutely to the plaintiffs, free from the burden of the roads and capable of being used for any purpose. In their Lordships' opinion that would be a very unreasonable construction of the Act. There is an express provision in s. 25 that the Assessor shall not take into consideration any increase to the value of the land acquired likely to accrue from the use to which it will be put. That points to the time when the land is acquired as the time for ascertaining its value. Independently of that provision it would lead to very strange and capricious results if changes in the condition of the land between the time when it was taken and the actual conclusion of the award were to increase or to lessen its value. The time of awarding compensation must be construed as meaning the time of compensation, the time at which the right to compensation attaches. At that time these plots of land were roadways ; and the plaintiffs are claiming for a supposed loss of value which had no existence when the ownership of the land was changed.

Their Lordships will humbly advise Her Majesty to dismiss the appeal with costs.

Appeal dismissed.

Solicitor for the appellants : Mr. *Augustus C. Bell.*

Solicitors for respondents : Messrs. *Sanderson, Holland, Adkin & Co.*

25 C. 203.

1897
MAY 1.

APPELLATE CIVIL.

25 C. 203.

[203] APPELLATE CIVIL.

Before Mr. Justice Trevelyan and Mr. Justice Stevens.

PRYAG SINGH (*Decree-holder*) v. RAJU SINGH AND OTHERS (*Judgment-debtors*).* [1st May, 1897.]

Limitation—Application for ascertainment of mesne profits—Decree for possession and mesne profits—Effect of striking off application for execution—What are proceedings and orders "in execution of decree."

An application for delivery of possession of land decreed and for ascertainment of mesne profits was made in 1892, more than three years after a previous application for the same purpose, and was "struck off" for non-service of notice. On a fresh application for ascertainment of mesne profits in 1895.

Held, that that portion of the proceeding or order of 1892 which related to mesne profits was not one "in execution of decree;" that under the circumstances the present application was not barred by that proceeding or order; and that the application was not barred by limitation, although the claim to possession was barred.

Puran Chand v. *Roy Radha Kishen* (1), followed; *Bunsee Singh* v. *Nuzuf Ali Beg* (2), distinguished.

[N.F., 24 B. 149; N.Appl., 36 M. 104=10 Ind. Cas. 552=21 M.L.J. 546=10 M.L.T. 69=(1911) 2 M.W.N. 93; R., 16 C.L.J. 3=15 Ind. Cas. 709.]

THIS appeal arose out of a decree for possession of land and mesne profits finally confirmed by the High Court on the 10th August 1886. The first application for delivery of possession and mesne profits made on the 27th November 1888 was rejected. The next application was found to have been made on the 21st August 1892 more than three years after the previous one was made. This application, however, was "struck off" for want of proof of due service of notice on the judgment-debtors. The last application was for ascertainment of mesne profits only, and was made on the 20th August 1895. The judgment of the District Judge on appeal was as follows:—

[204] "It seems to me that the application is out of time. The decree-holder admittedly never got possession of the land for which mesne profits are claimed. It is urged for the judgment-debtor that until possession is obtained the application cannot be entertained—*Bunsee Singh* v. *Nuzuf Ali Beg* (2), and that the decree-holder no longer had a right to obtain possession. I think this contention is sound. It appears that on the 21st August 1892, the decree-holder applied for possession as well as for mesne profits, and that the application was dismissed. This order for dismissal is final."

The decree-holder appealed to the High Court.

Babu *Uma Kali Mookerjee*, for the appellant.

Dr. *Asutosh Mookerjee*, for the respondents.

The judgment of the High Court (TREVELYAN and STEVENS, JJ.) was as follows:—

JUDGMENT.

The facts necessary to narrate for the determination of this case are not many. A suit was brought for possession of a certain property,

* Appeal from Order No. 380 of 1896, against the order of D. Cameron, Esq., District Judge of Tirhoot, dated the 15th of June 1896, affirming the order of Babu Joya Prosad Panda, Munsif of Somastipur, dated the 31st of March 1896.

(1) 19 C. 132. (2) 22 W.R. 328.

1897 MAY 1. — APPELLATE CIVIL. — 25 C. 203.

and a decree was made on the 10th August 1886 giving a right to obtain possession of 1½ bighas of the property claimed and mesne profits. On the 27th November 1888 an application for execution was made, and on the 21st August 1892, according to the facts found by the Court below, the next application was made. That was an application for possession and for an inquiry as to mesne profits. Our decision must in reality turn on what took place on that application. A notice was issued and rightly so, inasmuch as more than a year had expired since the date of the decree, and inasmuch as the defendant was entitled to notice of an application for an inquiry as to mesne profits. This application, we may observe, was partly an application in execution of decree, that is to say, in so far as it sought for possession of the property. But as pointed out by the decision of the Full Bench in *Puran Chand* v. *Roy Radha Kishen* (1), so far as regards *wasilat*, it is not an application for execution, but an application in the suit, not in execution of the decree but in pursuance of the decree. A proceeding in execution is a proceeding enforcing a decree made requiring a party to do or to abstain from doing some particular thing. It may be that the decree provides for possession or the payment of money. A proceeding in execution means a proceeding to enforce an order [205] already made. The order made in this case was not an order to do a particular thing, as a result of the decree, but an order in the suit directing an inquiry into the mesne profits. That is not a proceeding in execution of the decree. To that extent, therefore, the application was not an application in execution of the decree. The order was as follows : " Notice could not be served on account of want of identifier; no further step is taken. The case is, therefore, struck off."

It is a common practice in the Courts in the districts, when no steps are taken in execution proceedings, to strike off the case from the file. It is necessary in each case to see what is meant by an order striking off the case. If the object is only for the convenience of the Court's work and to ascertain the number of pending cases by taking the case off the list, then such order does not prevent a fresh application. But, on the other hand, if the intention of the Court was thereby to determine a matter in issue between the parties, then it might be that the effect of striking off the case would be to prevent further proceedings. As far as we can see the District Judge has treated this matter as if it was entirely a proceeding in execution of decree, and did not realize the distinction between the two portions of the claim, and that there was one portion which was not a proceeding in execution.

If that was so, it was not his intention to determine the question between the parties. The question remains whether this would operate as a bar to further proceedings in regard to the inquiry into mesne profits. In our opinion it does not. If there had been anything approaching to a determination of the question, then the removal of the case from the file might have operated to prevent a re-consideration of that question ; but, in our opinion, in this case nothing of the kind was done.

A further application was made for the ascertainment of mesne profits on the 20th August 1895. It is quite clear that, having regard to the decision of the Full Bench in *Puran Chand* v. *Roy Radha Kishen* (1) this application is not barred by limitation.

The learned vakil for the respondent says that we ought not [206] to accept a construction of law which would result in keeping alive such

(1) 19 C. 132.

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applications for an indefinite time. But, unless there is any limitation provided by the law, it is not for us to make one. There might be, apart from the limitation which has been contended for, a limitation applicable to a case of this kind. At any rate, it is quite clear that the Court would have power to prevent the abuse of its processes. Every Court has the power to do that. Following the decision of the Full Bench in *Puran Chand* v. *Roy Radha Kishen* (1) we hold that this application was not barred. That disposes of the main portion of the argument.

The learned District Judge has acted on a decision of Phear and Morris, JJ.—*Bunsee Singh* v. *Nuzuf Ali Beg* (2)—and has held that the application could not be made because the applicant has lost his right to possession to the property. That was a decision upon a section of Act VIII of 1859, s. 196, which differed from the terms of s. 211 of the Code of Civil Procedure, which is the law now in force. Section 196 of Act VIII of 1859 is in these terms: "When the suit is for land or other property paying rent, the Court may provide in the decree for the payment of mesne profits or rent on such land or other property from the date of the suit until the date of delivery of possession to the decree-holder with interest thereupon at such rates as the Court may think proper."

The law on the subject now in force, s. 211 of the Code of Civil Procedure, runs thus: "When the suit is for the recovery of possession of immoveable property yielding rent or other profit, the Court may provide in the decree for the payment of rent or mesne profits in respect of such property from the institution of the suit until the delivery of possession to the party in whose favour the decree is made or until the expiration of three years from the date of the decree (whichever event first occurs) with interest thereupon at such rate as the Court thinks fit;" so that as matters stand at present, the plaintiff cannot obtain mesne profits for more than three years after decree. Phear and Morris, JJ., after referring to the words they had used in the case of [207] *Puzeelun* v. *Keramut Hossein* (3) say this: "And applying these words to the present case, it is plain that the steps for the estimating or assessing or adjusting of mesne profits, from the date of suit up to the date when the plaintiff obtained possession, could not have been instituted until that possession was obtained; that is, could not have been instituted until the 18th January 1870. And the application of the 8th November 1872 was not even three years distant from this date." The reasons for this decision are inapplicable to the present law.

The result of the argument in this case would be that, because a defendant refuses to obey an order of the Court and deliver over possession to the plaintiff, the plaintiff must lose his right to mesne profits. We cannot say that this argument commends itself to us.

In the result we are of opinion that the plaintiff is entitled to an inquiry in accordance with the decree, as to mesne profits, and we decree the same.

The appellant is entitled to his costs in this appeal. In the lower Court each party will pay his own costs.

S. C. C. *Appeal allowed.*

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(1) 19 C. 132. (2) 22 W. R. 328. (3) 21 W. R. 212.

1897
JULY 6.

APPELLATE CRIMINAL.

25 C. 207 = 1 C.W.N. 681.

25 C. 207 = 1 C.W.N. 681.

APPELLATE CRIMINAL.

Before Mr. Justice Ghose and Mr. Justice Wilkins.

KASHI NATH NAEK (*Appellant*) *v.* QUEEN-EMPRESS (*Respondent.*)*
[6th July, 1897.]

Forgery—Abetment of forgery by writing out the deed—Unregistered document purporting to be a valuable security—Penal Code (Act XLV of 1860), *ss* 109, 114 *and* 467.

The accused was not only the writer but also took an active part in the preparation of a document, the alleged executant of which was dead before the date of the document, and the person who really had an interest under the document was convicted under s. 82 of the Registration Act (III of 1877). But evidence was wanting to show that the accused took any part in the forgery of the name of the alleged executant.

[208] *Held*, that the accused could not be convicted of the offence of forgery under s. 467 of the Penal Code. There being nothing on the record to show that the accused was a party to, or took any part in, the actual forgery of the document, or that he was present on the occasion when it was forged, the proper section to convict him under would be s. $\frac{467}{109}$, that is, of abetment of forgery, and not s. $\frac{467}{114}$.

An unregistered document, though it may not be a valuable security until the registration is completed, still "purports" to be a valuable security within the meaning of s. 467 of the Penal Code.

Queen-Empress v. *Ramasami* (1), approved of.

THE facts of the case for the purpose of this report sufficiently appear from the judgment.

Babu *Sarat Chundra Rai Chowdry*, for the appellant.

The Officiating Deputy Legal Remembrancer (Mr. *Abdur Rahim*), for the Crown.

The judgment of the High Court (GHOSE and WILKINS, JJ.) was as follows :—

JUDGMENT.

The appellant before us, Kashi Nath Naek, has been convicted by the Sessions Judge of Midnapore of offences under ss. 467 and 467/114 of the Indian Penal Code, and s. 82, cl. (*d*) of the Registration Act. The document which is said to have been forged is a *kobala*, bearing date the 16th March 1896, purporting to have been executed by one Khetter Nath Das in favour of a certain lady, the wife of one Kashi Nath Das. The deed was presented for registration to the Sub-Registrar; but he, suspecting something wrong, refused registration. It is said, however, that the appellant before us made certain representations before the said Registrar in regard to the person who presented the document for registration, and asked that officer to register the document, saying that it was all right. A prosecution was afterwards started against Kashi Nath Das and the appellant, Kashi Nath Naek; and it would appear from the record that Kashi Nath Das, the person who really had an interest under the document in question, was convicted by the Magistrate under s. 82 of the Registration Act. As regards the appellant, Kashi Nath Naek, after certain proceedings had been taken against him by the Magisterial authorities, he was committed **[209]** to take his trial before the Sessions Court for offences to which we have already made reference, and he was convicted accordingly. It seems to be perfectly clear upon the evidence in the case that the alleged executant

* Criminal Appeal No. 308, of 1897, made against the order passed by H. R. H. Coxe, Esq., Sessions Judge of Midnapore, dated the 22nd of March 1897.

(1). 12 M. 148.

of the document, Khetter Nath Das, was dead before the date of the document in question; and there can also be no doubt that the appellant, Kashi Nath Naek, was not only the writer of it, but was also the person who took an active part in the preparation of the document; but the evidence is wanting to show that he took any part in the forgery of the name of Khetter Nath Das, the alleged executant of the document; and we are of opinion that it is almost impossible to convict the appellant before us, upon the materials upon the record, of the offence of forgery. It appears to us, however, at the same time that whoever the forger of the document might have been, Kashi Nath Naek abetted the act of forgery; and in that view of the matter, we think, that he ought to be convicted under s. 467/109 of the Indian Penal Code, namely, that he abetted the offence of forgery of the document. As we have already observed, there is nothing to indicate that the appellant was a party to, or took any part in, the actual forgery of the document; nor does it appear that he was present upon the occasion when the document was forged. We, therefore, think that s. 114 of the Indian Penal Code has no application to the present case; and that the proper section to convict him under would be s. 467/109 of the Indian Penal Code.

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As regards the offence said to have been committed by the accused under s. 82, cl. (*d*) of the Registration Act, the evidence, to our mind, is doubtful. The Sub-Registrar, who is a respectable and responsible officer of Government, distinctly swears that the appellant did not take that part at the time the document was presented for registration which has been attributed to him; and in the conflict of testimony which exists in this case, we think it would be unsafe to convict him under cl. (*d*), s. 82 of the Registration Act. We, therefore, set aside the conviction under the Registration Act, and convict him under s. 467/109 of the Indian Penal Code only.

In the circumstances, we think that the justice of the case will be amply met, having regard to the terms of the section [210] of the Penal Code under which we convict him, by sentencing the appellant to two years' rigorous imprisonment.

We might add that a point was raised before us by the learned vakil for the appellant to the effect that s. 467 of the Indian Penal Code had no application to the present case; because the document, which was a *kobala*, was not actually registered, and, therefore, it could not possibly operate as a valuable security within the meaning of that section. We are, however, unable to accept this contention as correct; because the section in question runs thus: "Whoever forges a document which purports to be a valuable security or a will," and so on. The words are "*which purports to be*" and not "which is" a valuable security. The document may not be an effectual document so as to pass title until it is registered; but so soon as it is registered it takes effect from the date of execution thereof; and although it may not be a valuable security until the registration is completed, still it "purports" to be a valuable security within the meaning of the section. We find that the Madras High Court in the case of *Queen-Empress* v. *Ramasami* (1), referring to the case in 2 East's Pleas, p. 955, took very nearly the same view which we have just expressed; and although the facts of the case were somewhat different from those of the present case, still the principle which is laid down therein equally applies to this case.

S. C. B.

(1) 12 M. 148.

1897
JULY 14.

APPELLATE CIVIL.

25 C. 210 = 2 C.W.N. 91.

25 C. 210 = 2 C.W.N. 91.

APPELLATE CIVIL.

Before Mr. Justice Macpherson and Mr. Justice Ameer Ali.

GYANNESSA AND OTHERS (*Plaintiffs*) *v.* MOBARAKANNESSA AND OTHERS (*Defendants*).* [14th July, 1897.]

Transfer of Property Act (IV of 1882), *s.* 118—*Exchange—Partition—Evidence Act* (*I of* 1872), *ss.* 21 (3), 11 (2)—*Admissibility of petition and written statement filed in a previous proceeding.*

Some of the co-owners possessing an undivided share in several [211] properties took by arrangement a specific property in lieu of their shares in all the properties.

Held, that this transaction was not an "exchange" within the meaning of s. 118 of the Transfer of Property Act, but the completed transaction amounted to a "partition" which is not required by law to be effected by an instrument in writing.

Frith v. *Osborne* (1), referred to.

Where the plaintiffs and some of the defendants were co-owners of certain properties, the question at issue being whether there was a partition between them, and whether under that partition the defendants came to be in possession of a specific property in lieu of their shares in all the properties, a petition and a written-statement filed by the defendants in certain previous suits admitting the partition and the exclusive acquisition of the specific property were put in, but objected to as inadmissible in evidence:

Held, that the documents were admissible against those defendants under ss. 11, cl. (2) and 21 cl. (3) of the Evidence Act.

Naro Vinayek v. *Narhan* (2), relied upon.

[F., 3 Ind. Cas. 247 ; R., 18 Ind. Cas. 524 = 6 L.B.R. 170 ; D., 5 C.W.N. 724.]

THE facts of the case fully appear from the judgments of the High Court.

Dr. *Rash Behary Ghose* and Babu *Upendro Nath Mitter*, for the appellants.

Mr. *C. Gregory* and Moulvie *Mahomed Mustafa Khan*, for the respondents.

The following judgments were delivered by the Court (MACPHERSON and AMEER ALI, JJ.) :—

JUDGMENTS.

MACPHERSON, J.—The plaintiffs Nos. 1 to 3 and the defendants Nos. 2 to 4, being the descendants of one Naffar Mahomed, were the owners of the *jote* which is the subject of this suit and other properties. In June 1888, they entered into a written agreement called a *solenama*, by which the plaintiffs took a two-third share and the defendants a one-third share of the *jote*. The *solenama* is not before us, and we are not acquainted with its precise terms, but it is said to have effected a settlement of the disputes relating to all the family properties and to have provided for a partition of them. One provision admittedly was that, in the event of a partition, the defendants should take the whole *jote* as representing their share of all the properties.

* Appeal from Appellate Decree, No. 147 of 1896, against the decree of R. R. Pope, Esq., District Judge of Dinajpur, dated the 7th November 1895, reversing the decree of Baboo Kali Prasanna Mukerjee, Subordinate Judge of that District, dated the 27th of June 1895.

(1) (1876) L.R. 3 Ch. D. 618.

(2) 16 B. 125.

1897 JULY 14.

APPEL-LATE CIVIL.

25 C. 210 = 2 C.W.N. 91.

[212] The plaintiffs claim a two-third share of the *jote* alleging a dispossession by the defendants in March or April 1892. The first defendant claims to have purchased the entire *jote* from the other defendants after the partition contemplated by the *solenama* had been made. The facts in issue are : (1) Whether a partition in accordance with the terms of the *solenama* had been effected; (2) whether after partition the first defendant had purchased the *jote* from the other defendants. The lower appellate Court deciding both those issues in favour of the defendant, reversed the first Court's decree and dismissed the suit.

It is now contended that the transaction by which the vendee defendants obtained the *jote* being one of "exchange" under s. 118 of the Transfer of Property Act, could only be effected by a registered instrument and that there was no valid transfer of the *jote* to them. Also, that the District Judge in finding a partition has improperly relied upon two documents which were irrelevant and not evidence against the plaintiffs.

The *solenama*, it may be observed, was registered, but there was no subsequent writing giving effect to the partition.

The learned pleader for the appellant relies upon the case of *Frith* v. *Osborne* (1) as showing that the transaction referred to was in substance an "exchange" as defined in s. 118. There, an undivided moiety of lands was vested in *A*, *B* and *C* as trustees of a settlement, which expressly authorized a partition, and the other moiety was vested in *D*, *E* and *F* as trustees of a settlement with power to sell or exchange, and a partition deed was executed by the trustees of the two moieties. The question arose as to whether the power of sale and exchange given to *D*, *E* and *F* authorized a partition, and that involved the further question, which was then doubtful, of the power of tenants in common to effect an exchange of their respective moieties of the land held in common before they had made a partition. The Master of the Rolls held that such an exchange could be made, and that the power of exchange was properly exercised by a partition. In deciding a question such as that now raised, we must avoid getting involved in the intricacies of the law of England relating to real property.

[213] Assuming that there was what amounted to an "exchange" within the words of s. 118 between the vendor defendants and the plaintiffs, the undivided interest of the former in all the other properties being exchanged for the undivided interest of the latter in the *jote*, the Transfer of Property Act does not apply to the transaction. The exchange was intended to and did effect a partition. The completed transaction was the partition by which the parties held in severalty the lands which had been before held in common. The law does not require a partition to be effected by an instrument in writing, and the right of partition being an incident of property held as this property was, the right is not, according to the second section, affected by any of the provisions of the Act. The Act, moreover, does not profess to deal with partitions or the way in which they are to be effected.

Treating, therefore, the transaction as a partition, although it may have been effected in a way which involved, as between the co-owners, a transfer of the ownership of parts of the undivided property amounting to an exchange, I hold that it does not come under s. 118, and that it was not necessary to complete it by a registered instrument.

The documents objected to are Exs. 9 and 43, the former being a petition, and the latter a written statement, put in by the vendor

(1) (1876) L.R. 3 Ch. D. 618.

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defendants in certain suits, and they contain statements of those defendants that they were in possession of the entire *jote*. The District Judge says they were objected to before him as containing admissions made by the defendants which could not be proved on their behalf, and that is all we know about them.

The vendor defendants, who are charged in the plaint with colluding with the vendee, the first defendant, put in a verified written statement denying the partition and the sale, and one of them, it is said, was examined as a witness for the plaintiff. It is clear that they were supporting the plaintiffs' case, and I think the statements which went to show that there had been a partition and that they had changed their attitude could be proved as against them. The reference to s. 157 is probably a mistake, but I think the Judge was right under the circumstances of the case in holding that the statements were admissible under s. 21 (3) and s. 11 (2) of the Evidence Act.

[214] The appeal is dismissed with costs.

AMEER ALI, J.—I am of the same opinion. Two questions were raised in this appeal: (1) That the District Judge was wrong in relying on certain documents referred to in his judgment as they were inadmissible in evidence against the plaintiffs ; and (2) that, as the transaction by which defendants 2 to 4 are alleged to have acquired the property in suit was or amounted to an "exchange," under the provisions of s. 118 of the Transfer of Property Act, it ought to have been effectuated by a registered document, and not having been so done, the defendants 2 to 4 could not acquire any title thereto or convey any title by their sale to the first defendant.

As regards the first point, it must be remembered that the question at issue in the case was whether or not there was a partition between the heirs of one Naffar Mahomed, *viz.*, the plaintiffs and defendants 2 to 4 and whether under or in consequence of that partition, defendants 2 to 4 had acquired an exclusive right to the property in suit. The defendants 2 to 4, from whom the first defendant purchased the *jote* denied in their written statement that they had exclusively acquired or were in exclusive possession of the property. They denied also the fact of the sale to the first defendant. It appears that the second defendant was examined on commission on behalf of the plaintiffs. Under the circumstances, therefore, it is clear that the defendants 2 to 4, though placed in the category of defendants, were exactly in the same position as the plaintiffs, and that their interest were more or less identical. The two documents objected to are a petition and a written statement filed in some previous proceeding or proceedings, in which the defendants 2 to 4 admitted the partition, and the exclusive acquisition by them of the *jote* in suit. These documents were, therefore, clearly admissible against them. But I go further and hold that, having regard to the position of the parties, the statements contained in these documents are admissible generally in corroboration of the first defendant's allegation. The plaintiffs and defendants 2 to 4 were co-owners of certain property, and the fact in issue in the present case is, as already stated, whether there was a partition between them, and whether under that partition the defendants 2 to 4 acquired or came to be **[215]** in possession of a specific property in lieu of their shares in all the properties. Any act done or statement made by any of the co-owners which tends to corroborate the fact of partition would be relevant to the inquiry and consequently admissible in evidence. In *Naro Vinayek*

v. *Narhan* (1) statements such as we find here were held to come under the provisions of s. 11 of the Evidence Act. I am, therefore, of opinion that the petition and written statement, to the admissibility of which objection has been taken in this Court, are facts which by s. 11 are relevant as they make the existence of the partition, which is the fact in issue, highly probable, and that no error has been committed by the District Judge in relying on them.

1897 JULY 14. — APPELLATE CIVIL. — 25 C. 210 = 2 C.W.N. 91.

As regards the second point the grounds of decision have been so clearly stated by my learned colleague that I have very little to add. I only wish to observe that English cases are of much assistance in elucidating general principles and construing enactments when the Acts of the Indian Legislature happen to be in *pari materia* with English Statutes. But it would be dangerous, I think, to introduce into this country the complicated principles or incidents of the English law relating to real property. The question, however, is whether s.118 of the Transfer of Property Act is applicable to a transaction of the nature alleged, and found by the Judge to have taken place between the plaintiffs and the defendants 2 to 4. Section 118, in my opinion, is not applicable to cases where some of the co-owners possessing an undivided share in several properties take by arrangement a specific property in lieu of their shares in all. Section 118, as its language shows, refers to cases where two persons owning two specific properties transfer or convey their respective ownership one to the other.

In this country a partition between co-owners does not require to be effectuated or evidenced by a written document, and there is nothing in the Act or in the phraseology of s. 118 to warrant the suggestion that the Legislature intended to make any alteration in the recognized law on the subject.

For these reasons I agree in dismissing the appeal with costs.

B. D. B. *Appeal dismissed.*

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25 C. 216.

[216] APPELLATE CIVIL.

Before Mr. Justice Macpherson and Mr. Justice Ameer Ali.

ABDOOL LATIF MOONSHI AND ANOTHER (*Judgment-debtors*) v. JADUB CHANDRA MITTER (*Decree-holder Auction-purchaser*).*

[3rd September, 1897.]

Sale for arrears of rent—Application to set aside sale—Bengal Tenancy Act (VIII of 1885), s. 174, cls. (1) *and* (2)*—Deposit of decretal amount incorrectly calculated by ministerial officers of Court—Effect of deposit without a prayer in express terms to set aside the sale*—Challans—*Practice.*

The judgment-debtor, within thirty days from the date of sale of his holding for arrears of rent, deposited in Court under s. 174 of the Bengal Tenancy Act the decretal amount by a *challan* endorsed by the chief ministerial officer of the Court executing the decree. Subsequently it was discovered that the amount was short by 9 pies, which the judgment-debtor forthwith paid in, making up the deficiency, and presented a petition, praying that "the execution case may be declared as finally closed," but without applying in express terms to have the sale set aside: *Held*, that under s. 174 of the Bengal Tenancy Act the Court was bound to set aside the sale, notwithstanding that the applicant did not in express terms ask for that relief. *Ugrah Lall* v. *Radha Pershad Singh*(2), referred to.

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* Appeal from Order, No. 292 of 1896 against the order of R. R. Pope, Esq., District Judge of Dinajpur, dated the 11th of May, 1896, affirming the order of Babu Debendra Nath Roy, Munsif of Dinajpur, dated the 22nd of February 1896.

(1) 16 B. 125. (2) 18 C. 255.

1897 SEP. 3. — APPELLATE CIVIL. — 25 C. 216.

Per AMEER ALI, J.—The fact of his depositing the amount was a sufficient indication of his intention to seek the relief.

Per MACPHERSON, J.—The *challan* which sets out the purpose of the deposit may be regarded as a sufficient application.

[F., 13 C.L.J. 467 = 10 Ind. Cas. 51; 14 M.L.T. 534 = (1914) M.W.N. 62 = 22 Ind. Cas. 291; R., 11 C.W.N. 116; 1 O.C. 193 (196); D., 26 C. 449 (F.B).]

THE facts of the case sufficiently appear for the purposes of this report from the judgments of the High Court.

Syud *Shamsul Huda*, for the appellants.

Dr. *Rash Behary Ghose* and Babu *Jasoda Nandan Paramanik*, for the respondent.

The following judgments were delivered by the High Court (MACPHERSON and AMEER ALI, JJ.).

JUDGMENTS.

AMEER ALI, J.—It appears that on the 6th of January 1896 the holding of the appellant, who is a *raiyat*, was sold in execution of a decree obtained by his landlord, respondent in this Court, for [217] arrears of rent, and was purchased by the latter on the 3rd of February. The appellant deposited in Court, under the provisions of s. 174 of the Bengal Tenancy Act, the amount recoverable under the decree, with costs and a sum equal to five per cent. of the purchase-money. On the 7th of February the decree-holder presented an application to the Munsif, stating that the judgment-debtor had deposited 9 pies too little, and praying that the sale be confirmed, whereupon the Court ordered that the judgment-debtor might apply to have the sale set aside. The Court did not express any opinion whether the statement made in the decree-holder's petition that the amount deposited was short by 9 pies was correct or not. From the form of the order it would seem that the Munsif did not consider it well founded. However that may be, on the same day, presumably in order to be on the safe side, the judgment-debtor presented the following petition to the Court :—

"That on account of the claim in the above case together with costs and damages a sum of Rs. 52 9-15 gds. was deposited on the 3rd February, but upon a calculation it has been found that the said amount of claim has been deposited less by 3 pies (15 gds.). It is therefore prayed that the Court may be pleased to allow the said deposit of 3 pies to be deposited and to declare the execution case as finally closed."

This petition does not appear to be dated, but the impression of the seal of the Court bears date the 7th of February. The 9 pies was thus brought into Court on the 7th of February, and was ordered to be received on the 10th of February by a *challan* of that date.

The lower Courts have refused to set aside the sale of the appellant's holding, on the sole ground that as he made no application it could not be set aside. The District Judge, in affirming the order of the Munsif, says that "subsequently on the 10th February the judgment-debtor deposited in Court the 9 pies necessary, but made no application to set aside the sale." It seems to me that the learned Judge is in error on both points; the 9 pies was brought into Court on the 7th of February at the latest and not on the 10th, and the judgment-debtor did apply by the petition of that day to have the sale set aside. No other meaning can reasonably be attached to the prayer of that petition.

The Courts below have rejected the appellant's application to [218] set aside the sale of his holding, apparently on the ground that

under the law the judgment-debtor is bound to apply for that purpose in express terms.

Section 174 of the Tenancy Act, which gives to the *raiyat* the right of having the sale of his holding set aside, runs as follows :—

(1) " Where a tenure or holding is sold for an arrear of rent due thereon, then, at any time, within thirty days from the date of sale, the judgment-debtor may apply to have the sale set aside on his depositing in Court, for payment to the decree-holder, the amount recoverable under the decree with costs, and, for payment to the purchaser, a sum equal to five per centum of the purchase money.

(2) If such depoist is made within the thirty days, the Court shall pass an order setting aside the sale, and the provision of s. 315 of the Code of Civil Procedure shall apply in the case of a sale so set aside."

The remainder of the section is immaterial for the purposes of the present case. The Act nowhere provides how or in what mode the judgment-debtor is to apply. There is nothing to compel the judgment-debtor to apply by a mukhtear or pleader, and in fact it is conceded that he might have applied verbally and in person. But it is said that the words "may apply" indicate that some sort of application is necessary. Suppose the judgment-debtor happens to be a dumb person, would he be debarred from having the benefit of this section, or would he be compelled to employ a proxy in the shape of a pleader or mukhtear? Surely this could hardly be the intention of the Legislature. In my opinion the fact of his depositing the amount is a sufficient indication of his intention to seek the relief which the law provides. He brings in the money with what object? Surely for no other reason but to have the sale of his holding set aside. And I think the provisions of sub-s. 2 clearly support this view. It declares that if the deposit is made, the Court shall pass an order setting aside the sale. It shows that when the amount is deposited, it becomes the duty of the Court to set aside the sale. In my opinion the appellant did, as a matter of fact, apply to set aside the sale, and even if he did not, having deposited the amount, he is entitled **[219]** to have the sale set aside, and the Court is bound (under sub-s. 2 of s. 147) to make an order to that effect.

This, as I have already stated, was the sole ground on which the lower Courts have refused to set aside the sale. In this Court it was urged that as the amount deposited by the appellant on the 3rd of February fell short by 9 pies, the sale ought not to be set aside. This point does not appear to have been pressed in either of the Courts below, for there is not the smallest reference to it in their judgments. And I do not feel disposed to entertain it in this Court. Nor are the circumstances of the case such as to induce me to do so. The auction-purchaser, who is admittedly the landlord decree-holder, incurs no loss : he seeks to tie the appellant down to the strict letter of the law. In that case he ought to have pressed the point in the Courts below.

So far as the question raised here is concerned, the present case is exactly similar to the case of *Ugrah Lall* v. *Radha Pershad Singh* (1) decided by Petheram, C. J., and myself. In that case also the *raiyat*, judgment-debtor, deposited within the month a certain amount which was found afterwards to be short of the exact sum required by a trifling amount, which was subsequently paid up. And we held that the Munsif had acted rightly in setting aside the sale.

(1) 18 C. 255.

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Assuming that the decree-holder, in a case like this, is entitled to urge the point here, I think that as the materials on the record are sufficient to enable the Court to form an opinion whether it is well founded or not, it would only cause harassment to the judgment-debtor to remand the case for further inquiry. Ordinarily a judgment-debtor has no idea of the amount of costs and the additional sum payable by way of damages or compensation, which is calculated on the basis of a percentage on the purchase money. As a matter of well known practice the calculation is made in the office of the Judicial Officer executing the decree; and the aggregate amount is then entered in a *challan* or order to the Treasury Officer to receive and credit the same.

These *challans* contain three parts: The first part is to be filled in by the payer, the second is to be filled in by the Court [220] or under its orders, and the third part is to be filled in at Court by the cashier or the Treasury Officer. The first part of the *chalian*, dated the 3rd February 1896, given to the appellant, runs thus:—

Name of person or persons on whose behalf the money is tendered.	Name of person or persons to whose credit the amount is to be placed in the Court's Book.	Number of suit or date of judicial decree or order (if any) the amount is tendered.	Particulars of Receipts.	Amount tendered.	Remarks, if any.
1	2	3	4	5	6
Abdul Lutif Munshee. Judgment-debtor.	Jadub Chunder Mitter. Decree-holder.	Rent decree, No. 882 of 1895.	Mention in the sale proclamation. Rs. As. P. 48 15 5 Sale fee 1 1 10 Damages 2 7 0 52 7 15	Rs. As. P. 52 7 9	Fifty-two Rupees seven annas and nine pie only.

(Not legible)
Signature of Chief Ministerial officer.

Abdul Latif,
Signature of the person tendering the money.

It bears the endorsement of the chief ministerial officer, presumably to vouch the accuracy of the amounts entered in the 4th column; otherwise his endorsement would be meaningless.

The second part runs thus:—

Registered Number.	Registered Date.	Account to be credited whether Civil Court deposit, fines or forfeitures, stamp duty and penalties, or miscellaneous or petty receipts.	As per Court's challan register.
1	2	3	4
1161	3rd Feb. 1896.	C Deposit.	

[221] and contains the following order to the Treasury Officer, Dinajpur :—

To
The Treasury Officer, Dinajpur.
(Not legible)
Receive and credit the above if tendered to you
before 3 P.M. to day.
(Not legible)
Signature of the Judge in charge.

Signature of the
Accountant,
District Judge's
Court, dated 3rd February 1896.

This order is signed by the Judicial Officer in charge, and is countersigned by the Accountant of the District Judge's Court.

Part third runs thus :—

Received Notes. Received silver and copper.	*	*	*	Treasury Officer entered here number of notes.
Received Total Rupees	52	7	9	

Signature (not legible) 3rd February 1896.
Cashier of the Court, &c. (not legible) Accountant of the Treasury.

It will be seen from the above that the amount which the appellant deposited was checked in the *sherishta* or office of the Judicial Officer executing the decree ; its accuracy is vouched by the chief ministerial officer; it is then placed before the Judicial Officer, and receives his sanction. With all those guarantees for accuracy the appellant goes and deposits the money. It can hardly be said under the circumstances that the appellant, a *raiyat*, is responsible for a mistake in calculation made in the office. He did what under the law he was required to do, *viz.*, to obtain a *challan* for the amount that he had to deposit, for without the necessary *challan* he could not have paid the amount. With that document he goes to the Treasury [222] and deposits the sum of money stated therein. The decree-holder (purchaser) then discovers the deficiency of three farthings, and as soon as the judgment-debtor comes to know of it he pays in that also.

To my mind it would be grievous under the circumstances to hold that he is disentitled to have the sale of his holding set aside.

For all these reasons, I would decree the appeal and set aside the orders of the Courts below, and would direct that the sale of the 6th of January 1896 be set aside with costs in this Court. We allow the appellant no costs in the Courts below.

MACPHERSON, J.—I agree that a separate and formal application for the setting aside of the sale under s. 174 is not essential, and that if the necessary amount is deposited in due time the Court must set aside the sale. The *challans*, by which the amount is deposited with the Court's permission and which sets out the purpose of the deposit, may be regarded as a sufficient application. The decision of the lower Courts cannot, therefore, be supported on the ground on which it rests.

1897 SEP. 3. — APPELLATE CIVIL. — 25 C. 216.

That being so, I am not prepared to dissent from the conclusion of my learned colleague, that the case is practically governed by the case to which he has referred.

B. D. B. *Appeal allowed.*

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25 C. 222=2 C.W.N. 37.

MATRIMONIAL JURISDICTION.

Before Mr. Justice Ameer Ali.

K. M. BUTT (*Petitioner*) v. F. C. K. BUTT (*Respondent*).*
[6th September, 1897.]

Practice—Divorce—Withdrawal of petition for dissolution of marriage—Costs of petitioner, on what scale allowed—Divorce Act (IV of 1869), ss. 7, 35 and 45.

The petitioner on the 2nd June 1896 presented her petition, in which she prayed for the dissolution of her marriage with the respondent on the grounds of adultery and cruelty. A commission was issued at her instance to examine witnesses in England on the charges of adultery and cruelty, and the result of their evidence was that the petitioner was satisfied that [223] the charges brought by her against her husband were wholly unfounded, and she on the 2nd September 1897 applied for leave to withdraw her suit, and for payment of her costs by the respondent. She contended that her costs should be paid by him as between attorney and client. The respondent submitted he ought to pay costs as between party and party. *Held*, that the petitioner's costs, including costs of this application, be taxed as between party and party, it being open for the attorney for the wife to sue the husband for the rest of the costs.

ON the 2nd June 1896 the petitioner, Kathleen Mary Butt presented, her petition, in which she prayed for the dissolution of her marriage with the respondent Frank Charles Kernot Butt on the grounds of adultery and cruelty, or in the alternative for a judicial separation and for the custody of her child. Subsequently a commission was issued at the instance of the petitioner to examine certain witnesses in England. Upon the return of the commission executed the petitioner found that the evidence taken thereunder did not support the charges made by her in her petition, and determined to withdraw her suit.

On the 2nd September 1897 she applied by petition for liberty to withdraw her suit, and for an order that the respondent should pay her costs of the suit to be taxed on such scale as the Court might direct.

Mr. *Garth*, for the petitioner.—The petitioner withdraws her petition. The only question now before the Court is what the scale of costs should be. The respondent contends that he ought to pay costs as between party and party, whereas the petitioner's contention is that he ought to pay her costs as between attorney and client. The withdrawal of the petition is no reason why the solicitor should be deprived of his costs. The Court assumes the wife has nothing, and the solicitor is entitled to be paid his costs in full, and that would be costs as between attorney and client. In *Robertson* v. *Robertson* (1) it was held that the costs of the wife payable by the husband were not limited to the amount paid into Court or secured by the husband for that purpose. *Otway* v. *Otway* (2) and *Holt* v. *Holt and Fleming* (3) also support this contention. The Court would not allow

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* Matrimonial Jurisdiction, Original Civil Suit No. 4 of 1896.

(1) (1881) L. R. 6 P. D. 119. (2) (1888) L. R. 13 P. D. 141.
(3) (1858) 28 L. J. P. and M. 12.

the solicitor to lose costs due to him from his client, and the client under the circumstances is in reality the husband. 1897 SEP. 6.

[224] Mr. *J. G. Woodroffe*, for the respondent.—There is express authority that the costs should be as between party and party; it was so held by the old Ecclesiastical Courts, and the same rule has been followed after the passing of the Matrimonial Causes Acts of 1857 and 1858. In an ordinary suit the costs would be as between party and party, costs as between attorney and client being allowed only when it is expressly provided for, as in a mortgage. The general rule, therefore, is that costs should be allowed as between party and party. There is nothing in matrimonial causes to take them out of the general rule. Sections 7, 35 and 45 of the Indian Divorce Act (IV of 1869) are the only sections which apply to costs, and they seem to indicate that the Courts in India should act on the principles of the English Courts of Divorce. The general principles of taxing costs against a husband in a matrimonial cause are the same as in other cases,—Browne on Divorce, 5th edition, p. 361. In England formerly the wife was allowed costs as between party and party up to the setting down of the case for trial,—Browne on Divorce, 5th edition, p. 342. Can it be said that the principle is different after the case is set down for trial as to the recovery of costs reasonably incurred by the wife? [See Browne on Divorce, 5th edition, pp. 359 and 360—*Ottaway* v. *Hamilton* (1).] The Matrimonial Causes Acts of 1857 and 1858 do not contain provisions for costs as between attorney and client. That shows that the costs should be taxed as between party and party. If a case can be made out with reference to the other costs so as to bring them in as necessaries, then the remedy is by suit properly framed; those costs cannot be proved before the taxing officer—*Allen* v. *Allen and D'Arcy* (2), *Stocken* v. *Pattrick* (3). There is no doubt on the English authorities that the scale of costs should be as between party and party. The only authorities in the Indian Law Reports are *P.* v. *P.* (4) and *Natall* v. *Natall* (5). They appear at first sight to be against this contention; but in the first case the point was not alluded to in the judgment, and in the second case the point was not raised.

MATRIMONIAL JURISDICTION.

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JUDGMENT.

[225] AMEER ALI, J.—This was a wife's petition for dissolution of her marriage on the ground of the respondent's cruelty and adultery. A commission was taken out to examine witnesses in England, and the result of their evidence is that the petitioner is satisfied that the charge of adultery brought by her against the husband was wholly unfounded. She therefore applied to withdraw the suit, and by consent an order was made to that effect on the 2nd September instant. I, however, reserved for consideration the question of the principle on which the petitioner's costs to be paid by the respondent should be taxed. On her side it has been argued that the costs should be taxed as between attorney and client. On the respondent's side it has been urged that they should be taxed as between party and party. So far as can be gathered from the reports this is the first case in which the question has been expressly raised in this country, and as it involves a principle of some importance it is necessary that it should be carefully and fully considered.

The Indian cases cited at the bar do not afford much assistance.

(1) (1878) 3 C. P. D. 393. (2) (1860) 2 Sw. & Tr. 107.
(3) (1873) 29 L. T. (N. S.) 507. (4) 9 B. L. R. Ap. 6. (5) 9 M. 12.

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In the case before Macpherson, J., in *P.* v. *P.* (1) the prayer was that the petitioner, who was the attorney for the wife, should have his costs taxed as between attorney and client. The learned Judge, after dealing with the facts and circumstances of the case, made the following order :—

"Therefore, although I shall order the petitioner's costs to be taxed and to be paid by the respondent to her attorney (he being substantially entitled to such an order), her attorney must personally bear his own costs of this application. The petitioner's costs will be taxed on scale 2."

There is in the ordering part no reference to the prayer in the petition that the costs should be taxed as between attorney and client. The inference is that that portion of the prayer was not acceded to.

In *Natall* v. *Natall* (2) it was directed that the costs of the wife should be taxed as between attorney and client, but it does not appear that the point was argued or considered.

[226] The Indian Divorce Act (s. 7) provides : "That subject to the provisions contained in this Act, the High Courts and District Cour s shall, in all suits and proceedings hereunder, act and give relief on principles and rules which, in the opinion of the said Courts, are as nearly as may be conformable to the principles and rules on which the Court for Divorce and Matrimonial Causes in England for the time being acts, and gives relief."

Section 35 deals with the question of costs, but does not lay down any rule regarding the mode in which the costs of the wife should be taxed. Section 45 declares that "subject to the provisions herein contained, all proceedings under this Act between party and party shall be regulated by the Code of Civil Procedure."

Under these circumstances I must, having regard to the provisions of s. 7 of the Act, look for guidance to the English cases.

Mr. Garth for the petitioner has contended that as the husband has to pay the wife's costs, it follows that he must pay what she is liable for to her attorney, and he has referred to *Robertson* v. *Robertson* (3). This was an appeal from the judgment of the Divorce Court, and one of the questions raised was whether the costs of the wife payable by the husband were not to exceed the amount paid into Court or secured by him. It was held that such costs were not limited to the amount paid into Court or secured by the husband, and the conclusion come to is thus expressed by the Master of the Rolls at p. 123 :—

"It appears to me, therefore, that when the defence is fairly and reasonably conducted the solicitor ought to be paid in full his costs, that is, his costs properly incurred."

In *Otway* v. *Otway* (4) a similar question came up for consideration. In that case the wife was found guilty of adultery, and the question was whether the husband was liable to pay the costs reasonably incurred by her in the appellate Court, and it was held that he was. No question as to the mode of taxation was considered or decided in either of those two cases.

[227] The cases cited for the respondent bear more directly on the question. In *Stocken* v. *Pattrick* (5) the solicitor brought an action at common law for the recovery of his costs from the husband, and Chief Baron Kelly, in dealing with the questions raised before him, expressed

(1) 9 B.L. R. Ap. 6. (2) 9 M. 12. (3) (1881) L.R. 6 P.D. 119.
(4) (1888) L.R. 13 P.D. 141. (5) (1873) 29 L. T. (N. S.) 507.

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himself in terms which clearly indicate the principle on which I ought to act in this Court. The husband, who was the defendant in that action, had taken various objections to the suit of the solicitor, and in dealing with one of them, the Chief Baron says at p. 509:—

"Then there is another defence set up on behalf of the defendant which Mr. Griffiths argued with much earnestness and considerable ability. He says, and says truly, that where a suit of this nature is instituted by a wife against her husband, it must be carried on through the medium of an attorney, and the attorney may, under certain circumstances, call for his costs from day to day. That is the rule in the Divorce Court having jurisdiction over causes of this nature, and no doubt he is entitled to claim his costs from day to day. Moreover, if the suit is proceeded with and the result is a decree, he may claim the costs in that suit, if the suit has terminated in favour of the wife. No doubt it is in the discretion or judgment of the Court to allow them and decree to the wife the costs of the suit; but whether the plaintiff shall recover and so be held entitled to the costs of suit, or whether, as it may be, the suit may be found against her and no costs are allowed, if the costs are allowed, no doubt the attorney may obtain these costs, but only costs between party and party, and they have nothing to do with the costs as between attorney and client any more than in any action of debt in this Court. The attorney may recover those costs. He is nevertheless entitled to sue his client on whose behalf he has carried on the suit for the extra costs between attorney and client, and recover them subject to the deduction of any money he may have received on account."

This shows that in the Matrimonial Court the wife's costs are taxable as between party and party, and that the attorney may recover the rest of the costs in an action at law against the husband.

Another case *Ottaway* v. *Hamilton* (1) bears still more distinctly on the subject. There also the wife's attorney had brought an [228] action for his extra costs not covered by the taxation in the Matrimonial Court. The nature of the claim is thus stated by the Judge in the first Court: "The costs of the wife against the defendant as between party and party had been taxed upon the application of the wife, but the costs for which the plaintiff sued defendant in this action had been disallowed, and the plaintiff sought to recover them as costs which would be properly allowed as between attorney and client, and as such being necessaries supplied to the wife." And holding that they were necessaries the Judge decreed the plaintiff's claim.

On appeal by the defendant, Lord Justice Bramwell observed as follows: "I cannot see that because the plaintiff has obtained from the Divorce Division such sums as are allowed upon taxation, he is to be debarred from recovering the extra costs by an action against the husband."

The rule applied to taxation in the Divorce Division is indicated here, but it is more clearly expressed in Lord Justice Thesiger's judgment at p. 401. He says:—

"I now come to the question whether, under the Divorce Acts, taxation is the only remedy which the wife or the solicitor appointed by her has for the recovery of extra costs. If it could have been established that these statutes provide for the taxation of a wife's costs against her husband as between solicitor and client, there would have been great force in the argument that the remedy to be adopted is the use of the process of the

(1) (1878) L.R. 3 C.P.D. 393.

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Divorce Division to obtain payment of them. At all events the contention would have been well founded that where a wife, or a solicitor employed by her, applies to the Divorce Division to tax the costs, there would be such an election as to prevent either of them suing subsequently in an action at law." Then, after referring to s. 51 of the Matrimonial Causes Act, 20 and 21 Vict., Chap. 85, he proceeds: "These words seem to confer only the power of giving costs as between party and party, and in many cases the jurisdiction of the Court ought to be thus confined, for it has to deal, not only with husband and wife, but also with other parties, at least where the husband is the petitioner."

I may here observe that the power over costs contained in the Code of Civil Procedure is given to the Matrimonial jurisdiction [229] of this Court by s. 45 of the Indian Divorce Act, and that this section is thus in effect similar to s. 51 of the Matrimonial Causes Act, and points to the same conclusion.

Lord Justice Thesigar also refers to *Allen* v. *Allen and D'Arcy* (1), as showing that the Matrimonial Courts tax the costs of the wife payable by the husband between party and party.

In this case it was taken for granted that the wife's costs are taxed as between party and party, but the Judge Ordinary pointed out that in applying the rule a liberal construction should be put upon it. He says: "This taxation must certainly be reviewed. The question of the principle on which costs are to be taxed in matrimonial suits has not yet been settled, but I apprehend that I must adopt, as far as I can, the principles on which the Ecclesiastical Courts proceeded. I am informed that the principle of taxation in those Courts was as between party and party; but that term had a very different construction from that put upon it in Common Law Courts, because there they only allow the costs of such issues as are found for the persons who are to receive costs." He then proceeds to state the grounds on which a liberal construction should be put on the rule.

The result is, that I must follow the English rule, which seems clear. It will be open to the attorney of the wife to sue the husband for those costs which may not be allowed as between party and party. My direction is that the petitioner's costs, including the costs of this application, be taxed as between party and party, but liberally according at the meaning put upon the scale in *Allen* v. *Allen* (1). The conclusion at which I have arrived is, I find, in accordance with the practice followed in this Court. Mr. Belchambers, the Taxing Officer, has at my request furnished a note, in which he says: "The wife's costs in a matrimonial suit are taxed as between party and party on a liberal scale, full costs properly incurred being allowed." See note at pp. 291 and 292, Belchambers' "Rules and Orders."

Attorneys for the petitioner: Messrs. *Morgan & Co.*

Attorneys for the respondent: Messrs. *Sanderson & Co.*

H. W.

(1) (1860) 2 Sw. & Tr. 107.

25 C 230.

1897 SEP. 23.

APPELLATE CRIMINAL.

25 C. 230.

[230] APPELLATE CRIMINAL.

Before Mr. Justice Banerjee and Mr. Justice Wilkins.

ALI FAKIR (*Appellant*) v. QUEEN-EMPRESS (*Respondent*).*
[23rd September, 1897.]

Charge to Jury—Misdirection by the Judge—Erroneous verdict owing to misdirection—Failure of justice—Criminal Procedure Code (Act X of 1882), *ss.* 418, 423 (*d*) *and* 537.

On a charge of rape the Judge in his charge to the jury said: "You will observe that this sexual intercourse was against the girl's will and without her consent, &c.," instead of saying, as he ought to have done, "you will have to determine upon the evidence in this case, whether the intercourse was against the girl's will, &c.," and the charge went on in the same style of stating to the jury what had been proved instead of leaving it to them to decide what in their opinion was proved. In the concluding sentence of the charge the Judge said: "You have seen the witnesses, and I have no doubt that you will return a just verdict."

Held, that such a charge amounted to a clear misdirection, and that the verdict was erroneous owing to such misdirection. Even the concluding sentence did not satisfy the requirements of a proper charge.

The provisions in s. 423 (*d*) and s. 537 of the Criminal Procedure Code do not require that the Court is to go through the facts and find for itself whether the verdict is actually erroneous upon the facts.

[R., 26 M. 1 (18) = 2 Weir 521 (531).]

THE accused in this case was charged under ss. 376 and 354 of the Penal Code. The jury returned a verdict of guilty, and the Judge accepting the verdict sentenced the accused to transportation for life. The accused appealed against this finding and sentence on the ground that there was misdirection to the jury, and that the verdict was erroneous in consequence of such misdirection, and also on the ground of severity of sentence.

No one appeared for the accused.

The Officiating Deputy Legal Remembrancer (Mr. *Abdur Rahim*), appeared for the Crown.

The judgment of the High Court (BANERJEE and WILKINS, JJ.) was as follows:—

JUDGMENT.

[231] The appellant in this case was tried by jury before the Sessions Court of Dacca on charges of rape and assault to outrage female modesty, punishable under ss. 376 and 354 of the Indian Penal Code. The jury returned a verdict of guilty, and the learned Sessions Judge accepting the verdict has sentenced the accused to transportation for life. Against this finding and sentence the accused has appealed; and the appeal lies on a matter of law only (see s. 418 of the Code of Criminal Procedure) and also on the question of the severity of the sentence which as the section just referred to provides, is to be deemed a matter of law. Clause (*d*) of s. 423 further provides: "Nothing hereinafter contained shall authorize the Court to alter or reverse the verdict of a jury unless it is of opinion that such verdict is erroneous owing to a misdirection by the Judge or to a misunderstanding on the part of the jury of the law as laid down by him." Therefore, before a verdict can be interfered with, we

* Criminal Appeal No. 629 of 1897, against the order passed by F.S. Hamilton, Esq., Additional Sessions Judge of Dacca, dated the 2nd of August 1897.

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must be satisfied that such verdict is erroneous owing to a misdirection by the Judge or a misunderstanding on the part of the jury as to the law laid down by him. In the present case, the law has been clearly laid down by the Judge, and no question can be raised as to the law laid down by him being misunderstood by the jury. The question, therefore, which really arises for our consideration here is whether the verdict is erroneous owing to a misdirection by the Judge; and that question resolves itself into two other questions, *first*, whether there was any misdirection by the Judge in this case, and, *secondly*, if there was any misdirection by the Judge, whether it can be said that the verdict was erroneous owing to such misdirection, or, in other words, whether within the meaning of s. 537 of the Criminal Procedure Code the misdirection has occasioned a failure of justice.

With reference to the first question, we observe that the learned Judge's charge to the jury is vitiated by this material misdirection, that it never once tells the jury that it is for them to consider whether upon the evidence adduced in the case the offences are established as a matter of fact. After having explained the law to them, the learned Judge says to the jury: "You will observe that in this case the sexual intercourse was against the girl's will [232] and without her consent, or, at any rate, with only such consent as she gave under fear of the accused's threats of violence to her," instead of saying, as he ought to have done, "you will have to determine upon the evidence in this case whether the sexual intercourse was against the girl's will, etc.," and the charge goes on in that same style of stating to the jury what has been proved, instead of leaving it to them to decide what, in their opinion, is proved. This amounts to a clear misdirection. The view taken upon this point is fully supported by the case of the *Queen-Empress* v. *Bepin Biswas* (1) where the learned Judges observe: "It was certainly open to the Judge to express his own opinion regarding it" (that is, the evidence), "and he did so when he stated that he was unable to attach any weight to it. He should, however, have been careful to add that it was for the jury to form their own opinion on this evidence;" and we may add that the same view is taken by Phear, J., in the *Queen-Empress* v. *Raj Kumar Bose* (2).

Our attention was called by the learned Deputy Legal Remembrancer to the concluding sentence of the charge, in which the learned Judge says: "You have seen the witnesses, and I have no doubt that you will return a just verdict." Even that does not in our opinion satisfy the requirements of a proper charge. The learned Judge there does not tell the jury to form their own opinion upon the evidence. The passage just quoted in our opinion means no more than this, that the learned Judge expects the jury to return a verdict which, in his opinion, as indicated throughout the charge, was the just verdict, or, in other words, a verdict of guilty.

We are, therefore, of opinion that the first question, namely, whether there has been any material misdirection by the Judge, must, in this case, be answered in the affirmative.

Then there remains the question, whether, owing to such misdirection, the verdict is not erroneous, or, in other words, there has not been a failure of justice. On this point the view we take is this, that both cl. (*d*) of s. 423, and s. 537 of the Code of Criminal Procedure, require that before

(1) 10 C. 970. (2) 10 B.L.R. Ap. 36.

the verdict of a jury [233] can be reversed on the ground of a misdirection by the Judge, this Court must be satisfied that the misdirection was of a nature such that it may reasonably be supposed that the verdict was erroneous by reason of such misdirection; or, in other words, that there has been a failure of justice by reason of such misdirection. But the two provisions of the law just referred to do not in our opinion require that this Court is to go through the facts, and find for itself whether the verdict is actually erroneous upon the facts. The view we take on this point is in accordance with that taken by this Court in the case of *Wafadar Khan* v. *Queen-Empress* (1),

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Having regard to the nature of the misdirection pointed out above, it is impossible for us to say that the verdict has not been erroneous, that is, is not vitiated, by reason of the misdirection. We must, therefore, set aside the finding and sentence and order the case to be retried.

S. C. B. *Conviction set aside.*

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25 C. 233.

CRIMINAL REVISION,

Before Mr. Justice Banerjee and Mr. Justice Wilkins.

CHOA LAL DASS (*Petitioner*) v. ANANT PERSHAD MISSER (*Complainant Opposite Party*).* [29th October, 1897.]

Revision—Power of interference by the High Court—Test as to whether case is exceptional nature or not—Practice in Criminal case.

The High Court will not interfere in a case during its pendency in a subordinate Court unless it is of an exceptional nature; and one test of its being of such a nature is that a bare statement of the facts of the case without any elaborate argument should be sufficient to convince the High Court that the case is a fit one for its interference at an intermediate stage. *Chandi Pershad* v. *Abdur Rahman* (2) discussed.

[F., 11 Cr. L.J. 387=6 Ind. Cas. 624=17 P.W.R. 1910; R., 38 C. 68=13 C.L.J. 43=11 Cr. L.J. 525=7 Ind. Cas. 747; 12 Cr. L.J. 50=8 Ind. Cas. 1161=33 P.R. 1910 Cr=57 P.L.R. 1911; 130 P.L.R. 1901; D., 10 C.W.N. 322 (325, 331).]

THE accused in this case was charged with having committed criminal trespass. He moved the High Court to set aside the proceedings of the Deputy Magistrate, including the charge framed, on the ground that upon the facts stated by the complainant [234] the trespass complained of was not criminal but civil trespass.

Mr. *Sinha* and Babu *Dasarathi Sanyal*, for the petitioner.

Mr. *P. L. Roy* and Babu *Romesh Chunder Bose*, for the opposite party.

The judgment of the High Court (BANERJEE and WILKINS, JJ.) was as follows:—

JUDGMENT.

We are asked to set aside the proceedings in this case including the charge that had been framed against the petitioner, on the ground that upon the facts stated by the complainant, the trespass, which is the offence complained of, was not criminal trespass, and could only be civil trespass,

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*Criminal Revision No. 597 of 1897 made against the order of Babu H. M. Sandyal, Sub-Deputy Magistrate of Soopale, dated the 30th of July 1897.

(1) 21 C. 955. (2) 22 C. 131.

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if trespass it could be called; and in support of the contention that we ought to interfere in this case, three cases have been referred to, namely, *Ishur Chunder Karmokar* v. *Seetul Dass Mitter* (1), *Shumbhu Nath Sarkar* v. *Ram Kamal Guha* (2), and *Chandi Pershad* v. *Abdur Rahman* (3).

The first question that arises for consideration is whether we ought to interfere at this stage of the case. The learned Counsel for the petitioner contends upon the authority of the last mentioned case that we ought to interfere.

No doubt we have the power to interfere in any case and at any stage of it; and we quite assent to the proposition enunciated in the case of *Chandi Pershad* v. *Abdur Rahman* that "there can be no doubt whatever that we have the power to interfere at any stage of the case, and when it is brought to our notice that a person has been subjected to harassment of an illegal prosecution, it is our bounden duty to interfere." But whilst on the one hand it is our bounden duty to prevent the harassment of parties by illegal prosecutions, on the other hand it is our duty to allow proceedings in the subordinate Courts to go on and take their natural course, unless there is any exceptional ground for our interference; because if the rule was not limited in this way, the result would be, that it would be open to every person accused of an offence before a subordinate Court to come up [235] to this Court at any stage of the case, and as often as he likes in the course of the trial, and ask us to put a stop to further proceedings. Such a thing the Legislature could never have intended by any provision in the Code of Criminal Procedure, and such a thing would seriously impede the speedy administration of justice. The learned Counsel for the petitioner very properly concedes that the cases for our interference during their pendency in the subordinate Courts must be of an exceptional nature. The question then is, what should be the practical test to apply, to determine whether any particular case is of that exceptional nature. Without meaning to lay down any hard and fast rule, which it is impossible as it is undesirable to do upon a question like this, we think we may say that one safe practical test would be this, namely, that a bare statement of the facts of the case without any elaborate argument should be sufficient to convince this Court that it is a fit one for its interference at an intermediate stage. The learned Judges who decidedt he case of *Chandi Pershad* v. *Abdur Rahman* thought in the exercise of their judicial discretion that the case before them was of a nature such that their interference was justified. In the present instance, without prejudging it in any way, and without pronouncing any opinion upon its merits, we must say that the case does not fulfil this test. The contention of the learned Counsel that upon the facts alleged by the complainant the offence of criminal trespass is not at all made out, may be perfectly sound; but as we have said above, we do not think it necessary for us at this stage of the case to go into that question, if it has to be determined upon any lengthy or elaborate argument.

In this view of the case, and for the reasons stated above, the rule must be discharged.

S. C. B. *Rule discharged.*

(1) 17 W.R. Cr. 47. (2) 13 C.L.R. 212. (3) 22 C. 131.

25 C. 236.

[236] APPEAL FROM ORIGINAL CIVIL.

Before Sir Francis Maclean, Kt., Chief Justice, Mr. Justice O'Kinealy, and Mr. Justice Trevelyan.

MOHENDRA LALL MITTER AND ANOTHER (*Plaintiffs*) v. ANUNDO COOMAR MITTER AND OTHERS (*Defendants*).* [14th January, 1897.]

Letters Patent, High Court, 1865, cl. 15—Order refusing application to commit for contempt—Appeal—Judgment.

An appeal lies from an order refusing an application to commit for contempt of Court.

THIS was an appeal against a decision of Mr. Justice Sale, made in suit No. 522 of 1882 on the 13th August 1896. The judgment was as follows:—

SALE, J.—"I think the circumstances clearly show that this is not a case where the Court ought to commit the parties on whom the rule was served for contempt.

The rule was obtained on these grounds, that the Receiver was in possession of the estate of Durga Churn Mitter, and that in 1895 his possession had been interfered with by the persons named in the rule, and that that interference amounted to a contempt.

The parties on whom the rule was served have appeared to show cause "why they should not be committed to jail for contempt for interfering with the possession of the Receiver of this Court and Receiver appointed in this suit of the zemindaries belonging to the estate of Durga Churn Mitter, deceased, in the pleadings in this suit named."

The whole question is whether, on the materials before me, I am prepared to say that it has been proved that the parties showing cause have been guilty of contempt. The affidavit which has been filed on behalf of the persons showing cause places a complexion on the case very different from that which it bore when the rule was obtained.

The decree in the suit was made so far back as 1884. By it the Receiver was appointed Receiver of the estate of Durga [237] Churn Mitter. There was a very long delay in completing the decree. That was not done until 1889, and no steps appear to have been taken by the parties to the suit to put the Receiver in possession till June 1895, and it is quite clear that the Receiver has never succeeded in getting complete possession of the estate. He found what one would have expected him to have found after all these years of delay, that the parties to the suit had been busy in transferring their shares to outsiders, and that these outsiders denied all knowledge of the appointment of the Receiver, and claimed that they had paid good consideration for leases executed in their favor, and insisted on their right being recognised. The result was that there was a struggle between the Receiver on the one side and the lessees on the other; and the assistance of the Criminal Courts appears to have been invoked by both sides. Now, while it is very difficult to say that the Receiver has succeeded in obtaining possession of the estate, it is beyond doubt that he is entitled to possession; and if the usual steps had been taken in the proper time, I should have given him every assistance in obtaining possession.

It seems to me he would have been well advised if, instead of going to the Criminal Courts, he had applied to this Court for its assistance and

* Appeal from Order No. 44 of 1896, against the decision of Mr. Justice Sale, dated the 13th August 1896.

for an order for possession against the persons who dispute his title. It is impossible, in a proceeding of this kind, finally to determine the question whether or not these transfers set up are valid or merely *benami*, and executed for the purpose of resisting the Receiver. But having regard to the nature of the dispute and the steps taken for the purpose of ousting the lessees, it seems to me it would be an injustice to visit the lessees with the punishment for contempt. In order that the Court should exercise its powers of punishment for contempt, it must first be shown clearly that the Receiver is entitled to possession of the property, and next that that possession is interfered with by some person who has no *bona fide* claim to a superior title. That is not the sort of case which, under all the circumstances, can be fairly said to have been established here.

The rule must be discharged with costs. I have been asked to make an order for possession as against the lessees. If the rule served on them had called on them to show cause why such [238] an order should not be made, I should, as at present advised, have been inclined to make the order; but I cannot do so now, as they have not been called on to show cause against any such order. They are here merely to show cause why they should not be committed to jail.

The plaintiffs appealed.

Mr. *T. A. Apcar* and Mr. *Chowdhry*, for the appellants.

Mr. *Dunne* and Mr. *Avetoom*, for the respondents.

Mr. *Dunne* raised the preliminary objection that there could be no appeal from such an order as this. There can certainly be no appeal under the Civil Procedure Code; if there be any appeal it must be under the Charter. But the order is not a 'judgment' within the meaning of cl. 15 of the Charter. The persons sought to be committed are not parties to the suit; and there is no final decision as to any right or liability. There can be no appeal from such an order as the present one because it is the mere exercise of a discretion. *Mohabir Prosad Singh* v. *Adhikari Kunwar* (1); *Kishen Pershad Panday* v. *Tiluckdhari Lall* (2); *Lutf Ali Khan* v. *Asgar Reza* (3). The case of *The Justices of the Peace for Calcutta* v. *The Oriental Gas Company* (4) shows what a "judgment" is; and that case has always been followed. [O'KINEALY, J., referred to *Achaya* v. *Ratnavelu* (5), to *In re Rajagopal* (6), and to *Banno Bibi* v. *Mehdi Husain* (7).] Section 591 of the Code prohibits an appeal in such a case as this. And in England it has been held that no such appeal will lie, *Ashworth* v. *Outram* (8).

Mr. *T. A. Apcar*, for the appellants.—According to the usual practice of this Court, this question has never been considered arguable. The cases cited by Mr. Dunne were all under the [239] Code; this is not. It is a matter falling within the general jurisdiction of the Court, and the Court is invested with all the powers of the Queen's Bench Division and Chancery Division in England—*Martin* v. *Lawrence* (9). In *Jarmain* v. *Chatterton*(10) it was held that there is an appeal from a refusal to commit, as it is not purely a matter of discretion, and that decision was followed in *Bristow* v. *Smyth* (11). The term "judgment" must be liberally construed, as in *DeSouza* v. *Coles*(12); and if the decision determines a question of right or liability, as this does, it is appealable, *The Justices of*

(1) 21 C. 473 (475). (2) 18 C. 182. (3) 17 C. 455.
(4) 8 B.L.R. 433. (5) 9 M. 253. (6) 9 M. 447.
(7) 11 A. 375. (8) (1877) L.R. 5 Ch. D. 943.
(9) 4 C. 655. (10) (1882) L.R. 20 Ch. D. 493.
(11) (1885) 2 Times L.R. 36. (12) 3 M.H.C. 384.

the Peace for Calcutta v. *The Oriental Gas Company* (1). An appeal lies from an order for committal for contempt because contempt is a kind of offence; and it is difficult to see why an appeal should not lie from an order refusing to commit.

Mr. *Dunne* in reply.

The Court (MACLEAN, C.J., O'KINEALY, J., and TREVELYAN, J.) were of opinion that the order was appealable, and they accordingly heard and dismissed the appeal. [The rest of the decision, however, is immaterial for the purposes of this report.]

Attorney for the appellants: Babu *Sitanath Das*.

Attorney for the respondents: Babu *Bhuban Mohan Das*.

H. W.

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25 C. 239.

APPEAL FROM ORIGINAL CIVIL.

Before Sir Francis Maclean, Kt., Chief Justice, Mr. Justice O'Kinealy and Mr. Justice Trevelyan.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL (*Defendant*) *v.* RAJLUCKI DEBI (*Plaintiff*) AND ANOTHER (*Defendant*).*
[7th January, 1897.]

Civil Procedure Code (*Act XIV of* 1882), *s.* 424—*Suit against the Secretary of State for India in Council—Notice—Public Demands Recovery Act* (*Bengal Act VII of* 1880), *ss.* 8, 9, 20—*Sale for default in payment of costs of realising Government revenue—Common ground of appeal—Code of Civil Procedure, s.* 544.

Section 424 of the Civil Procedure Code provides that "No suit shall be instituted against the Secretary of State in Council, or against a public [240] officer in respect of an act purporting to be done by him in his official capacity, until the expiration of two months next after notice in writing has been, in the case of the Secretary of State in Council, delivered to, or left at the office of a Secretary to the Local Government or the Collector of the District," &c.

The plaintiff had instituted a suit against the Secretary of State for India in Council to set aside a certain sale of the plaintiff's property (possession of which had been given to the purchaser), but had not given him the notice prescribed by s. 424 of the Civil Procedure Code. The first Court (AMEER ALI, J.) gave the plaintiff a decree.

Held on appeal (reversing the decision of AMEER ALI, J.) that whether or not the words "in respect of an act purporting to be done by him in his official capacity" relate only to a public officer and not to the Secretary of State, no suit whatever is maintainable against the Secretary of State, unless the notice prescribed by s. 424 of the Code of Civil Procedure has been given; and that therefore the present suit could not be maintained.

[F., 35 B. 362 = 13 Bom. L.R. 273 = 10 Ind. Cas. 639; 4 O.C. 133 (137); R., 30 C. 36 (72); 34 C. 257 = 5 C.L.J. 148; 37 M. 113 = 16 Ind. Cas. 947 = 23 M.L.J. 181 = 12 M.L.T. 224 = (1912) M.W.N. 786; 10 O.C. 49.]

A SUM of Rs. 4-4-0 was due from the plaintiff to the Collector of the 24-Pargannahs, by way of process fees incurred in the realisation of income-tax from the plaintiff. The plaintiff declined to pay that amount; and certain land of hers was sold by the Collector in default of payment, and purchased for Rs. 2,600 by the defendant Radharomon Shaw, who was put into possession. The plaintiff subsequently brought a suit against the defendants, in which she prayed, *inter alia*, that the sale certificate,

* Appeals from Original Decrees, Nos. 22 and 23 of 1896, against the decision of Mr. Justice Ameer Ali, dated the 7th February, 1896, in Suit No. 106 of 1894.

(1) 8 B.L.R. 433.

1897 JAN. 7. — APPEAL FROM ORIGINAL CIVIL. — 25 C. 239.

and the sale and all proceedings connected therewith, might be set aside, and that the defendants, or one of them, might be ordered to pay the costs of the suit.

The suit was tried by AMEER ALI, J., who made a decree in favour of the plaintiff, directing that the sale certificate should be cancelled, that the purchase-money should be returned to the purchaser, and that the defendants should pay the costs of the suit. He held on the authority of *The Midland Railway* v. *Local Board of Wellington* (1); *Waterhouse* v. *Keen* (2); *Davies* v. *Mayor of Swansea* (3); *Wilson* v. *Mayor and Corportion of Halifax* (4); *Flower* v. *Local Board of Low* [241] *Leyton* (5) and *Bhau Balapa* v. *Nana* (6), that the qualification "in respect of an act purporting to be done by him in his official capacity," in s. 424 of the Civil Procedure Code, related to the Secretary of State for India in Council, as well as to a public officer, and that in actions of tort no notice was necessary.

The Secretary of State appealed.

Mr. *Dunne* (with him the Advocate-General Sir *Charles Paul*), for the appellant.—Notice of action as prescribed by s. 424 of the Civil Procedure Code is essential. The qualification with regard to acts done in an official capacity is not referable to the Secretary of State. The section is an absolute prohibition of a suit against the Secretary of State, without notice, whatever the nature of the suit may be. But in any event the sale, if it can be said to be the act of the Secretary of State at all, was an act done in his official capacity. In Act X of 1877, s. 424, the words "in respect of an act purporting to be done by him in his official capacity" were not present; they were introduced by Act XII of 1879. But this latter Act also introduced the same qualification into two other sections, *viz.*, 428, 429, showing that it had reference only to a public officer; for s. 428 relates only to a public officer, and in s. 429 the Secretary of State is differentiated from a public officer. The case of *Bhau Balapa* v. *Nana* (6) was a totally different case; it was not a suit against any one in his official capacity, but only against the Collector as guardian of a minor's property.

Mr. *Hill*, for the purchaser, Radharomon Shaw, supported the argument of Mr. *Dunne*, and urged that the sale could not be set aside, unless the certificate of sale also was set aside, so that the purchaser could only be made a party if the plaintiff sought to set aside the sale as well as the certificate.

The plaintiff did not appear on the appeal either in person or by counsel.

The following judgments were delivered by the Court (MACLEAN, C. J., and O'KINEALY and TREVELYAN, JJ.) :—

JUDGMENTS.

[242] MACLEAN, C. J.—It is unfortunate that in this case we have not had the advantage of the plaintiff being represented by counsel, so that we might have heard from him the arguments by which he sought to maintain the judgment of the learned Judge in the Court below. The point which we have to decide is a very short one, nor does it strike me as one of any real difficulty.

The suit was instituted by the plaintiff against the Secretary of State for India and another gentleman, who is the purchaser under a certificate

(1) (1883) L R. 11 Q.B.D. 788.
(2) (1825) 4 B. and C. 200.
(3) (1853) 8 Exch. 808=22 L.J. Exch. 297.
(4) (1868) L.R. 3 Ex. 114.
(5) (1877) L.R. 5 Ch. D. 347.
(6) 13 B. 343.

of sale following a decree under which certain property was put up for sale, and sold to meet the claim of the Government in respect of certain moneys due from the plaintiff, to set aside that sale.

An objection is taken by the Secretary of State in Council that he has not been served with the necessary notice under s. 424 of the Code of Civil Procedure to which he submits he is entitled before an action can be instituted. The question to my mind depends upon what is the true construction and effect of that section of the Code. The section runs as follows:—

"No suit shall be instituted against the Secretary of State in Council, or against a public officer in respect of an act purporting to be done by him in his official capacity, until the expiration of two months next after notice in writing has been, in the case of the Secretary of State in Council, delivered to, or left at the office of a Secretary to the Local Government or the Collector of the District, and in the case of a public officer, delivered to him or left at his office, stating the cause of action," and so forth.

It is admitted that no such notice was given. In his defence the Secretary of State raised the point that such notice ought to have been given, and that in the absence of such a notice the action is not maintainable.

It was contended before the Court below, and it is contended here, that upon the true construction of s. 424 the words "in respect of an act purporting to be done by him in his official capacity" do not apply to the case of the Secretary of State in Council. Looking, if one may look, at the punctuation of the section and at the section grammatically, I incline to take the view so submitted as the correct construction, but it is not really **[243]** material for the purpose of this decision, for it is clear that what was done in this case by the Secretary of State in Council was done and must be regarded as having been done by him in his official capacity. Therefore, whether the view suggested that those words do not apply to the Secretary of State in Council, but only to public officers, be sound or not, becomes immaterial.

Now, the language of that section, read according to its ordinary and natural meaning, is precise and clear. It is a section dealing with procedure. We are asked to cut down the ordinary meaning of the words, and to hold that they mean something quite different from that which in their ordinary acceptation they do. The section says: "No suit shall be instituted." We are told we ought to confine the words to a particular class of suit, that is, to suits founded on tort, and claiming damages. I am unable to see why the section should be cut down as suggested.

A variety of cases were cited in the Court below,—English cases based upon English Acts of Parliament in which the language and the subject-matter is different. Upon this it is not out of place to refer to what has been said by Lord Macnaghten in delivering the judgment of the Judicial Committee in a very recent case, *Narendra Nath Sircar* v. *Kamalbasini Dasi* (1). It is true that in that case the Judicial Committee was dealing with the question of the construction of a will having regard to a particular section of the Indian Succession Act.

The judgment runs: "The learned Judges of the High Court have taken the line which was approved in the House of Lords. The Subordinate Judge followed exactly the opposite course. His judgment, with much display of learning and research, is a good example of the practice

(1) 23 C. 563 = 23 I.A. 26.

1897 JAN. 7. — APPEAL FROM ORIGINAL CIVIL. — 25 C. 239.

which Lord Herschell condemns, and the mischief which the Indian Succession Act, 1865, seems designed to prevent. To construe one will by reference to expressions of more or less doubtful import to be found in other wills, is for the most part an unprofitable exercise. Happily that method of interpretation has gone out of fashion in this country. To search and sift the heaps of cases on wills which cumber our English law reports, in order to understand and interpret wills of people speaking a different tongue, trained in different habits of thought and [244] brought up under different conditions of life, seems almost absurd."

It seems that substituting "English Acts of Parliament" for "wills" the observations of the Privy Council may be usefully applied to this case. In lieu of reading s. 424 by the light of the decisions of the English Courts in cases under various English Acts of Parliament, where the language and in most cases the objects of the Acts are different, I prefer to read the section itself and try to arrive at a conclusion from the language used as to what the Legislature actually meant. But even if the true principle be that the statutory notice is only requisite in cases of tort, as I understand is the principle of Mr. Justice Ameer Ali's judgment, the plaintiff's suit in this case is based upon an alleged tort on the part of the Secretary of State, namely, in wrongfully selling the property, and asking for costs against him on the footing of such wrongful act.

If the object of such a section as 424 be that the notice is given so that, before an action is brought, the Secretary of State may have breathing time so as to enable him to determine whether reparation ought not to be made,—if that, I say, be the object,—I fail to see why the principle does not apply to the present case; if so, the notice was requisite. There is a short reference in the judgment to a decision of the late Master of the Rolls (Sir George Jessel) in *Flower* v. *Local Board of Low Leyton* (1) to the effect that notice cannot be necessary where the object of the action is to restrain an immediate and irreparable injury. The materials before us do not enable us to say how far the present case comes within the principle laid down in the decision of Sir George Jessel, though I notice that no injunction is asked for against the Secretary of State. It would appear, therefore, that he, at any rate, could not be described, and was not regarded by the plaintiff, as doing any immediate or irreparable injury, which necessitated, as against him, an immediate interlocutory order for an injunction. For these reasons it appears to me that upon the preliminary point the judgment of the Court below is erroneous, and I think the appeal must succeed with costs.

[245] O'KINEALY, J.—I agree in the judgment just delivered by the learned Chief Justice, because reading s. 424 of the Procedure Code, I find that it declares that no suit can be instituted against the Secretary of State "until the expiration of two months next after notice in writing has been delivered to or left at the office of a Secretary to the local Government," and I can find no indication that any limitation has been put upon the word "suit."

TREVELYAN, J.—I think it quite clear that the Secretary of State was entitled to notice of this suit for the reasons given by the learned Chief Justice.

Mr *Hill*.—The purchaser is entitled to his costs against somebody, and in the view of this Court the Secretary of State certainly ought not

(1) (1877) L.R. 5 Ch. D. 347.

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to have been made a party. [MACLEAN, C. J.—Do you ask to have the suit dismissed as against the purchaser?] Yes: for, although he is only the respondent, he is entitled to take a ground common to all the defendants. The question of notice is common ground. Notice must be given in order that the suit may lie against the Secretary of state; and as the suit has been dismissed as against him, it should be dismissed as against the other defendant also. By the dismissal of the suit, the sale certificate is allowed to remain, and the purchaser's title is complete. If the suit is not to be dismissed as against the purchaser, the Court would be bound to direct the Secretary of State to refund. But it cannot do that, because, by the present decision of the Court, there is no suit against the Secretary of State. [MACLEAN, C. J.—Is that a ground of defence common to you both within s. 544 of the Code?] Yes, because it goes to the entire suit of the plaintiff.

MACLEAN, C. J.—The result of the judgment of the Court is that the suit is dismissed, not only against the Secretary of State for India in Council, but also against the defendant Radharomon Shaw with costs both in the Court below and in this Court.

We make no order as to the costs of the appeal No. 23 of 1896.

Attorney for the appellant: The Government Solicitor (Mr. *W. K. Eddis*).

Attorneys for the respondent Radharomon Shaw: Messrs. *Dignam & Co.*

H. W.

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25 C. 246.

[246] APPELLATE CIVIL.

Before Sir Francis William Maclean, Kt. Chief Justice, and Mr. Justice Banerjee.

SARALA DASI AND OTHERS (*Plaintiffs*) *v.* JOGENDRA NARAYAN BASU AND ANOTHER (*Defendants.*)* [5th May, 1897.]

Interest—Mortgage—Construction of mortgage— Post diem *interest, where none is stipulated for in the deed.*

Where a mortgage-deed contained a covenant for payment of principal and interest at a fixed rate in two years, and further covenants not to transfer the mortgaged property until payment of principal and interest, and also on failure of payment of interest for "one year" to treat the amount after the lapse of that year, as principal:—

Held, upon the construction of the mortgage-deed, the parties intended that if the principal were not paid by the stipulated date, interest should continue to run at the rate mentioned in the deed, and that the mortgagee was entitled to recover the principal with interest at the stipulated rate to the date of the decree of the first Court, and at the rate of 6 per cent. thereafter.

Mathura Das v. *Narindar Bahadur Pal* (1), referred to.

[F., 23 M. 534=10 M.L.J. 101; 14 C.P.L.R. 49 (52).]

THIS appeal arose out of an action brought by the plaintiff upon a mortgage bond, dated the 25th *Falgoon* 1292 B. S. (8th March 1886). The bond, amongst other, contained the following covenants:—

" We shall pay interest on the said amount at the rate of 1 per cent. per mensem, until the said principal and interest thereon are paid up; we

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* Appeal from Original Decree, No. 150 of 1896, against the decree of Babu Beni Madhub Mitter, Subordinate Judge of Hooghly, dated the 31st of March 1896.

(1) 19 A. 39=23 I. A. 138.

1897 MAY 5. — APPELLATE CIVIL. — 25 C. 246.

shall not sell or make a gift of the said *mehal* or any way prejudice our rights. . . . If we fail to pay the interest of one year, then, after the lapse of one year the said amount of interest will be considered as principal and we shall pay interest on it at the above mentioned rate. We shall repay the whole amount together with interest thereon in the month of *Chaitra* 1294 B. S. (March 1888) the time fixed for the payment of the same. If we cannot repay the principal amount together with the interest thereon within the fixed time, then you shall institute a suit against us and realize the whole amount by sale of the mortgaged properties; and if the whole sum fails to be realised by this means, then you shall realise it by the sale of our other moveable and immoveable properties standing either in our names or *benami*."

The only question material for the purposes of this report [247] was, what was the rate of interest (if any) the plaintiff was entitled to after the due date. The Subordinate Judge on this question observed :—

"I am of opinion that, although there is no express stipulation in the bond for payment of interest after the due date, still the plaintiff is entitled to claim damages for breach of contract from the defendants, from the due date to the date of the institution of this suit. Had the defendants paid the amount due to the plaintiff on the due date, then the plaintiff would be able to lend that amount to some other person and get interest from him. It has been already shown the defendants did not pay the amount due to the plaintiff on the date on which it was due, and caused the plaintiff to refrain from instituting a suit by their entreaties. Under such circumstances the plaintiff is entitled to get damges in the shape of interest, after the due date, at a rate at which moneys are lent with security. Neither party has adduced any evidence to prove the rate of interest of mortgage bonds in the locality at the time the due date expired. Under these circumstances I think the Court ought to allow simple interest in lieu of damages to the plaintiff after the due date at the rate of 6 per cent. per annum."

From this decision the plaintiff appealed to the High Court, on the ground that, upon the construction of the mortgage bond, the Subordinate Judge ought to have allowed interest after due date at the stipulated rate.

Babu *Sarada Churn Mitter* and Babu *Haro Kumar Mittra*, for the appellant.

Babu *Nil Madhub Bose* and Babu *Shib Chunder Palit*, for the respondents.

The judgment of the High Court (MACLEAN, C.J., and BANERJEE, J.) was as follows :—

JUDGMENT.

MACLEAN, C. J. (BANERJEE, J., concurring).—The appellants complain that the Judge in the Court below has not given them the interest to which they are entitled on the mortgage created in their favour by the defendants, the realisation of which security was the subject-matter of the present suit. The questions we have to decide are first, whether, upon the construction of the mortgage deed, the plaintiffs as mortgagees are entitled to *post diem* interest at the rate stipulated for in the deed.

If upon the construction of the deed, we arrive at a conclusion adverse to the plaintiffs, the appellants, then a further question would arise whether the plaintiffs are entitled to any and [248] what interest upon the mortgage money up to the date of payment.

In the view we take of the construction of the deed the second question does not arise. In my opinion, there is, though not an express, an implied stipulation that *post diem* interest is to be paid and to be paid at the rate stipulated for in the deed. We can only determine the intention of the parties upon the question of interest from the terms of the deed itself. One deed cannot be construed by reference to the construction judicially put upon another deed, but it is impossible to avoid noticing the marked resemblance between the terms of the deed in this case and those in the deed in the case of *Mathura Das* v. *Narindar Bahadur Pal* (1), a case which has been much commented upon in the course of the present argument. But I refer to and rely upon that case, not by reason of the similitude of language between the deed in that and in the present case, but with reference to the arguments upon which, in construing the deed in that case, the Privy Council relied and based their conclusion. The reasoning in that case appears to me to be very pertinent to the present. Looking at the provisions of the deed in this case, I think it was the intention of the parties,—and in a simple mortgage transaction it is not an unusual intention,—that if the principal money be not paid by the stipulated time, interest should continue to run, and run at the stipulated rate. Such a construction is consistent with the ordinary intention of mortgagor and mortgagee in an ordinary mortgage transaction.

I will now consider certain of the provisions of the deed itself. At the top of p. 21 of the Paper Book, we find this, "we shall pay interest on the said amount at the rate of one per cent. per mensem." I pause there for a moment. There is nothing there confining the payment of interest only until the time stipulated for payment off of the principal. As regards time the payment of interest is unlimited. The deed then proceeds: "Until the said principal and interest thereon are paid up, we shall not sell or make a gift of the said *mehal*, or in any way prejudice our rights in the same." The "said interest" in that clause refers of necessity to the interest [249] mentioned in the preceding clause,—interest, as I have pointed out, unlimited as to the period over which it was to be payable.

Now I find, in the case to which I have referred, an almost similar provision in the deed in that case. I find in that deed this clause: "Until the payment in full of this amount, principal and interest, I shall not transfer, either directly or indirectly, the mortgaged property to any one else, and if I do, such a transfer should be deemed false and inadmissible." Now what do their Lordships of the Privy Council say upon such a condition as that—"If it be true," they say, "that covenants not to transfer till principal and interest be paid are sometimes inserted, when the intention is only to secure interest for a single year, such intention must be gathered from other parts of the deed itself. If such a covenant, not being controlled by other parts of the deed, does not mean that interest is to run till payment, it is very difficult to say what it does mean." I may also rely upon the reasoning of their Lordships at p. 145 of the report (1), as applying with equal force to the present case.

There are other provisions in the deed which appear to me to support our present view. For instance there is the provision that, if the mortgagors fail to pay interest for "one year," then, after the lapse of that year, the amount was to be treated as principal. The time stipulated for repayment of the principal was at a date between one and two years from the date of the mortgage. This reference to the failure to pay one year's

(1) 19 A. 39=23 I.A. 138.

1897 MAY 5. — APPELLATE CIVIL. — 25 C. 246.

interest appears to me to indicate that it was in the contemplation of the parties that interest was to be paid until the principal was repaid, and that the transaction was not to be closed when the day fixed for payment of the principal arrived. Then the provision for sale in default of repayment of the principal sum "together with interest" thereon, the provision for realising "the whole amount," the reference to the non-realisation of "the whole sum," are expressions which appear to me to indicate that the interest referred to in the deed is interest up to the time of realisation. As I have pointed out before, such construction is in accordance with the usual intentions of parties to such a transaction. In my opinion, therefore, upon the construction of the mortgage-deed the parties intended that if the principal were not paid by the stipulated **[250]** date, interest should continue to run at the rate mentioned in the deed. Being of that opinion, I think the Court below was in error as to the amount of interest allowed to the plaintiff, and the decree must be varied by directing that the plaintiff be entitled to principal with interest, at the rate mentioned in the mortgage-deed, up to the date of the decree in the first Court, and after that date at the rate of six per cent. per annum until payment. The appeal must be allowed with costs in proportion to the amount decreed and disallowed respectively. The costs in the Court below will be increased proportionately by the additional sum to be recovered on the security.

S. C. G. *Appeal allowed.*

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25 C. 250=1 C.W.N. 646.

APPELLATE CIVIL.

Before Sir Francis William Maclean, Kt., Chief Justice, and Mr. Justice Banerjee.

MOHESH CHANDRA BHUTTACHARJEE AND ANOTHER (*Opposite Parties*) *v.* BISWA NATH BHUTTACHARJEE (*Petitioner*).*
[29th April 1897.]

Probate and Administration Act (*V of* 1881), *s.* 98—*Act VI of* 1889, *s.* 15, *amending Act V of* 1881—*Construction of Act—Meaning of the words* "*an account.*"

The provisions of s. 98 of the Probate and Administration Act, that an executor shall within one year from the grant of probate or letters of administration "or within such further time as the Court may from time to time appoint, exhibit an account of the estate," mean that one account is to be exhibited, and not a series of accounts from time to time; the words "from time to time appoint" relating to an extension of the period within which an account is to be exhibited.

[R., 31 C. 629=8 C.W.N. 578.]

THE facts of the case, so far as they are necessary for the purposes of this report, appear sufficiently from the judgments of the High Court.

Mr. *W. C. Bonnerjee* and Babu *Horendra Narayan Mitter*, for the appellants.

Mr. *C. P. Hill* and Babu *Basanta Kumar Bose*, for the respondent.

The following judgments were delivered by the High Court (MACLEAN, C. J., and BANERJEE J.) :—

JUDGMENTS.

[251] MACLEAN, C. J.—The point we have to decide is a short one, *viz.*, as to the true construction of s. 98 of the Probate and Administration

* Appeal from Original Order, No. 89 of 1897, against the order of S. J. Douglas, Esq., District Judge of Dacca, dated the 15th of January 1897; and Rule No. 140 of 1897.

1897 APRIL 29.

APPELLATE CIVIL.

25 C. 250 = 1 C.W.N. 646.

Act V of 1881. The facts of the case lie within a narrow compass. The testator made a will on the 17th of July 1884, and the two appellants and the respondent, who is represented by Mr. Hill, were appointed executors. The testator died on the 14th September in that year leaving an adopted infant son, and on the 1st of June 1885 probate was granted to the appellants alone. On the 31st of January 1887, the appellants filed, I presume under the section I have referred to, their accounts from 16th September 1884, a day or two after the testator's death, to 30th September 1886. On the 10th of June 1887, by what I may call a somewhat short cut, the respondent's name was inserted into the probate as one of the executors, the other executors not objecting. In 1888, the respondent brought a suit against the appellants for an account of the executorship, alleging that he was not allowed by his co-executors to interfere in the management of the estate. However, on the 8th of January 1889 the respondent withdrew that suit and admitted that the accounts were correct. In 1891, another suit, on behalf of the infant beneficiary was instituted by the mother, as his next friend, against the appellants for accounts from September 1884 to April 1891. I understand that the respondent in this appeal was not a party to that suit. I do not understand how an administration suit could be regarded as properly framed, one of the executors not being a party. Be that as it may, on the 31st of December 1891 that suit was compromised, the compromise being declared by the Court to be for the benefit of the infant. Matters rested thus until the 9th of September 1895 when the respondent applied to the District Judge of Dacca under s. 98 of the Act to which I have referred, asking for accounts from the appellants from the 1st of December 1886 to the 31st December 1896. That application was resisted by the appellants, but on the 15th of January 1897, the learned Judge ordered the appellants to give accounts for the period which I have mentioned; hence the present appeal.

These being the facts, the question turns upon the true construction of s. 98 of the Probate and Administration Act, the [252] question admittedly being, whether the Court can under that section go on from time to time directing executors to deliver accounts, or whether, according to the true meaning of that section, that power can only be exercised once. The section has been read (1) and I need not read it again; but to my mind the language is reasonably clear. It says first, that "the executor or administrator shall within six months from a certain date, or within such further time as the Court, which granted probate or letters of administration, may from time to time appoint, exhibit an inventory," and so on. Stopping there, I think it is clear that the words "from time to time appoint," relate to an extension of the period within which the inventory is to be exhibited, and if this be so, these words so used in this part of the section throw considerable light upon the meaning of the same words used in the

(1) Section 98 (as amended by s. 15 of Act VI of 1889), so far as is material to this report, is as follows :—

"An executor or administrator shall, within six months from the grant of probate or letters of administration, or within such further time as the Court which granted the probate or letters may from time to time appoint, exhibit in that Court an inventory containing a full and true estimate of all the property in possession, and all the credits, and also all the debts owing by any person to which the executor or administrator is entitled in that character, and shall in like manner, within one year from the grant, or within such further time as the Court may from time to time appoint, exhibit an account of the estate showing the assets which have come to his hands, and the manner in which they have been applied or disposed of."

1897 April 29. — Appellate Civil. — 25 C. 250 = 1 C.W.N. 646.

subsequent part of the section. The words "from time to time appoint," cannot mean, in the earlier part of the section, that the Court can go on, again and again, calling on executors to furnish an inventory. One inventory would be sufficient, but as, say in the case of a large estate, it might not be practicable to furnish that inventory within the time specified in the section, the Court is empowered to extend that period from time to time.

I now come to that part of the section dealing with the executor's account. The material words are, "and shall in like manner within one year from the grant, or within such further time as the said Court may from time to time appoint, exhibit an account [253] of the estate showing the assets," and so forth. The language used is identical in both parts of the section, and I am of opinion that the words in the latter part of the section "from time to time appoint" relate to an extension of time for putting in the account, and does not authorize the Court to go on calling upon the executors to exhibit accounts from time to time, as often as the Court thinks fit. This view is emphasised by the consideration that the section speaks of "an account," that is one account, not a series of accounts. As I have pointed out there are good reasons for giving the Court a discretionary power of extending the time both for the inventory and the account. In the case of a large estate it might not be possible for the executors to exhibit an account of the assets within the time fixed. The Legislature, therefore, empowers the Court to extend that period. I see nothing in the language of the section, read in its ordinary sense and signification, to authorize the Probate Court to go on from time to time ordering executors to go on exhibiting their accounts. With respect to the suggestion that the respondent's contention, if successful, would have a useful result in ensuring that an estate is properly administered, the answer to that is, that the ordinary Civil Courts are the proper tribunals to which to apply if the parties interested are under the impression that the executors are not properly doing their duty.

Upon these grounds I think that the construction which the learned Judge has put upon the section is erroneous, and that the appeal must succeed, and be decreed with costs; and the appeal succeeding, it is admitted by Mr. Bonnerjee, who obtained the rule, that the rule becomes unnecessary. That being so, the rule will be discharged with costs.

Banerjee, J.—I am of the same opinion. Section 98 of Act V of 1881, so far as it is necessary to refer to it for the purposes of this case, enacts that "an executor or administrator shall within one year of the grant of letters of administration, or within such further period as the said Court may from time to time appoint, exhibit an account of the estate showing the assets which have come to his hands and the manner in which they have been applied or disposed of," and that means, evidently, that there [254] is to be a filing of accounts, and that is to be within one year from the granting of the probate or letters of administration, or within such further time as the Court granting probate or letters of administration may from time to time appoint. The section does not say that the filing is to be first within one year of the order, and then again within such further time as the said Court may from time to time appoint; but it speaks of the time of filing being within one year from the time of the probate or letters of administration being granted, or within such further time as the said Court may from time to time appoint. What is spoken of as taking place from time to time is not the filing of a series of accounts, but the appointment of

the time within which the filing of the account is to take place; or, in other words, the clause relates merely to the extension of the time within which the filing of the account must take place.

1897 APRIL 29. — APPEL-LATE CIVIL. — 25 C. 250= 1 C.W.N. 646.

S. C. G. *Appeal allowed, and Rule discharged.*

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25 C. 254=2 C.W.N. 97.

APPELLATE CIVIL.

Before Sir Francis William Maclean, Kt., Chief Justice, and Mr. Justice Banerjee.

SARNA MOYEE BEWA (*Petitioner*) *v.* SECRETARY OF STATE FOR INDIA IN COUNCIL (*Opposite Party*).* [6th September, 1897.]

Hindu Law—Inheritance—Letters of Administration—Probate and Administration Act (*V of* 1881)—*Prostitute—Succession to property of degraded woman.*

In the absence of any local custom or usage to the contrary, a woman of the town is no heir to her deceased sister, who was also a woman of the town.

Sivasangu v. *Minal* (1), distinguished.

A woman of the town, who is a Hindu by birth, does not cease to be a Hindu by reason of her degradation, and succession to her property is governed by Hindu law.

[F., 38 C. 493=15 C.W.N. 807=9 Ind. Cas. 657; 6 C.L.J. 372; 10 C.W.N. 1085; R., 40 C. 650=17 C.L.J. 438=17 C.W.N. 679=19 Ind. Cas. 129; 4 N.L.R. 31; 27 M.L.J. 353=16 M.L.T. 270=(1914) M.W.N. 672.]

THE facts of the case, so far as they are necessary for the purposes of this report, and the arguments, appear sufficiently from the judgment of the High Court.

Babu *Golap Chunder Sarkar*, and Babu *Gobind Chunder Deb Roy*, for the appellant.

[255] Babu *Ram Chunder Mitter*, for the respondent.

The judgment of the High Court (MACLEAN, C. J., and BANERJEE, J.) was as follows:—

JUDGMENT.

This appeal arises out of an application for letters of administration to the estate of Sahachari Bewa by the appellant, who claims to be her sister and only heir. The application was opposed by the Secretary of State for India, who alleged that the deceased Sahachari Bewa was a woman of the town, that the petitioner was not her heir, and that the estate of the deceased had escheated to the Crown.

The Court below has disallowed the application, holding that the sister was no heir to the property of a woman under the Bengal School of Hindu law, and that the evidence was not sufficient to prove that the petitioner was the sister of Sahachari.

The petitioner has preferred this appeal against that decision, and it is contended on her behalf, *first*, that the learned Judge below is wrong in holding that the sister is no heir to a woman's property; and *secondly*, that the learned Judge below is wrong in holding that the evidence is insufficient to prove the relationship set up.

It is conceded, as it must be, that if the Hindu law governs this case, it must be the Hindu law of the Bengal School, and that according to the

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* Appeal from Original Decree No. 202 of 1896, against the decree of J. Pratt, Esq., District Judge of 24-Pergunnahs, dated the 31st of March 1896.

(1) 12 M. 277.

1897 SEP. 6. — APPELLATE CIVIL. — 25 C. 254 = 2 C.W.N. 97.

law of that School the sister is no heir. But the learned Vakil for the appellant seeks to make out the right of his client upon two alternative grounds.

In the first place, he argues that as the deceased Sahachari was a woman of the town, and the petitioner also belongs to the same class, the ordinary Hindu law does not apply to this case, and that it is governed by those principles of natural justice not inconsistent with the Hindu law, according to which the sister, as a near consanguineal relation, should be held to be in the line of heirs; and in support of this argument he relies upon the definition of "heritage" in the Dayabhaga, Ch. 1, para 5, according to which the right of inheritance depends upon relationship with the former owner, and also upon the cases of *Myna Boyee* v. *Ootaram* (1); *Sivasangu* v. *Minal* (2); *Narasanna* v. *Gangu* (3), and *Tara* [256] *Naikin* v. *Nana Lakshman* (4). And in the second place he contends that Sahachari Bewa should be considered as a person who was not a Hindu within the meaning of s. 331 of the Indian Succession Act, that succession to her property should be held to be governed by that Act, and that her sister should therefore be held to be her heir.

The first branch of this argument is ingenious, but not sound. The passage of the Dayabhaga (Chap I, 5) relied upon only shews at the most that every right to inherit is created by relationship with the former owner; but it does not establish the converse proposition that every relationship with the former owner creates the right to inherit. Moreover, it would be a strange anomaly, that though the sister is no heir to a female proprietor under the Bengal School of Hindu law, if they remain undegraded, yet if they both lapse into prostitution, the one becomes an heir of the other, quite apart from custom. The rule that of the ordinary heirs to a woman, those who remain undegraded are not competent to inherit her property, if she becomes degraded by leading the life of a prostitute, which has been laid down in several cases of which I may mention one, namely, *In the goods of Kaminey Money Bewah* (5), is based upon the principle that by her degradation the tie between her and her undegraded relations becomes severed; and this principle is unaffected by Act XXI of 1850, which only removes the disqualification by degradation of the person claiming the right to inherit. But that rule cannot help the petitioner in this case; for here there is no question of competition between a degraded and an undegraded relation; the question being whether the petitioner is an heir of the deceased at all. Nor is there any question here as to whether the petitioner is by custom an heir to the deceased, no custom being pleaded or proved. Of the cases cited, *Myna Boyee* v. *Ootaram* (1) has only a remote bearing upon the present case. In that case certain persons being the illegitimate sons of a Christian father by Hindu mothers, were brought up as Hindus, and lived as members of a Joint Hindu family, and one of the questions raised was whether [257] any one of them could claim as heir the property of his uterine brother. The Courts in this country having answered the question as a point of Hindu law in the affirmative, their decision was reversed by the Privy Council, and the case was sent back for further inquiry, especially with reference to local custom or usage. After the remand, the Madras High Court re-affirmed the original answer, the learned Judges "feeling satisfied" as they said "that all the analogies of Hindu law and the

(1) 8 M.I.A. 400 = in High Court after remand. 2 M.H.C. 196.
(2) 12 M. 277. (3) 13 M. 133. (4) 14 B. 90. (5) 21 C. 697.

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plain rules of equity and justice are in favour of the evidence of heritable blood between the illegitimate sons." Whether this view is correct or not it is unnecessary for us now to consider. It will be sufficient to say that accepting it to be correct, it does not help the appellant before us, because in the case cited the party claiming to be the heir, the uterine brother of the deceased, was certainly his heir under the ordinary Hindu law, but for the stain of illegitimacy on the relationship between the parties, and all that the Madras High Court decided was that that stain did not affect the heritable right of the plaintiff; whereas in the present case the appellant is no heir to the deceased under the ordinary Hindu law of the province, and what she has to make out is that the stain of degradation creates a new heritable right in her.

As for the other three cases relied upon, *Sivasangu* v. *Minal* (1), *Narasanna* v. *Gangu* (2), and *Tara Nāikin* v. *Nana Lakshman* (3), they and other similar cases, of which there are several in our reports, are based more or less upon local custom and usage. It was ingeniously argued upon the authority of a text of the Skanda Purana cited in the Mitakshara in its commentary on Yajnavalkya, Chap. II, v. 290 (see Sanskrit, Mitakshara, Bombay Edition, p. 265, Grish Chunder Tarkalankar's Translation, p. 231) which treats prostitutes as forming a fifth class or caste, that prostitutes belong to one caste or community all over India, and that if a degraded sister of a prostitute is her heir in Madras as has been held in *Sivasangu* v. *Minal* (1), the same rule should be held to be true for Bengal. One simple answer to this argument [258] is that in the case just mentioned, the deceased and her degraded sister lived jointly, and this circumstance is relied upon in the judgment, whereas in the case before us the appellant and her deceased sister lived in widely distant places, and did not since their degradation meet each other more than twice or thrice in the course of nearly a quarter of a century. And we need hardly add that a custom obtaining amongst any caste in Madras or Bombay cannot, in the absence of evidence, be assumed to govern the same class in Bengal.

The second branch of the argument advanced by the learned Vakil for the appellant is clearly untenable. The deceased Sahachari was clearly a Hindu by birth, and it is neither shown nor even suggested that she ever abjured Hinduism. By lapsing into prostitution she became an outcaste, but did not cease to be a Hindu. The passage of the Mitakshara referred to above fully supports this view. The Indian Succession Act cannot therefore apply to this case.

In the view we take that assuming the appellant to be the sister of the deceased, still she is no heir to her, it becomes unnecessary to consider the question whether the relationship set up has been proved.

The result then in our opinion is that the appeal fails, and must be dismissed with costs.

S. C. G. *Appeal dismissed.*

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(1) 12 M. 277. (2) 13 M. 133. (3) 14 B. 90.

1897 JULY 27.

APPELLATE CIVIL.

25 C. 258 = 2 C.W.N. 219.

25 C. 258 = 2 C.W.N. 219.

APPELLATE CIVIL.

Before Sir Francis William Maclean, Kt., Chief Justice, and Mr. Justice Banerjee.

KALI PROSUNNO BASU ROY AND OTHERS (*Decree-holders*) *v.* LAL MOHUN GUHA ROY (*Judgment-debtor*).* [27th July, 1897.]

Limitation Act (*XV of* 1877), *art.* 179, *sch.* II, *cl.* 3—*Execution of decree—Order allowing amendment of a decree—Review of judgment—Code of Civil Procedure* (*Act XIV of* 1882), *ss.* 623, 624 *and* 206.

An order granting an application for amendment of a decree under s. 206 of the Code of Civil Procedure is an order passed upon review of [259] judgment within the meaning of art. 179, sch. II, cl. (3) of the Limitation Act; therefore an application for execution of a decree within three years from such an order is not barred by limitation.

Kishen Sahai v. *The Collector of Allahabad* (1), referred to.

[**Diss.**, 27 A. 575 = 2 A.L.J. 287 = A.W.N. (1905), 108; 4 A.L.J. 469 = A.W.N. (1907) 169; **R.**, 9 C.W.N. 605 (607); 13 Ind. Cas. 140; **Disc.**, 28 C. 177 (179); 5 C.W.N. 192; **Doubted**, 10 C.L.J. 467; **D.**, 24 M. 25 (26).]

THE facts of the case for the purposes of this report appear sufficiently from the judgments of the High Court.

Babu *Horendra Narayan Mitter*, for the appellants.

Babu *Bepin Behary Ghose*, for the respondent.

The following judgments were delivered by the High Court (MACLEAN, C. J., and BANERJEE, J.).

JUDGMENTS.

MACLEAN, C. J.—On the 18th November 1891, judgment was given in this case by the Subordinate Judge on an appeal to him. The effect of that judgment was to dismiss the suit against the defendants (the present appellants) with costs in that Court and in the Court below. It subsequently transpired that the decree drawn up, although it gave the defendants their costs before the Subordinate Judge, did not give them their costs before the first Court, and in consequence of that error the present appellants, on the 3rd of March 1894, made an application under s. 206 of the Code of Civil Procedure to have the decree amended and made to harmonise with the judgment, and on the 10th March 1894 that application was granted. On the 26th February 1896, the appellants, who had thus obtained a judgment in their favour for their costs, took proceedings in execution for the purpose of recovering them. Their right to do so was disputed by the judgment-debtor, and disputed upon the ground that art. 179 of the second schedule of the Limitation Act was a bar to their claim. The question we have to decide is whether his right to execution is or is not barred.

The question to my mind is not free from difficulty, but as the result of the argument we have heard I am of opinion that the appellants ought to succeed and to succeed upon the ground that the order of the 10th March 1894 was substantially an order passed upon a review of judgment within the meaning of art. 179 of the second schedule to the Limitation

* Appeals from Order Nos. 144 and 145 of 1897 against the order of Babu Ram Gopal Chaki, Subordinate Judge of Dacca, dated the 16th of December 1896, affirming the order of Babu Paresh Chandra Banerjee, Munsif of Munshigunge, dated the 18th of April 1896.

(1) 4 A. 137.

Act, and that being so, the period would run, not from the 18th November [260] 1891, the date of the judgment, but from the 10th of March 1894, the date of the decision passed on the review. I have indicated what was the nature of the application, which resulted in the decree being amended on the 10th March 1894, and looking at ss. 623 and 624 of the Code of Civil Procedure, it would appear that the terms "review of judgment" or "review of the decree" are applicable, not only to cases where there is something faulty in the judgment itself—I mean the actual judgment pronounced as opposed to the decree—but the cases where there is any mistake or error on the face of the record or any clerical error apparent on the face of the decree. This shows that the term "review of judgment" is not confined merely to cases where the judgment itself was to be reviewed. This, in my opinion, is the sense in which the term "review of judgment" is to be read under the above sections of the Code, and, if so, it is not unreasonable to suppose that the Legislature in the Limitation Act used the same term in the same sense, that is, in the sense in which it is used under the Code. I do not think that in this view I am placing too wide or too comprehensive a construction on these words as used in the Limitation Act. My opinion gains support from that expressed by the Allahabad High Court in the case of *Kishen Sahai* v. *The Collector of Allahabad* (1), where the Judges say this: "We consider that the proceedings under this application," which was an application practically similar in its nature to that made in this case in March 1894, "were substantially of the nature of a review of judgment, and will, under art. 167, sch. II of Act IX of 1871, at the time in force, give a period from which limitation will run in respect of the subsequent application for execution which will therefore be within time."

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Upon these grounds I think the appeal must succeed, and must be allowed with costs.

BANERJEE, J.—I am of the same opinion. The question raised in this case is whether the application for execution of decree is barred by limitation. The Courts below have answered that question in the affirmative, and it is contended on appeal before us by the learned Vakil for the decree-holders that the Courts below are [261] wrong in holding that the application for execution is barred by limitation, because in the first place limitation should be reckoned in this case from the date of the amendment of the decree upon the application under s. 206 of the Code of Civil Procedure; and in the second place, even, if that contention fails, the decree-holders should be allowed to reckon time from the date of the application for amendment of the decree under cl. 4 of art. 179 of the second schedule of the Limitation Act.

In my opinion the second contention is not tenable, because the application that was made was not one to take some step in aid of execution of the decree within the meaning of cl. 4 of the said article, the decree itself not having been such as it ought to have been, and the application really being one not for having any step taken in aid of execution, but for having the decree amended, so as to make it fit for execution by the decree-holder. But upon the first contention I think, though not without some hesitation, that the view which the learned Vakil for the appellant asks us to adopt is the correct view.

The date of the decree must, no doubt, be taken to be the date of the judgment; and it is difficult to say that the date of the decree here was the date on which the amendment was made, when the date of the

(1) 4 A. 137.

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judgment remained unaltered. But, then, there was here an application for amendment of the decree, and for amendment on a most material point, the point being that the costs of the first Court should be made recoverable by the appellants before us. According to the directions contained in the judgment, the appellants before us were entitled to those costs. By some error in the preparation of the decree, this part of the direction in the judgment was left out of the decree. Was the amendment of the decree then a review of judgment within the meaning of the third clause of art. 179? If it was, then the decree-holders are entitled to reckon time from the date of the decision passed on the review, and that date is within three years from the date of the application for execution. The expression "review of judgment" is not defined any where in the Limitation Act, and evidently the Legislature used that expression in the Limitation Act in the sense in which it is used in the Code of Civil Procedure. Now, in the Code of Civil Procedure, on referring to ss. 623 and 624, [262] I find that the expression "review of judgment" is used interchangeably with the expression "review of decree," that is an amendment of the decree that does not necessitate any alteration in the judgment. If that is so, there seems to be good reason for thinking that a case like the present was intended to be covered by the third clause of art. 179. It is not likely that the Legislature did not provide for a case like this, where a decree is substantially altered, although the procedure adopted for having the alteration effected was by way of an application under s. 206, and not by way of an application under s. 623 of the Code. There being no reason for taking the expression "review of judgment" in any limited or narrow sense, I think we may take it in a sense such as would include a case like the present; and this view receives some support from the case of *Kishen Sahai* v. *The Collector of Allahabad* (1).

S. C. G. *Appeals allowed.*

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25 C. 262.

APPEAL FROM ORIGINAL CIVIL.

Before Sir Francis Maclean, Kt., Chief Justice, Mr. Justice Macpherson and Mr. Justice Trevelyan.

GOURI SUNKER PANDAY (*Plaintiff*) *v.* ABHOYESWARI DABEE (*Defendant*).* [10th and 21st December, 1896.]

Execution of decree—Charge—Attachment without sale—Transfer of Property Act (IV of 1882), ss. 67, 99, 100—Res judicata.

The plaintiff, a judgment-creditor, had in the High Court obtained a decree against the defendant, whereby it was ordered that the defendant should pay to the plaintiff a sum of Rs. 1,68,123, and that the said sum should be a charge on certain immoveable properties situated in the mofussil and specified in a schedule to the decree. In August 1894 the plaintiff obtained an order for transfer of the decree to a mofussil Court, and sent a copy of the decree for execution there. He obtained in that Court an order for attachment and sale of the property, but that order was reversed on appeal in May 1895, the High Court holding that the properties could not be sold in execution of the decree, but that a separate suit must be brought under [263] s. 67 of the Transfer of Property Act (2). The plaintiff then applied to the Court that passed the decree for an order for transmission of the decree to the mofussil Court with a view to execution. That

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*Appeal from Order No. 9 of 1896, against the decision of Mr. Justice Sale, dated the 3rd March 1896 in Suit No. 41 of 1892.

(1) 4 A. 137. (2) See 22 C. 859.

application was refused by SALE, J., who held that the decision of May 1895 was conclusive as to the plaintiff's right to attach the property as distinct from a sale, or to sell it except after a suit under s. 67 of the Transfer of Property Act. 1896 DEC. 21.

Held on appeal (reversing the decision of SALE, J.) that the application was not *res judicata*. APPEAL FROM

Held, also, that an order for attachment only as distinct from a sale could be made. *Aubhoyessury Dabee* v. *Gouri Sunkar Panday* (1), explained. *Chandra Nath Dey* v. *Burroda Shoondury Ghose* (2), referred to. ORIGINAL CIVIL.

[D., 7 O.C. 314 (315).]

25 C. 262.

UNDER a decree of the High Court in its original jurisdiction, the plaintiff was the judgment-creditor of the defendant; and the decree directing payment also gave the plaintiff a charge on certain immoveable property belonging to the defendant, and situated in the mofussil. On the 22nd September 1893, the plaintiff obtained an order for sale; but that order was set aside on appeal. On the 7th August 1894 he obtained an order and sent a certified copy of the order to the mofussil Court for execution. The defendant put in objections, which, however, were disallowed, and an order was made for execution. An appeal was preferred from that order, and a rule was obtained on the 13th March 1895 to stay execution pending the appeal. On the 27th May 1895 the High Court (NORRIS and GORDON, JJ.) reversed the order for execution (1). The plaintiff then applied to the High Court in its original jurisdiction for an order for transmission of the decree with a view to attachment of the property. The order was refused, SALE, J., holding that the matter was concluded by the decision of NORRIS and GORDON, JJ.

The judgment of SALE, J., was as follows:—

This is an application for transmission of the decree of this Court for execution to a mofussil Court, that is to say, the Court **[264]** of the Judge of the 24-Pergannahs, and the application raises the question as to whether the plaintiff is entitled to proceed by way of execution for the purpose of realizing the amount due under the decree. Mr. Apcar has referred to s. 99 of the Transfer of Property Act, and he has contended that that section contemplates the precise right which he says he desires to exercise—the right to attach the properties. The effect of the decree is to charge certain properties with the decretal amount, and it is admitted that the present application is a step in the procedure to enable the applicant to attach certain of the properties charged under the decree. Section 99 does not in terms give, nor was it intended thereby to give, to a person who has obtained a mortgage decree, a right to attach the mortgaged properties. The right to proceed by way of attachment must be dependent, I think, on the provisions of the Civil Procedure Code. The object of s. 99 of the Transfer of Property Act is (in those cases where mortgaged property has been attached) to prevent the judgment-creditor from proceeding to sell that property, except in a particular way, *viz.*, under s. 67 of the Act; and it may be, as Sir Griffith Evans has suggested, that the section was framed in view of the practice which, though not recognized in this Court, certainly prevails in the mofussil, whereby mortgagees who have obtained money decrees are allowed to attach the mortgaged property. The same question was raised between the parties in the cases of *Aubhoyessury Dabee* v. *Gouri Sunkar Panday* (1).

Mr. Apcar has contended that that case does not conclude him on the point as to whether he has the right to attach. It is said that the case only decides that the plaintiff has not the right to proceed to sale of the

(1) 22 C. 859. (2) 22 C. 813.

1896 DEC. 21. — APPEAL FROM ORIGINAL CIVIL. — 25 C. 262.

property. And Mr. Apcar contends that he is entitled to put himself in the position contemplated by s. 99, and that for that purpose he is entitled to an order for attachment.

But the order appealed against was in effect an order directing the attachment to issue against a portion of the property charged by the decree. The order was that the property, the subject-matter of the attachment, should be sold after attachment, which must mean that the property should be attached in the first **[265]** instance; there could be no sale in execution till after attachment. That order the appellate Court said should be set aside. At p. 864 of the report the learned Judges say: "If the plaintiff wishes to sell the properties charged, he must bring a suit." That seems to me to be a ruling to the effect that no step in execution can be taken for the purpose of realizing any portion of the money due under the decree. That being so, I have no option but to refuse the present application with costs.

The plaintiff appealed.

Mr. *Hill* (with him Mr. *Stephen*), for the appellant.—The question for the Court is whether the plaintiff is entitled to have the decree transmitted. The matter is not *res judicata.* The Court has put an erroneous construction on the Transfer of Property Act, and the plaintiff is entitled to show that, and to ask for transmission of the decree. There is nothing in s. 99 of the Transfer of Property Act prohibiting an attachment of this kind, nor is it necessary to bring a separate suit—*Chundra Nath Dey* v. *Burroda Shoondury Ghose* (1). Section 100 of the Transfer of Property Act does not apply to a charge created by a decree of the Court; it refers only to charges created by the parties or by operation of law. But this charge was created by the decree of the Court, and not the less so because that decree was a consent decree. It is submitted that the decision in *Aubhoyessury Dabee* v. *Gouri Sunkar Panday* (2) is wrong. For the decree is something higher than any agreement between the parties; and it was not the agreement but the decree that created the charge. [MACPHERSON, J.—At present the effect of such an order is that you cannot execute the decree at all.] That is so. That decision is merely a precedent; and the decree in this case is a subsisting decree. [MACPHERSON, J.—Had the learned Judge any authority to say whether the mofussil Court could or could not attach these properties?] I submit not. All that he was asked to do was to transmit the decree. We confessed that the object of the application was to attach with a view to sale; and because **[266]** he said that object could not be attained, he refused to make the order.

Mr. *Woodroffe* and Mr. *S. R. Dass*, for the respondent.—The Court has declared that the decree made in this suit was a charge on the property. [MACPHERSON, J.—Taking that order at its highest, all that it holds is that the Court would not attach and sell. It does not hold that the Court could not attach. Is that *res judicata*?] Yes,—*Ram Kirpal Shukul* v. *Rup Kuari* (3). In the present case, the appellant applied for a review of the decision of Norris and Gordon, JJ.; it was refused, and he has never appealed against it. He concedes that he cannot attach and sell the property, and the Court will not make an order which it knows will be of no effect. There is no such step known to the law as merely sending a decree from one Court to another; the sending is always for the purpose of executing the decree. [MACPHERSON, J.—He could possibly

(1) 22 C. 813. (2) 22 C. 859. (3) 6 A. 269=11 I.A. 37.

benefit under s. 295 of the Code by such an order.] That section applies only to the execution of decrees for money. This is not a money decree, it is a mortgage decree, and the execution of mortgage decrees is regulated by the Transfer of Property Act. The decree-holder cannot bring the property to sale otherwise than by a suit under s. 67 of the Act,—*Jadub Lall Shaw Chowdhry* v. *Madub Lall Shaw Chowdhry* (1); *Matangini Dassee* v. *Chooneymony Dassee* (2), *Azim-Ullah* v. *Najm-un-nissa* (3). If he does, the sale is invalid—*Durgayya* v. *Anantha* (4).

Whenever real property is to be dealt with in execution proceedings under the Code, sale is to be preceded by attachment. Thus, in ss. 244 and 266 attachment and sale are treated as one process. In *Denonath Ruckit* v. *Mutty Lall Paul* (5) it is laid down that the words "attachment and sale" are to be taken together, and not read distributively. Therefore, if an order for attachment be made, and the attachment effected under s. 274, the Court may,—and 'may' in s. 274 is declared in [267] *Kashi Nath Roy Chowdhry* v. *Surbanand Shaha* (6) to mean 'shall'—order the sale of the property. Leaving aside prohibitory orders, which are clearly distinguishable, there is no provision in the Code, with respect to immoveable property, for attachment not to be followed by sale.

It is *res judicata* that the appellant is in the position of a mortgagee; he cannot now be allowed to contend that he has a mere money decree. [TREVELYAN, J.—Suppose a mortgagee has a decree on a claim entirely apart from the mortgage—say a decree in respect of work done—cannot he attach the mortgaged property without selling it?] No, because s. 99 of the Transfer of Property Act says he shall not, whether the claim arises on the mortgage or not. [TREVELYAN, J.—Then he is in a worse position than any other person by the very reason that he is a mortgagee of the property.] Nor can he come in under s. 295 of the Code, unless he has a mere money decree. And as a sale of the property is barred by s. 99 of the Transfer of Property Act, the Court will not issue a useless order for attachment merely.

Mr. *Hill* in reply.—An order refusing execution does not make the matter a *res judicata*—*Delhi and London Bank* v. *Orchard* (7), *Hurrosoondary Dassee* v. *Jugobundhoo Dutt* (8).

In the argument before Norris and Gordon, JJ., it was conceded that the attachment, without the order for sale, could go. It does not follow that, because a sale cannot be had without attachment, therefore an attachment must necessarily be followed by a sale. There are various sections in the Code which recognize an attachment apart from a sale; and this is intended for the protection of the judgment-creditor as against both the judgment-debtor and third persons. See, for instance, ss. 235(*j*), 274, with Form No. 141,—and the Forms are by s. 644 of the Code made of statutory obligation. So in s. 260 where the attachment of the property is put in the same category as imprisonment of the person, *i.e.*, as a means of exerting pressure [268] on the debtor. So, again, ss. 275 and 284 show that a subsequent order is contemplated if a sale is desired.

Further, this decree is not a mortgage decree. It is a money decree combined with a charge created by the decree. But the fact that it is a money decree and something more does not make it cease to be a money decree; and it is recognized as such by Norris and Gordon, JJ. There

(1) 21 C. 34. (2) 22 C. 903. (3) 16 A. 415.
(4) 14 M. 74. (5) (1863) 1 Hyde, 158. (6) 12 C. 317.
(7) 3 C. 47 = 4 I.A. 127. (8) 6 C. 203.

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are many advantages in having an attachment, whether the plaintiff is a first mortgagee or a subsequent incumbrancer. The judgment in *Aubhoyessury Dabee* v. *Gouri Sunkar Panday* did not decide that we could not have an attachment, but only that we could not sell. The learned Judge in the Court below is wrong in supposing that it did so decide. Section 99 of the Transfer of Property Act clearly points to a recognition of the right to attachment quite apart from the right to sell.

C. A. V.

The following judgments were delivered by the Court (MACLEAN, C.J., and MACPHERSON and TREVELYAN, JJ.):—

JUDGMENTS.

MACLEAN, C. J.—This case has been very elaborately argued, and many cases have been cited, and various sections of the Code and Acts of the Legislature referred to; but in my opinion the case is reduced to a short, and I do not think a really difficult, point.

The plaintiff is a judgment-creditor of the defendant, and the decree directing payment also gave him a charge upon certain property of the defendant. I purposely refrain from expressing any opinion as to whether the plaintiff is a mortgagee within the meaning of s. 99 of the Transfer of Property Act; in the view I take of this case it is immaterial to say anything as to that. Having obtained his judgment he not unnaturally wishes to obtain the fruits of it. He has made two unsuccessful attempts to do this. On the 22nd September 1893 he obtained an order from this Court for the sale of the property, but that order was reversed on appeal. On the 7th August 1894 he obtained an order to send a certified copy of the decree to the Judge of the Assam Valley Districts for execution, and then applied in that Court, for a sale after attachment of the property, to the Judge [269] of that Court, and on the 2nd March 1895 the Court made the order, notwithstanding the objection of the defendants, who urged that the properties could not be sold in execution of the decree, unless and until the plaintiff had instituted a suit for sale under the conjoint operation of ss. 99 and 67 of the Transfer of Property Act.

It is clear that the point raised, discussed, and decided in the Court at Dhubri was, whether or not the property could be sold unless and until a fresh suit for sale had been brought under s. 67 of the Transfer of Property Act. There is nothing in the judgment as to mere attachment as opposed to a sale. The judgment did not deal with that point in any way. The judgment-debtor appealed, and the appeal was heard before Justices Norris and Gordon, and their judgment was given on the 27th May 1895. It is quite clear from what is stated in that judgment that the point really argued on the part of the judgment-debtor was that no order for the sale of the properties could be made, until the plaintiff had instituted a suit under s. 67 of the Transfer of Property Act. That was Sir Griffith Evans' contention. The contention of the plaintiff, as stated in that judgment, is perfectly consistent with this view. He contended that the decree was tantamount to an agreement by the debtor that the properties should be sold in default of payment of the instalments. I have looked at the report of this case in I. L. R., 22 Calcutta series, p. 859, and there is not a suggestion in the arguments on either side that the question whether a mere attachment could not issue as opposed to a sale was ever raised. The head-note of the case tends to show that the judgment was intended to deal only with the question of a right to a sale.

The learned Judges themselves say: "We are of opinion that Sir Griffith Evans' contention must prevail." I have shown what his contention was. Again they say: "Unless the construction of the decree is such as Mr. Hill contends for, it is clear that the plaintiff cannot *sell* without bringing a suit." But for the somewhat loose expressions at the end of the judgment, the point would have been in my opinion quite unarguable. I will read the sentence.

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"As the decree stands, the plaintiff can realize the instalments [270] by execution by sale and attachment of any property of the defendants, but if he wishes to sell and attach the properties charged, he must bring a suit." I do not quite understand what is meant by the expression "by execution by sale and attachment," and the expression "to sell and attach."

Those expressions appear to me to put the cart before the horse. I could understand them if they were "attachment and sale," or "attach and sell." In my opinion these words "and attachment," "and attach," have slipped into the language of the judgment by mistake: they are at variance with the arguments in the case, and with the reasons given for, and with the previous portions of, the judgment and with the terms of the order as drawn up; and I do not think that by the use of those somewhat ambiguous phrases the Judges ever meant to decide, or that they ever did decide, that under the circumstances an order for attachment, as opposed to an order for sale, could not be made. In my opinion, by that judgment all that the Judges intended to decide and did decide was, that if the plaintiff wished to sell he must institute a suit.

In this state of circumstances, the judgment-creditor applied to the Court below that the case might be transmitted to the Court of 24-Pergunnahs for execution by way of attachment. Mr. Justice Sale refused the application, holding that Justices Norris and Gordon had held, in the judgment I have criticised, that an attachment could not issue; that upon that point the matter was *res judicata*, and that therefore the Court would not transmit the case, as there would be no object in so doing if an attachment could not issue. Hence the present appeal. It is clear from the case of *Chundra Nath Dey* v. *Burroda Shoondury Ghose* (1) that the property could be attached; and it is clear to my mind from the various sections of the Code which have been referred to that certain advantages do accrue to a judgment-creditor from obtaining such attachment.

Mr. Woodroffe contends that attachment and sale constitute one step only in the path of execution. I am quite unable to accept that view. Attachment is one thing, sale is another. [271] There may be an attachment, not of necessity to be followed by sale, and there may be a sale not necessarily the result of an attachment. But the respondents urge, as they did in the Court below, that the matter is *res judicata* by reason of the judgment of Justices Norris and Gordon. I am by no means satisfied that, looking at what is now asked, and what was asked before Justices Norris and Gordon, the question of *res judicata* is not disposed of against the respondent by a mere comparison of what the two applications were, and that the question of *res judicata* ought not properly to have been left for decision, when, if at all, an application is made in the Mofussil Court for an attachment. However, the point has been argued and decided in the Court below, and I will deal with it.

(1) 22 C. 813 (817).

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I need not lay down at this time of day what is necessary to constitute a *res judicata*, nor need I refer to s. 13 of the Code. The principle is now, I think, well established. The only difficulty is as to its application to the particular circumstances of each particular case. The question here is, did the learned Judges intend to decide, and did they in fact decide, that an attachment, as opposed to a sale, could not issue? I have stated before what I think the real point before them was, and what they really decided and intended to decide. They were asked to direct a sale "after attachment," and they refused to do so; they were never asked merely to make an order for attachment. So far as I am aware no such application has ever been made in this Court. In my opinion the case is not one of *res judicata*. I think that Mr. Justice Sale has misapprehended the true purport and effect of the judgment of Justices Norris and Gordon, that his conclusion was consequently erroneous, and that this appeal must be allowed with costs.

MACPHERSON, J.—I agree. The decision of the Division Bench of this Court does not, I think, prevent the plaintiff from attaching this property in execution of his decree. There was in that case an order for sale after attachment. The appeal was against the order for sale, and the contention before the Court was that as the present appellant had, by the decree which he sought to execute, a charge upon the property attached, he could not sell it without instituting a suit under s. 67 of the Transfer of Property [272] Act. The contention prevailed, but I see nothing in the judgment to indicate that the Court considered or dealt with the appellant's right to attach the property under his decree as distinct from his right to sell it. There is certainly one loose expression at the end of the judgment, in which it is said "if he wishes to sell and attach the properties charged he must bring a suit," but the circumstance that the sale is referred to before the attachment indicates, as is apparent from the rest of the judgment, that the right to sell after attachment was the question which the Court was considering.

The question which the Court had to determine in the present case was whether the decree should be transferred to the District Court for execution under s. 223 of the Civil Procedure Code. If the plaintiff has the right to attach the property within the jurisdiction of the Court to which he wishes the decree to be transferred, the Court was, I think, bound to make the order for transfer. Whether, having made the attachment, he can proceed further or can get anything out of the attachment, is a matter for the Court executing the decree to decide, and this may possibly to some extent depend upon events which may yet happen.

I see nothing in the law to prevent an attachment in execution of the money decree, even if before the property could be sold in pursuance of the attachment it is necessary for the appellant to take further proceedings.

TREVELYAN, J.—I agree that this appeal should be allowed, and that the respondent should pay to the appellant the costs of the application and of the appeal.

There are two questions—(1) whether this application is barred by the law of *res judicata*; (2) whether, if it be not so barred, the plaintiff is entitled to an order which can apparently lead to an attachment only, and not be followed by an order for sale.

On the first question I think that the right to an attachment *per se* has not been judicially determined between the parties.

The only question which arose in the matter which eventually came up on appeal before Norris and Gordon, JJ., was whether the judgment-

creditor was entitled to obtain an order for sale. [273] This is, I think, clear from the memorandum of appeal and from the judgment. The whole judgment is directed to a consideration of the right to a sale, and it is only an expression at the end of it which can give any handle to the contention that the question is now barred.

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There is no discussion in the judgment as to the right to an attachment independently of the right to a sale, and this right cannot be said to have been directly or substantially in issue, or to have been finally or at all decided. I read the judgment and the order as setting aside the attachment, only because it was ancillary to the sale.

I would, therefore, hold that the matter of the present application is not *res judicata*.

As to the second question I am exceedingly doubtful whether Mr. Justice Sale had any power to determine the question as to whether land situate outside the limits of the original jurisdiction was capable of being attached under this decree. It is not necessary to determine this question here: but it is capable of contention that the duty of the Judge transmitting the decree is confined to determining whether there is a *bona fide* application to transmit a live decree, and whether the conditions contained in s. 223 of the Civil Procedure Code have been fulfilled.

Assuming that he had power to decide this question, I cannot agree with the view which he has taken of it.

An attachment and a sale are not so indissolubly wedded as never to be capable of separation. It is true that, as a rule, a sale is the ordinary consequence of an attachment, but a mere attaching creditor has certain rights apart from his right to a sale; for instance, he has a right to participate in the proceeds of sale under s. 295 of the Civil Procedure Code, and he has a right to redeem the property under the Transfer of Property Act. The Code of Civil Procedure itself deals with an attachment as a proceeding separate from a proceeding to sell (see ss. 235, 274, and 284). I am not prepared to say that if there is no right to sell there cannot, under any state of circumstances, be an attachment.

[274] Whether in this particular case the Court should allow an attachment is, in my opinion, a matter to be determined only by the Court to which the decree is sent for execution. I would allow the appeal.

Appeal allowed.

Attorneys for the appellant: Messrs. *Remfry & Rose.*
Attorney for the respondent: Babu *Bhuban Mohan Dass.*

H. W.

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25 C. 274.

CRIMINAL REFERENCE.

Before Mr. Justice Banerjee and Mr. Justice Wilkins.

DURGA CHARAN MALI (*Complainant*) v NOBIN CHANDRA SIL (*Accused*).* [21st September, 1897.]

Penal Code (Act XLV of 1860), *s.* 183—*Resistance to attachment—Lawful authority—Village Chaukidari Act (Bengal Act VI of* 1870), *ss.* 26, 27 *and* 34.

Where a village chaukidar, without the preparation and publication of a list of defaulters, and without any written authority as required by ss. 26 and 27,

* Criminal Reference, No. 259 of 1897, made by R.H. Anderson, Esq., Sessions Judge of Mymensingh, dated the 10th of September 1897.

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of the Village Chaukidari Act (Bengal Act VI of 1870), attached some property for levying the amount of arrears, *held*, that resistance to such attachment was not an offence under s. 183 of the Penal Code.

CRIMINAL REFERENCE.

25 C. 274.

REFERENCE by the Sessions Judge of Mymensingh under s. 438 of the Criminal Procedure Code in respect of a conviction and sentence under s. 183 of the Penal Code by the Joint Magistrate of Mymensingh. The material portion of the letter of reference was as follows :—

"The petitioner has been convicted by the Joint Magistrate of Mymensingh under s. 183 of the Indian Penal Code for offering resistance to a chaukidar, who was attaching a drum for chaukidari tax, and has been sentenced to a fine of Rs. 15, or in default to fourteen days' rigorous imprisonment.

"I think this conviction is illegal because the chaukidar had no "lawful authority" to take the petitioner's property. By the Chaukidari Act, s. 2, the authority could only be in writing signed by the collecting member of the Panchayet. Moreover, by s. 26 this distraint could only be made after [275] the preparation and publication of the list of defaulters. The Joint Magistrate finds there was no written authority to distrain and no publication of a list of defaulters. In my opinion s. 34 of the Act has not the force the Joint Magistrate gives it. It is intended to protect the Panchayet and persons acting under his authority from prosecution or suit, except as therein provided for any act which is technically illegal. It does not, as I take it, render all irregular acts legal, so as to debar those who are affected by them from resisting them."

No one appeared in support of the reference.

The judgment of the High Court (BANERJEE and WILKINS, JJ.) was as follows :—

JUDGMENT.

Upon the facts found by the Joint Magistrate himself, the provisions of ss. 26 and 27 of the Village Chaukidari Act (Bengal Act VI of 1870), had not been complied with, and the chaukidar had no authority to attach the property in question. Resistance to the attachment by him cannot, therefore, we think, constitute an offence under s. 183 of the Indian Penal Code. This view is to some extent supported by the case of *Abdool Gaffur* v. *Queen-Empress* (1).

We, therefore, set aside the conviction and sentence, and order refund of the fine if it has been realized.

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25 C. 275.

CRIMINAL REFERENCE.

Before Mr. Justice Banerjee and Mr. Justice Wilkins.

QUEEN-EMPRESS *v.* BENI MADHAV CHAKRAVARTI (*Accused*).*
[12th September, 1897.]

Penal Code (Act XLV of 1860) s. 283—*Obstruction in a public way.*

The accused was charged generally with obstructing a public way, no danger, obstruction, or injury being alleged to have been caused to any person nor was there any clear evidence that the way was a public way. *Held*, that the conviction under s. 283 of the Penal Code could not be sustained.

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* Criminal Reference, No. 246 of 1897, made by K.N. Roy, Esq., Officiating District Judge of Pubna and Bogra, dated the 30th of August 1897.

(1) 23 C. 896.

1897 SEP. 12. — CRIMINAL REFERENCE. — 25 C. 275.

REFERENCE made by the Officiating Sessions Judge of Pubna and Bogra under s. 438 of the Criminal Procedure Code in respect of a conviction and sentence passed by the Sub-Divisional Magistrate of Serajgunge on the 22nd of July 1897.

[276] The material portion of the letter of reference was as follows :—

"It appears that a road passed by the west of the petitioner's house which he blocked up ten years ago by building a house on it, and his brother Hem Chandara Chakravarti brought thereupon a suit in the Civil Court to have the road opened out. The case resulted in a compromise by which the petitioner agreed to deviate the road by his *bahirbari* or outer apartment, and he has now attached a gate to his deviated road, and is said to have caused obstruction to it. It is said that the petitioner keeps the gate open during day but closes it at night. The case originally arose from a complaint of some of the villagers and was supplemented by a report of the *chaukidar* who could not pass through the road at night on his round. It ultimately went to the Chairman of the Shahazadpore Union, the substance of whose report was that there was a road to the west of the petitioner's house from a very long period, that he constructed a house upon it about ten years ago and deviated the road through a portion of his outer apartment, which he has now blocked up by a gate.

"The Sub-Divisional Magistrate of Serajgunge having treated those reports as complaints, and without proceeding under s. 133 and the cognate sections of the Criminal Procedure Code, has convicted the petitioner under s. 283 of the Indian Penal Code for obstructing the road, and has sentenced him to pay a fine of Rs. 50, and in default to undergo simple imprisonment for one month. He has also passed an order that the road must be cleared and left two cubits wide within three days.

"In order to sustain a conviction under s. 283 of the Indian Penal Code it should in the first place be shown that some particular person or persons have been obstructed by the accused, and the accused cannot be charged *generally* with obstruction in a public way. In the present case the *chaukidar*, who is said to have been obstructed, has not been examined, none of the ladies said to have been obstructed has been examined, and all the witnesses speak of the general obstruction of the road, not of their personal case. I submit that under the circumstances the conviction cannot be sustained under s. 283 of the Indian Penal Code. This has been clearly held in the matter of *Empress* v. *Ram Singh* (1) and in the case of *Queen* v. *Khader Moidin* (2). In the second place it must be shown that the road is a public way. The compromise petition by which the petitioner granted a deviation of the road to his brother is on the record. It does not show that the road in question was a public one. The road was granted by one brother to another only ten years ago, and, as it passed through the petitioner's outer apartment, unless there be very good evidence it cannot be said that it is a public thoroughfare. In the report of the Chairman of the Union the road is not described as a public way. All that is said is that nearly [277] all the villagers pass through it to a *bill*, and its obstruction has caused inconvenience to the public and specially to the ladies of the Hindu families who have no other road to go to the *ghat*. The evidence of Sub-Inspector Bama Charan Sen is that the females of the village use the road from a long time for going to the *ghat*. Though, therefore, there can be no doubt that the road in question has been very much in use by the women of the village, I have doubts whether it was

(1) 11 C.L.R. 462.

(2) 4 M. 235.

1897 SEP. 12. — CRIMINAL REFERENCE. — 25 C. 275.

thrown open entirely to the public. The long use by the women of the village cannot make the road to be a public way—See *Sham Soonder Bhuttacharjee* v. *Monee Ram Doss* (1). Applying also the tests of Mr. Justice Wilson in the Full Bench case of *Chuni Lall* v. *Ram Kishen Sahu* (2) it is doubtful whether this road can be held to be a public way. The proper course for the Sub-Divisional Magistrate was to take proceedings under s. 133 of the Criminal Procedure Code and the cognate sections, and give the benefit of a jury to the petitioner with regard to the question whether the road was public or private. The order directing the widening of the road could not be passed except under these sections. I, therefore, recommend that the conviction of the petitioner as well as the order directing the clearing of the road be quashed."

No one appeared in support of the reference.

The judgment of the High Court (BANERJEE and WILKINS, JJ.) was as follows:—

JUDGMENT.

We think the view taken by the learned Sessions Judge in this case is in the main correct. The accused has been convicted by the Sub-Divisional Magistrate of Serajgunge of an offence punishable under s. 283 of the Indian Penal Code and sentenced to pay a fine of Rs. 50, and he has been ordered to remove within three days the obstruction complained of. But all that the learned Magistrate in his judgment has found against the accused is that he has blocked up altogether by a gate a road which, in his opinion, is a public road. This finding is not in our opinion sufficient to sustain the conviction. To warrant a conviction under s. 283 of the Indian Penal Code for causing obstruction in a public way, it must be established that the act of the accused has caused "danger, obstruction, or injury" to some person [see *Empress* v. *Ram Singh* (3) and *Queen* v. *Khader Moidin* (4)]. But there is no finding to that effect in the [278] judgment of the Magistrate. Then, again, though the learned Magistrate in effect finds that the road in question is a public road, what the evidence shows is, to quote the words of the judgment, "that a road passed by the west of the accused's house which he first blocked up by building a house on it, and then deviating it over his *bari* blocked up altogether by a gate." The four witnesses examined for the prosecution all say, either expressly or in effect, that the road which has been obstructed is not the old road but the road passing through the *bahirbari*, or the compound of the outer house of the accused, which the accused opened after having closed the old road by building his house over it. The evidence leaves it very doubtful whether the way is a public way within the meaning of s. 283 of the Indian Penal Code.

For these reasons we set aside the conviction and sentence and the order for removal of the obstruction complained of, and direct that the fine, if realized, be refunded.

S. C. B.

(1) 25 W. R. 233.
(2) 15 C. 460.
(3) 11 C. L. R. 462.
(4) 4 M. 235.

25 C. 278.

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CRIMINAL REVISION.

25 C. 278.

CRIMINAL REVISION.

Before Mr. Justice Banerjee and Mr. Justice Wilkins.

PREONATH DEY AND OTHERS (*Petitioners*) v. GOBORDHONE MALO (*Opposite Party*).* [15th October, 1897.]

Criminal Procedure Code (Act X of 1882), *ss.* 133 *and* 137—*Reference by Sub-Divisional Magistrate to a second class Magistrate*—Bona fide *question of title—Jurisdiction of Magistrate—Public nuisance.*

A Sub-Divisional Magistrate having made a conditional order under s. 133 of the Criminal Procedure Code (Act X of 1882), against a person to remove an obstruction on a public thoroughfare, or appear and shew cause before a second class Magistrate, the said person appeared as directed, and the order was made absolute under s. 137. In revision the High Court held that, having regard to the penultimate paragraph of s. 133, the order was not illegal, on the ground that it was made absolute by a Magistrate with second class powers other than the Magistrate who made the conditional order. *In re Narasimha* (1) approved of.

[279] When a question of title is *bona fide* raised the Magistrate ought not to make an order under ss. 133 and 137 of the Criminal Procedure Code, but should allow the party an opportunity for the determination of the question by a Civil Court. The claim of title must, however, be *bona fide* and not a mere pretence to oust jurisdiction ; and it is for the Magistrate to say whether the claim is a *bona fide* one or a pretence. *Luckeenarain Banerjee* v. *Ram Coomer Mookerjee* (2), and *Queen-Empress* v. *Bissessur Sahu* (3) followed.

Although no length of enjoyment can legalize a public nuisance—see *Municipal Commissioners of Calcutta* v. *Mahomed Ali* (4)—yet the long possession or enjoyment of what is said to be a nuisance may give to the objection of the person so possessing or enjoying it the character of a *bona fide* dispute as to title such as might have the effect of ousting the jurisdiction of the Magistrate under ss. 133 and 137 of the Code, and making the question a proper one for the Civil Court.

[Rel. on., 18 C.W.N. 1086 ; R., 31 C. 979 (982)=9 C.W.N. 72 ; 20 A.W.N. 204 ; 10 C.W.N. 845 (847).]

THE petitioner moved against the order of a second class Magistrate passed under s. 137 of the Criminal Procedure Code (Act X of 1882), making absolute an order under s. 133 passed by the Sub-Divisional Magistrate for the removal of certain obstructions in a place alleged to be a public thoroughfare upon the grounds: (1) that the Magistrate who made the conditional order absolute had no authority to do so as he was a Magistrate with second class powers; and (2) that the Magistrate had no jurisdiction inasmuch as there was a *bona fide* claim of private right as regards the land in dispute.

Babu *Atulya Charan Bose*, for the petitioners.

Babu *Boidya Nath Dutt*, for the opposite party.

The judgment of the High Court (BANERJEE and WILKINS, JJ.) was as follows :—

JUDGMENT.

This is a rule calling upon the Magistrate of the district to show cause why the order complained of in this case should not be set aside upon the ground that the Magistrate who made it had no authority to investigate the matter and to make the conditional order passed by the Sub-Divisional Officer absolute.

* Criminal Revision, No. 623 of 1897, against the order of Babu Mano Mohan Chatterjee, Sub-Deputy Magistrate of Jehanabad, dated the 11th of August 1897.

(1) 9 M. 201. (2) 15 C. 564. (3) 17 C. 562. (4) 7 B. L. R. 499.

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The order complained of is one passed by a second class Magistrate under s. 137 of the Code of Criminal Procedure, [280] making absolute an order under s. 133 passed by the Sub-Divisional Officer for the removal of certain obstructions caused by the petitioners in a place which was alleged to be a public thoroughfare.

The grounds upon which we are asked by the learned vakil for the petitioner to set aside the order are: *first*, that the Magistrate who made the conditional order absolute under s. 137 of the Code of Criminal Procedure had no authority to do so as he was a Magistrate with second class powers; and, *secondly*, that he had no authority to make the conditional order absolute in this case as there was here a *bona fide* claim of private right raised by the petitioners as regards the land in dispute.

As to the *first* ground, the penultimate paragraph of s. 133 of the Code distinctly provides that the Magistrate who makes the order under the section may direct the person against whom it is issued "to appear before himself or some other Magistrate of the first or second class at a time and place to be fixed by the order, and move to have the order set aside or modified in manner hereinafter provided." The section itself, therefore, clearly authorizes a second class Magistrate to hear the objections of the party against whom an order under the section is made. It is quite true that cl. (*b*) of s. 135 provides that, where a party against whom an order under s. 133 is issued applies for the appointment of a jury to try whether the order is reasonable and proper, such application is to be made to the Magistrate by whom the order under s. 133 was passed; but the express mention of "the Magistrate by whom it" (*i.e.*, the order) "was made," in cl. (*b*) itself goes to show that it is only when the party against whom the order is issued wants to avail himself of the alternative of having a jury appointed that his application must be made to the Magistrate by whom the original order was issued. Section 137, however, under which the order now complained against was made, does not require that the Magistrate who is to hear the objections and take evidence must be the Magistrate by whom the original order was made, but simply provides that if the party against whom the order is made appears and shows cause against the order, "the Magistrate shall take evidence in [281] the matter." That, in our opinion, evidently means the Magistrate to whom the proceedings may be referred under the penultimate paragraph of s. 133; and, as that section distinctly provides that the case may be referred to a Magistrate of the second class, we think the mere fact of the Magistrate who made the order under s. 137 being a second class Magistrate, does not show that he had no authority to make the order complained against. We may add that this view is in accordance with the decision of the Madras High Court in the case of *In re Narasimha*(1).

It remains then to consider the *second* ground upon which our interference is asked. The learned vakil who appears to show cause contends that it is not open to the petitioners to raise the second ground, having regard to the terms of the rule. No doubt the matter is open to argument; but we are inclined to think that the rule, as it stands, is broad enough to admit of the second ground being urged. We may add that our taking this view cannot be said to have any prejudicial effect, as the learned Magistrate of the district who has shown cause in the explanation submitted by him, entered into matters relevant to the second ground as well as those concerned with the first.

(1) 9 M. 201.

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Now, the law on the subject is laid down in a series of cases of which we need only refer to two, *viz.*, *Queen Empress* v. *Bissessur Sahu* (1); *Luckeenarain Banerjee* v. *Ram Coomar Mookerjee* (2). It is this, that when a question of title is *bona fide* raised, the Magistrate ought not to make an order under ss. 133 and 137, but should allow an opportunity for the determination of the question by a Civil Court. The claim of title must, however, be *bona fide* and not a mere pretence to oust jurisdiction; and it is for the Magistrate to say whether the claim is a *bona fide* one or a pretence.

In the present case the Magistrate who made the conditional order absolute under s. 137 has not considered the question whether the claim of title raised is a *bona fide* claim or a mere pretence. He has, it is true, found that the land in dispute is part [282] of a public thoroughfare; but that finding does not dispose of the question whether the dispute raised by the petitioners before us was or was not a *bona fide* dispute as to title; and one reason which induces us to take this view is that, although one of the petitioners urged that he had raised the embankment for over twelve years and had been in undisputed possession of it since then, and so the question of obstruction could not arise now, this is all that the learned Magistrate says with reference to this objection: "The last argument, however, cannot stand in the face of the ruling in *The Municipal Commissioners of Calcutta* v. *Mahomed Ali* (3), where it is laid down that no length of enjoyment can legalize a public nuisance." The Magistrate does not find that the allegation about the petitioners' enjoyment for twelve years and upwards is a mere assertion without any foundation for it; but he simply says, whether that was true or not would not affect the question. We are of opinion that he should have gone into the question and seen whether the fact of long possession did not give to the objection of the petitioners the character of a *bona fide* dispute as to title such as should have the effect of ousting the Magistrate of his jurisdiction under ss. 133 and 137.

As the Magistrate has not considered the case from this point of view, we think the proper course to take in this case would be that taken by this Court in the case of *Queen Empress* v. *Bissessur Sahu* (1) to which we have already referred; and we accordingly set aside the order under s. 137, and direct that the Magistrate, after notice to both parties, do investigate the case *de novo*. If he is satisfied that the contention of the petitioners that the way is not a public way is a *bona fide* one, he should set aside the conditional order. If, however, he finds upon proper reasons that the contention is not *bona fide*, he should affirm that order.

S. C. B.

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(1) 17 C. 562. (2) 15 C. 564. (3) 7 B.L.R. 499.

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APPEL-
LATE
CIVIL.
25 C. 283 =
2 C.W.N.
89.

25 C. 283 = 2 C.W.N. 89.

[283] APPELLATE CIVIL.

Before Mr. Justice Trevelyan and Mr. Justice Stevens.

MAHOMED ABDUL HYE (*Judgment-debtor*) *v.* GAJRAJ SAHAI (*Decree-holder*).* [13th August, 1897.]

Public Demands Recovery Act (Bengal Act VII of 1880*),* ss. 2 *and* 20*—Limitation—Act XI of* 1859, *s.* 34*—Execution of decree annulling sale—Decree of Privy Council—Decree for costs—Rate of exchange.*

Section 2 of the Public Demands Recovery Act (Bengal Act VII of 1880) does not make the provision of limitation in s. 34 of Act XI of 1859 applicable to the execution of a decree annulling a sale under s. 20 of Bengal Act VII of 1880.

In converting into Indian currency the amount of costs expressed in sterling in an order of Her Majesty in Council, the rate of exchange is the rate which prevailed at the time when the order was made.

Dakhina Mohan Roy Chowdhry v. *Saroda Mohan Roy Chowdhry* (1) followed.

[R., 26 C. 414 (427) (F.B.).]

THE facts material to the report in this case appear from the judgment of the High Court.

Sir *Griffith Evans* and Dr. *Asutosh Mukerjee*, for the appellant.

Babu *Lalmohan Das* and Babu *Nalini Ranjan Chatterjee*, for the respondent.

JUDGMENT.

The judgment of the High Court (TREVELYAN and STEVENS, JJ.) was delivered by

STEVENS, J.—This is an appeal from an order of the District Judge of Tirhoot, disallowing an objection by the judgment-debtor to the execution of the decree in respect of costs awarded against him by an order of Her Majesty in Council. The case in which those costs were awarded was one for the setting aside of a sale under the certificate procedure, Bengal Act VII of 1880. The contention was that, inasmuch as s. 2 of Bengal Act VII of 1880 provides that that Act shall, as far as is consistent with the tenor thereof, [284] be construed as one with Act XI of 1859 passed by the Governor-General in Council and Act VII of 1868 passed by the Lieutenant-Governor of Bengal in Council, the provisions of s. 34 of Act XI of 1859 apply to the present case. That section provides that " if a sale made under this Act," *i.e.*, Act XI of 1859 " be amended by a final decree of a Civil Court, application for the execution of such decree shall be made within six months after the date thereof, otherwise the party in whose favour such decree was passed shall lose all benefit therefrom." Admittedly in the present case the application for execution was made more than six months after the date of the decree, and it is contended that under the provision of law which we have just quoted the decree-holder has lost all benefit from his decree.

We think that s. 2 of Bengal Act VII of 1880 cannot have the effect of making the provisions of s. 34 of Act XI of 1859, which relates to a decree annulling one class of sales, applicable to such a decree as is referred to in s. 20 of Act VII of 1880, that is a decree setting aside a sale of another kind. We think that this is apparent from the fact that

* Appeal from Order, No. 329 of 1896, against the order of D. Cameron, Esq., District Judge of Tirhoot, dated the 8th of June, 1896.

(1) 23 C. 357.

1897 AUG. 13. APPELLATE CIVIL. 25 C. 283 = 2 C.W.N. 89.

s. 20 contains separate provisions applicable to the case of decrees setting aside sales in execution of certificates, those provisions not being consistent in some respects with the corresponding provisions of s. 34 of Act XI of 1859 relating to a decree for the setting aside of a sale under that Act.

Another question which arises in this appeal is as to the time when the rate of exchange is to be calculated on the costs expressed in sterling in the order of Her Majesty in Council. Those costs have been estimated by the decree-holder at the rate of exchange which prevailed at the time when execution was applied for. It is contended that they should have been estimated at the rate which prevailed at the time when the order was made. In support of this contention a ruling of this Court, *Dakhina Mohan Roy Chowdhry* v. *Saroda Mohan Roy Chowdhry* (1) has been cited. This is a matter relating to the practice of the Court, and we think that we ought to follow that ruling, unless we were clearly of opinion that the point ought to be referred to a Full Bench. We must, therefore, vary the order of the Court below to this extent, that [285] the costs awarded in sterling by Her Majesty in Council must be converted into Indian currency at the rate of exchange for the time being fixed by the Secretary of State for India in Council at the time when the order of Her Majesty in Council was made. Subject to this variation of the order under appeal, the appeal is dismissed. The appellant must pay the respondent's costs.

S. C. C. *Decree varied.*

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25 C. 285.

APPELLATE CIVIL.

Before Mr. Justice Trevelyan and Mr. Justice Stevens.

JAGDEO SINGH (*Defendant*) *v.* PADARATH AHIR (*One of the Plaintiffs*).*
[30th August, 1897.]

Bengal Tenancy Act (*VIII of* 1885), ss. 121 *and* 140—*Suit for compensation for illegal distraint—Non-joinder of parties in an action on tort—Joinder when too late—Objection of non-joinder not duly taken, Effect of—Limitation Act* (*XV of* 1877), s. 22.

A suit for compensation for illegal distraint under s. 121 of the Bengal Tenancy Act (VIII of 1885) was brought by one of two persons jointly entitled to the crops distrained. Objection being taken by the defendant at a late stage of the case on the ground of non-joinder of a party, that party was, on his own application, added as a plaintiff, but his claim was then barred by limitation. *Held*—

(1) Section 140 of the Bengal Tenancy Act did not exclude a suit of this kind.

(2) The rule that persons having the same cause of action must sue jointly does not apply to actions on tort in every case in which persons have been damnified by the same tortious act.

(3) If the objection of non-joinder of party in an action of tort be not taken at the time and in the way provided by law, the defendant is liable to such portion of the damages only as have been incurred by the plaintiff who originally brought the suit.

(4) The whole suit was not barred by limitation in consequence of the provisions of s. 22 of the Limitation Act (XV of 1877).

[F., 2 C.L.J. 496; 15 C.L.J. 225 = 14 Ind. Cas. 478; R., 6 C.L.J. 383 (392).]

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* Appeal from Appellate Decree, No. 704 of 1896, against the decree of Babu Madhub Chandra Chuckerbutty, Subordinate Judge of Shahabad, dated the 19th of December 1895, affirming the decree of Babu Mohim Chunder Sircar, Munsif of Arrah, dated the 21st of June 1895.

(1) 23 C. 357.

1897 AUG. 30. — APPELLATE CIVIL. — 25 C. 285.

THE facts and arguments of pleaders material to the report in this case appear from the judgment of the High Court.

Babu *Umakali Mukerjee*, and Babu *Makhan Lall*, for the appellant.

[286] Dr. *Asutosh Mukerjee*, for the respondent.

The judgment of the High Court (TREVELYAN and STEVENS, JJ.) was as follows :—

JUDGMENT.

In the suit out of which this appeal arises, the plaintiff Padarath Ahir sued to recover Rs. 304-12-9 dams, which he had to pay into Court, in order to obtain the release of his crops from attachment, together with Rs. 7-0-9 dams, the costs alleged to have been incurred in making the attachment. The plaintiff's case was that the principal defendant Jagdeo Singh had wrongfully caused the crops to be distrained under colour of s. 121 of the Bengal Tenancy Act, 1885, as the crops of the second defendant Anarath Rai, falsely alleging that the latter was the tenant of the plaintiff's holding on which the crops had been grown. Both the Courts below have found in favour of the plaintiff on the facts.

The plaint was filed within one month of the date when the attachment was made, but for some reason, which has not been explained to us, there appears to have been very great delay in disposing of the suit, and at a very late stage of the trial, some fourteen months after the filing of the plaint, a supplementary written defence was filed, in which for the first time the plea of defect of parties was taken. It was urged that inasmuch as Padarath's brother Kirtarath had an interest in the holding, he should have joined in bringing the suit. The obvious reply to this plea was that under s. 34 of the Code of Civil Procedure it was not admissible at that stage of the proceedings, but the plaintiff unfortunately for himself attempted to cure the defect to which objection had been taken, and what was done was that Kirtarath applied with Padarath's consent to be added as a co-plaintiff. This was done with the result, which might have been expected, that a fresh plea of limitation, based upon s. 22 of the Limitation Act, was at once taken by the defendants. That plea was allowed by the Court of first instance so far as the interest of Kirtarath was concerned, and a decree was given only for one-half of the amount claimed, excluding the sum alleged to have been paid as the costs of the deposit, which was disallowed as not proved.

The defendant Jagdeo Singh appealed, and Padarath also [287] appealed in respect of the moiety disallowed as the share of Kirtarath, but both appeals were dismissed by the lower appellate Court.

The defendant Jagdeo Singh only has come up to this Court in second appeal. The grounds which have been argued before us are, first, that the plaintiff had no right of suit; and, secondly, that the whole of the claim ought to have been held to have been barred by limitation.

A preliminary objection was taken for the respondent that no second appeal lies in the case, inasmuch as it is in reality not a suit for compensation for illegal distress such as is contemplated by art. (35) (*j*) of the second schedule of the Provincial Small Cause Courts Act, but is merely a suit for the recovery of the amount which the plaintiff-respondent had had to pay, in order to procure the release of his crops from attachment. We think that objection is untenable, because the claim was not only for the recovery of the sum paid, but also for damages, namely the cost alleged to have been incurred in paying it. It is therefore a suit for compensation.

We proceed to deal with the appeal.

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25 C. 285.

It is contended in the first place that the suit will not lie at all because such a suit can be brought only under the provisions of s. 140 of the Bengal Tenancy Act, and under that section a suit for compensation, where property has been distrained on an application made under s. 121 of the Act, lies only in a case in which such an application is not permitted by the latter section. It is contended that in the present case the distraint was made on an application made under s. 121 and permitted by the section. We think that there is nothing in s. 140 to exclude an action of this kind in a case like that before us in which the landlord is found to have abused his power of distraint by distraining the crops which belong to the tenant on the pretence that they belong to another person in collusion with himself. There has been an invasion of the rights of the tenant for which he is entitled to a remedy, and if the case is not one of the kind contemplated by s. 140 he is not, so far as we can see, deprived by the provisions of that section of the ordinary right of action [288] which any person who suffers from a tortious act has against the tortfeasor. We may observe that this objection appears to have been taken for the first time in this Court.

With reference to the question of limitation we have first to see whether the addition of Kirtarath as a co-plaintiff was, in the circumstances of the case, legally made, looking to the provisions of s. 34 of the Code of Civil Procedure. No doubt the objection taken by the defendants for want of parties was inadmissible under that section, as not having been made before the first hearing. The difficulty is that that objection was not made in the proper manner, as we have already noticed, but Kirtarath made an application, with the consent of the original plaintiff Padarath, to be added as a co-plaintiff. Under the provisions of s. 32 this could be done at any time, and we think that the validity of the act of the Court, which was done at the instance of Kirtarath and Padarath, cannot be affected by the fact that in moving the Court to do it they are influenced by the defendants having made an objection which was not sustainable and which Padarath might have successfully resisted on that ground. The addition of Kirtarath was perfectly legal in itself, and we think that Padarath and he are bound by their own act in causing it to be made.

The contention for the appellant on the point of limitation is that the two brothers had a joint cause of action upon which they could only sue jointly, and therefore the bar against Kirtarath's claim must apply to that of Padarath also. No provision of law has been cited in support of this argument, but we have been referred to the following reported cases, several of which appear to have been cited in the Courts below: *Obhoy Churn Nundi* v. *Kritartha Moyi Dossee* (1); *Ramsebuk* v. *Ramlall Koondoo* (2); *Ramdoyal* v. *Junmenjoy Coondōo* (3); *Imamuddin* v. *Liladhar* (4); *Jibanti Nath Khan* v. *Gokool Chunder Chowdry* (5); and *Kalidas Kevaldas* v. *Nathu Bhagvan* (6).

[289] None of these cases seems to us to be in point. No doubt there are certain classes of cases in which persons having the same cause of action must sue jointly, such as suits upon a contract; but we are not aware of any authority for the application of this rule to actions on tort in every case in which several persons have been damnified by the same tortious act.

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(1) 7 C. 284. (2) 6 C. 815. (3) 14 C. 791.
(4) 14 A. 524. (5) 19 C. 760 (764). (6) 7 B. 217.

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The non-joinder of a plaintiff in an action for wrong independent of contract may be a ground for insisting on the person being joined as plaintiff; but if that objection be not taken at the time and in the way provided by law, the defendant is liable for such portion of the damages as have been incurred by the plaintiff alone.

We do not think that there was anything to prevent Padarath in the present case from suing alone for compensation for the illegal distraint, as far as he was injuriously affected by it, and in this view his claim, which was certainly brought in time, would not be barred by the subsequent addition of Kirtarath as a co-plaintiff.

We dismiss this appeal with costs.

S. C. C. *Appeal dismissed.*

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25 C. 289.

APPELLATE CIVIL.

Before Mr. Justice Banerjee and Mr. Justice Wilkins.

BEHARY LAL MOOKERJEE AND ANOTHER (*Plaintiffs*) v. BASARAT MANDAL AND OTHERS (*Defendants*).* [19th November, 1897.]

Landlord and tenant—Suit for rent—Deposit of rent by a tenant through the transfree of the holding from him, whether valid—Bengal Tenancy Act (VIII of 1885), s. 61.

A deposit of rent, though not made by a tenant himself, but made on his behalf by a transferee of the holding from him, is a valid deposit within the meaning of s. 61 of the Bengal Tenancy Act.

[R., 16 C.L.J. 546=15 Ind. Cas. 561.]

THE facts of this case are sufficiently stated in the judgment of the High Court.

Babu *Karuna Sindhu Mookerjee* and Babu *Jogendro Chunder Ghose*, for the appellants.

[290] Babu *Norendro Chunder Bose*, for the respondents.

The following judgment was delivered by the High Court (BANERJEE and WILKINS, JJ.)

JUDGMENT.

BANERJEE, J.—In this appeal, which arises out of a suit for arrears of rent, the question is whether the deposit of rent set up in the defence of the tenants-defendants was a valid deposit under s. 62 of the Bengal Tenancy Act. The grounds upon which the learned Vakil for the plaintiffs-appellants asks us to hold that deposit to be invalid in law are, *first*, that the preliminary tender which was necessary in this case was not a valid tender as it was not made by the recorded tenants, but was made by the transferees from them; *secondly*, that the deposit was made in respect of rent which had not fallen due at the time; and, *thirdly*, that the deposit was made, not by the tenant as required by law, but by the transferee from him.

The first objection is, in our opinion, concluded by the finding arrived at by the lower appellate Court, which is to the effect that the tender was made by two of the defendants, that is, two of the recorded tenants.

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* Appeals from Appellate Decrees Nos. 215 and 216 of 1896, against the decrees of Babu Dwarkanath Mitter, Subordinate Judge of 24-Pergunnahs, dated the 8th of November, 1895, reversing the decree of Babu Bhoobun Mohun Ghose, Munsif of Basirhat, dated 19th of February, 1895.

As to the second objection, it does not appear to have been raised before either of the Courts below; and as it involves the determination of a question of fact, namely, whether at the date of the tender the amount tendered had or had not fallen due, we do not think we ought to allow the objection to be raised at this stage of the case, as it would necessitate a remand and protract the litigation.

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As to the third objection, it is quite true that s. 61 enacts that "the tenant may present to the Court having jurisdiction to entertain a suit for the rent of his tenure or holding, an application in writing for permission to deposit in the Court the full amount of the money then due." But the question is whether the law requires that the tenant must present the application to the Court in *person*. We do not think that it would be a reasonable construction of the section to hold that it requires that the tenant must present the application in person.

The application here was made on behalf of the tenant though it was presented on his behalf by the transferee of the holding from him.

[291] The Bengal Tenancy Act does not make any provision as to how applications, other than those in suits, are to be made by or on behalf of parties in a case like this. Neither s. 145 nor s. 188 applies to cases of this description. That being so, we think the view taken by the lower appellate Court, that an application, such as the one that was made in this case for the deposit of rent, was in substantial compliance with s. 61, is a reasonable view.

The objections urged against the validity of the deposit all fail; and this appeal must consequently be dismissed with costs.

S. C. G. *Appeal dismissed.*

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25 C. 291.

CRIMINAL REFERENCE.

Before Mr. Justice Hill and Mr. Justice Stevens.

BHIKU KHAN (*Petitioner*) v. ZAHURAN (*Opposite Party*).*
[7th December, 1897.]

Maintenance, Order of Criminal Court as to—Criminal Procedure Code (Act X of 1882), s. 488—*Imprisonment for default of payment of maintenance—Warrant of commitment—Procedure.*

An order of commitment to prison for default in payment of a wife's maintenance allowance cannot be made without proof that the non-payment was due to wilful neglect of the person ordered to pay. *Sidheswar Teor* v. *Gyanada Dasi* (1) followed.

The law contemplates a single warrant of commitment in respect of the arrears due at the time of its issue. Where six months arrears were due, an order for separate warrants of commitment awarding a separate sentence of imprisonment of one month on each warrant, was therefore held to be bad in law.

As to the mode of computing the term of imprisonment the case of *Allapichai Ravuthar* v. *Mohidin Bibi* (2) followed.

[**Diss.**, 7 Bur.L.T. 225=15 Cr.L.J. 434=24 Ind. Cas. 170; **R.**, 5 O.C. 316 (318).]

THE facts of this case, so far as they are necessary for the purposes of this report, appear from the judgment of the High Court.

No one appeared at the hearing of the reference.

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* Criminal Reference No. 308 of 1897, made by F. B. Taylor, Esq., Judicial Commissioner of Chota Nagpur, dated the 11th November, 1897.

(1) 22 C. 291. (2) 20 M. 3.

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[292] The judgment of the High Court (HILL and STEVENS, JJ.) was as follows:—

JUDGMENT.

The order of the Magistrate of the 15th September last committing Bhiku Khan to prison for five months for making default in the payment of his wife's maintenance allowance cannot be maintained. It was decided in the case of *Sidheswar Teor* v. *Gyanada Dasi* (1) that before such an order can be made it must be proved that the non-payment was due to wilful neglect of the person ordered to make the payment. No evidence directed to this point has been taken by the Magistrate. This is the reason given by the Judicial Commissioner of Chota Nagpur for his recommendation that the order should be set aside.

Bnt it appears to us that the order of the Magistrate is in another respect also contrary to law. The petition of Zahuran, dated the 30th January 1897, relates to the arrears of her maintenance for the six months from the 1st July to the end of December 1896. The Magistrate states that he directed Bhiku Khan to be imprisoned in the first instance for the arrears only of the month of July 1896. This order was made on the 18th June last. The next order in the matter is of the 12th July, and directs the issue of a notice to Zahuran requiring her to state whether she had been paid for any of the five remaining months of the year 1896. Zahuran made no answer to this requisition, and on the 17th July the following order appears in the order sheet: "File she is absent." About this time it appears that Bhiku Khan was released from prison as a "jubilee prisoner." "Hence," the Magistrate states in his letter of explanation to the Judicial Commissioner, "I have now taken action on Zahuran's petition mentioned above" (the petition, that is, of the 30th January 1897) "for the five remaining months' balance separately for each." The "action" to which reference is here made is disclosed by the order of the 15th September 1897, the order that is which has been brought to our notice by the letter of the Judicial Commissioner. The order is in these terms: "As the defendant won't pay, he will go to prison on each of the five warrants for five months in all, one month in each case."

[293] This order was passed apparently without notice to Bhiku Khan, and, as has been already mentioned, it was made without any evidence having been taken to support it.

Leaving these considerations out of view, however, we think that the law contemplates a single warrant of commitment in respect of the arrears due at the time of its issue, and that for this reason as well as that already mentioned the order of the 15th September is bad in law. It was not, we think, intended that a person against whom an order for maintenance has been made under s. 488 of the Code should be subject, when arrears have been allowed to accumulate before the aid of the Court is invoked, to a series of separate terms of imprisonment in respect of the arrears of each month, preceded, as all imprisonment under the section ought to be, by a separate inquiry and warrant of distress in each case.

The procedure contemplated by the Legislature in such a case seems to us to be that the Magistrate should in the first place satisfy himself by evidence that the non-payment complained of has been due to

(1) 22 C. 291.

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wilful neglect on the part of the person bound by the order. He should then issue his warrant for the levy of the whole amount due in the manner prescribed by the section. If after this course has been taken any part of the aggregate amount due remains unsatisfied, the Magistrate may sentence the defaulter to a proportionate term of imprisonment.

The mode of computing the term seems to us to have been correctly indicated by the High Court of Madras in the case of *Allapichai Ravuthar* v. *Mohidin Bibi* (1) where it is said: "The procedure contemplated by the Code appears to be to deduct the sum levied from the sum due, and then to ascertain how many months arrears the balance represents. The maximum imprisonment that can be imposed will then be one month for each month's arrears, and if there is a balance representing the arrears for a portion of a month of a further term of a month's imprisonment may be imposed for such arrear."

These principles, we may remark, relate to the computation of the maximum term of imprisonment which may be awarded **[294]** under the section. It ought perhaps to be unnecessary to point out that before he inflicts the highest penalty of which the law allows, it is the duty of a Magistrate to satisfy himself judicially that the case is one in which the defaulter ought to be dealt with with marked severity. The Magistrate, however, in the present case does not appear to have given the question any consideration whatever, and indeed upon the materials before him any conclusion at which he might have arrived would have been of little value.

We set aside the order of the 15th September committing Bhiku Khan to prison and direct that he be set at liberty.

B. D. B. *Order set aside.*

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25 C. 294.

ORIGINAL CIVIL.

Before Mr. Justice Sale.

ENAMUL HUQ v. EKRAMUL HUQ.* [16th December, 1897.]

Inspection of Documents—Practice—Inspection by agent of a party.

When under an order giving liberty to a party to a suit, his attorneys and agents, to inspect and peruse the documents produced by the opposite party, inspection by an agent is contemplated, the order should be read in such a way as would give the Court some control over the persons to be appointed to inspect the documents. Such an order contemplates that the agent will be a person standing in the position of the party for the purposes of the suit.

Held, therefore, that the Court ought not to permit a person formerly in the service of the defendant to inspect as the plaintiff's agent the defendant's books, which had been in his charge.

THIS was an application, adjourned from Chambers, that the defendant should allow the presence of Abdul Jubbar, accountant, as the plaintiff's agent, at the inspection of documents under an order dated the 20th February 1897.

The plaintiff and the defendant owned a joint business, and the defendant also had a separate business; and the plaintiff now sought to

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* Original Civil Suit No. 5 of 1896.

(1) 20 M. 3.

1897 DEC. 16. — ORIGINAL CIVIL. — 25 C. 294.

have the assistance of Abdul Jubbar at the inspection of the [295] books of the joint business in respect of a period when the books were under the supervision of Abdul Jubbar.

The defendant alleged, in answer to the application, that in 1893 the books of the separate business were also under Abdul Jubbar's charge, and that he had subsequently dismissed Abdul Jubbar. The statement as to the dismissal was denied on affidavit by Abdul Jubbar. The application was adjourned into Court.

Mr. *Jackson* showed cause against the application.—It would be in the highest degree objectionable that a person who, according to the defendant, has been dismissed from his service for making away with his books, should be allowed to take inspection of the defendant's books on the plaintiff's behalf. The plaintiff wants Abdul Jubbar to make the inspection, or at least to be present at the inspection, because the books of accounts were kept under him while he was in the defendant's service.

This is not a mere objection of sentiment; it is a personal objection. While in the defendant's employment, Abdul Jubbar was giving the plaintiff information as to matters in this suit. If this application be granted, it will be open to a party to a suit to authorise any person whomsoever to inspect documents on his behalf. Even an independent professional accountant is not an agent for this purpose unless a special case is made out to justify his appointment—*Bonnardet* v. *Taylor* (1). [*Draper* v. *The Manchester, Sheffield and Lincolnshire Railway Co.* (2); *Bartley* v. *Bartley* (3); and *Dadswell* v. *Jacobs* (4) were also cited.]

Mr. *Dunne* in support of the application.—The rule which is said to apply in England has never been applied in India, and it is not possible for it to apply here. One of the most ordinary modes of inspection in this country is inspection by some person on behalf of the party. Suppose, for instance, there are accounts between an English firm and a Marwari one, and the accounts, or some of them, are in Nagri, who could inspect the Nagri accounts on behalf of the English firm? From the very nature of the case the English firm would have to appoint some agent familiar with the [296] Nagri language to inspect the books on their behalf. *Dadswell* v. *Jacobs* (4) was not a case of inspection properly so called; for there a firm sought to compel their agent to produce certain documents relating to their business to the person who was a rival of that agent, and the only question was whether the defendant's objection to giving inspection of his books to a rival trader was a reasonable one. And whatever the case of *Bonnardet* v. *Taylor* may decide, there is in this country no rule that an agent *pro hac vice* may not be appointed to inspect documents. If such a rule were laid down in India, inspection would become impossible, and suits would never be ready for hearing. Besides, in *Bonnardet* v. *Taylor* (1) it was sought to appoint a professional accountant to transact the other party's books. That is not the case here. In this case the plaintiff will inspect the books; all he wants is to have Abdul Jubbar to sit by him and give such assistance as he can.

The case of *Draper* v. *The Manchester, Sheffield and Lincolnshire Railway Co.* (2) is distinguishable; for there it was sought to appoint the accountant of a rival company to inspect the books. The cases cited against the plaintiff, therefore, have no real bearing on the present case.

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(1) (1861) 1 J. & H. 383.
(2) (1861) 3 DeG. F. & J. 23.
(3) (1852) 1 Drewry 233.
(4) (1887) L. R., 34 Ch. D. 278.

Abdul Jubbar has filed an affidavit denying that he was dismissed from the defendant's service. He is certainly in the plaintiff's employment now, and is therefore entitled, under the order, to inspect the books on the plaintiff's behalf. He was in the plaintiff's service before the date on which inspection was sought; and the plaintiff offers to agree to any terms the defendant desires for the protection of his books.

The rule laid down by this Court is, that where there is any difficulty in the way of inspection, the proper place for inspection is the Court; let the books, therefore, be produced in Court.

ORDER.

SALE, J.—This is an application by the plaintiff for an order that the defendant, Ekramul Huq, do allow Abdul Jubbar, the plaintiff's agent, to be present at the inspection directed by the order of the 20th February 1897.

[297] The material portion of the order is as follows: "And the applicant, his attorneys and agents, are to be at liberty to inspect and peruse the documents so to be produced and left, and to take copies and abstracts thereof and extracts therefrom as the applicant shall be advised."

It is contended, on the part of the plaintiff, that the words of the order leave the Court no discretion, and that Abdul Jubbar is a person who answers to the description of the word "agent" as used in the order.

It is admitted that Abdul Jubbar was originally a servant of the defendant Ekramul Huq, and that he continued in his service until some time after the date of the order for inspection, and that up to his discharge some time in 1897 he was employed as an accountant and had charge of the books of the defendant Ekramul Huq. It appears to me that the words "attorneys and agents," as used in the order for inspection, should be read in such a way as would give the Court some sort of control over the persons taking part in the inspection of documents directed by the order. I think it is clear from the authorities cited that similar words are interpreted by the Courts in England in a restricted sense which permits the exercise of such control.

In accordance with these authorities the words "attorneys and agents" should be read as referring either to the applicant himself or to persons who stand in his position with reference to the suit generally. It is to be observed that in allowing a party to inspect, the Court gives him a privilege of a very important character, and it is the duty of the Court to see that the privilege is not exercised so as to operate prejudicially against his opponent.

It is said that to read these words in the exclusive sense contended for would render it impossible for inspection to be conveniently obtained in this country; but I think the Courts in this country, in permitting servants or agents of parties, other than those strictly falling within the words of the order, to take part in the inspection, would be disposed to exercise a reasonable discretion, and would not prevent a party from employing a servant for the purposes of the inspection unless it was shown that there was some sufficient ground of objection as against him.

[298] It appears to me that the person whom it is proposed to employ in the present instance does not come strictly within the words of the order, and that the Court would be entitled to exercise a discretion in permitting him to act for the plaintiff in the matter of the inspection.

That being so, the question is whether the objection made as regards Abdul Jubbar is a reasonable one. It is, I think, something more than a

1897 DEC. 16. — ORIGINAL CIVIL. — 25 C. 294.

mere sentimental objection. It is to be remembered that serious allegations are made against this person by the defendant Ekramul Huq; and, though I say nothing as to the truth of these allegations the admitted circumstances under which he left the service of the defendant and entered the service of the plaintiff are such as would expose him to a strong temptation to take undue advantage or make improper use of the knowledge he had gained while in the defendant's employ if he is permitted to take part in the inspection.

I think, therefore, I ought not to compel the defendant to admit Abdul Jubbar to the inspection, and the present application must be refused with costs.

Attorney for the plaintiff: Babu *O. C. Ganguli.*

Attorney for the defendant: Babu *G. C. Chunder.*

H. W.

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25 C. 298=2 C.W.N. 222.

APPELLATE CIVIL.

Before Sir Francis William Maclean, Kt., Chief Justice, and Mr. Justice Banerjee.

BASARADDI SHEIKH (*Plaintiff*) *v.* ENAJADDI MALEAH (*Defendant*).*
[25th November, 1897.]

Vendor and Purchaser—Transfer of Property Act (IV of 1882), *s.* 55, *sub-s.* 2—*Implied covenant for title—English Conveyance Act of* 1881, 44 *and* 45 *Vic., ch.* 41, *s.* 7.

[299] In the absence of any contract to the contrary there is under s. 55, sub-s. 2 of the Transfer of Property Act, an implied covenant for title on the part of the vendor.

[**F.**, 13 C.P.L.R. 97 (98); **Appl.**, 1914 M.W.N. 57 (58)=22 Ind. Cas. 42; **R.**, 4 C.W.N. 63 (65); 8 O.C. 345 (347).]

THE facts of this case, so far as they are necessary for the purposes of this report, are fully set out in the judgment of the High Court.

Dr. *Ashutosh Mookerjee* and Babu *Mohendra Nath Bose*, for the appellant.

Babu *Purno Chunder Shome*, for the respondent.

The following judgments were delivered by the High Court (MACLEAN, C.J., and BANERJEE, J.)

JUDGMENTS.

MACLEAN, C.J.—This appeal raises a short point of law, and the point of law is, whether, having regard to sub-s. (2) of s. 55 of the Transfer of Property Act, a vendor of immoveable property must be, in the absence of any contract to the contrary, taken to covenant for title. The facts in this case lie within a very narrow compass. The plaintiff bought a small piece of land of the defendant in the year 1295 B. S. (1888) and the consideration money was thirty rupees. A conveyance was duly executed and registered. It appears that subsequently, after the conveyance to the plaintiff had been executed and registered, a question arose as to the title of the defendant, and certain proceedings were taken in

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* Appeal from Appellate Decree No. 436 of 1896, against the decree of J. Pratt, Esq., District Judge of 24 Pergunnahs, dated the 24th of December 1895, affirming the decree of Babu Priya Lal Pyne, Munsif of Diamond Harbour, dated the 15th of July 1895.

which it was virtually decided that the defendants had no title. I may here remark that, in his defence in the present suit, the defendant does not allege that he has a title to the property in question. 1897 Nov. 25.

Under these circumstances the plaintiff sues the defendant, and asks, amongst other things, for the recovery of his purchase money and interest. APPELLATE CIVIL.

No doubt the plaintiff based his case in a great measure, if not entirely, upon allegations of fraud, which view has not been adopted by either of the Judges in the Courts below. But although he has so based his case, to my mind he is entitled to urge before us that, even if he cannot sustain a case of fraud, as a matter of law he is entitled to succeed upon the ground that there was a covenant for title on the part of the vendor. The learned District Judge has decided that in this case "the doctrine **[300]** of *caveat emptor* applies, and that therefore the plaintiff is not entitled to succeed." But it does not appear that the section of the Transfer of Property Act to which I have referred was called to the learned District Judge's attention. In my opinion, and having regard to that section, there was a covenant on the part of the vendor that the interest which he professed to transfer to the plaintiff subsisted, and that he had power to transfer the same. I have two or three times invited the learned vakil to say what his answer was to that section, but my invitation was not accepted. This section is to some extent analogous to s. 7 of the English Conveyance Act of 1881, and in my opinion, in the absence of any contract to the contrary, which is not suggested in the present case, sub-s. 2 of s. 55 of the Transfer of Property Act must be taken as incorporated into the present contract between the plaintiff and the defendant, which in effect is tantamount to a covenant for title on the latter's part. I do not appreciate what that section can mean unless it means what I have indicated above. I think, therefore, that quite apart from the question of fraud, there was a covenant for title in this case on the part of the vendor, and that, in that respect, the learned District Judge has miscarried. The appeal must therefore succeed. 25 C. 298 = 2 C.W.N. 222.

We think that the proper order to make as to costs is this: Inasmuch as the appellant launched and argued his case on the question of fraud in the Courts below he will get no costs (except the institution fees) in those Courts, but he must have his costs of this appeal.

BANERJEE, J.—I am of the same opinion. The question that arises in this appeal is whether the effect of sub-s. 2 of s. 55 of the Transfer of Property Act is to imply a covenant for title in the absence of any contract to the contrary. I think that the question ought to be answered in the affirmative and in favour of the appellant who was the plaintiff in the Court below, and who brought this suit to recover compensation owing to the title of his vendor, defendant No. 1, having been found to be wanting in reference to the property conveyed to him.

The only grounds upon which the learned vakil for the respondent **[301]** sought to meet the appellant's contention were, *first*, that the suit was based upon fraud, as to which the Courts below have found against the plaintiff; and, *secondly*, that having regard to the fact found by the first Court that the plaintiff knew, or was expected to know, all about the property conveyed to him, he is not entitled to succeed in a suit like this.

As to the first answer, though no doubt the plaint makes several allegations imputing fraud to the defendant No. 1, still the main fact now relied upon by the learned vakil for the appellant is also alleged, *viz.*, that it was found in a suit brought by the plaintiff against one Janadolla, a suit to which the present defendant No. 1 was also made a party, that

1897 Nov. 25. — APPELLATE CIVIL. — 25 C. 298 = 2 C.W.N. 222.

the present defendant No. 1 had no title to the property in dispute. Having regard to that fact, and having regard to the absence of any allegation by the defendant No. 1 that he had a title to the property, we do not think that the first answer can avail the respondent.

As to the second answer, the only way in which it could possibly have availed the defendant was by showing that there were circumstances in the case from which a contract to the contrary might have been implied—a contract, namely, that the plaintiff took a conveyance with all defects in the vendor's title. We do not think that there has been any finding to that effect, and the second answer must in my opinion therefore also fail.

There can be no doubt as to the meaning of sub-s. 2, s. 55 of the Transfer of Property Act. Its effect is clearly to imply a covenant for title somewhat in the same way as such covenants are implied according to the provisions of s. 7 of the English Conveyance Act of 1881, 44 and 45 Victoria, Chap. 41.

S. C. G. *Appeal allowed.*

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25 C. 302.

[302] APPELLATE CIVIL.

Before Sir Francis William Maclean, Kt., Chief Justice, and Mr. Justice Banerjee.

PROHLAD TEOR AND OTHERS (*Defendants*) *v.* KEDAR NATH BOSE AND OTHRES (*Plaintiffs*).* [1st September, 1897.]

Landlord and tenant—Encroachment by a tenant—Effect of such encroachment—Position of such tenant—Trespasser.

When a tenant encroaches upon the land of his landlord he does not by such encroachment become the tenant in respect of the land encroached upon against the will of the landlord.

[R., 4 C.W.N. 508; 16 C.P.L.R. 36 (40); Doubted, 35 M. 618 = 10 Ind. Cas. 575 = 21 M.L.J. 615 = 10 M.L.T. 12; D., 31 C. 397; 2 C.L.J. 125.

THIS appeal arose out of an action brought by the plaintiffs to recover possession of certain land by ejectment of defendants Nos. 1, 2 and 3, as well as for apportionment of rent. The allegation of the plaintiffs was that they held the disputed land under an *amalnama* dated 6th Baisak 1299 B. S. (17th April 1892), and a *pottah* dated 7th Kartic 1299 B. S. (22nd October 1892), granted by the present zemindar-defendant No. 4, Peary Mohun Roy, and that they were dispossessed by the defendants Nos. 1, 2 and 3, by a proceeding under s. 145 of the Criminal Procedure Code, which was decided in favour of the said defendants. The defence of defendants Nos. 1, 2 and 3 was that they were in possession of the disputed land by virtue of a *pottah* granted on the 14th Baisak 1256 B. S. (25th April 1849) by the previous zemindars, known as the Biswases. They impugned the plaintiffs' lease as being one set up in collusion with the zemindar-defendant, and they also pleaded limitation. The zemindar-defendant supported the plaintiffs' case, but pleaded that no apportionment of rent could be allowed to them.

* Appeal from Appellate Decree, No. 197 of 1896, against the decree of J. Pratt, Esq., District Judge of 24-Pergunnahs, dated the 22nd of October 1895, reversing the decree of Babu Hara Krishna Chatterjee, Additional Subordinate Judge of that District, dated the 27th of September 1894.

The Subordinate Judge, holding that the land in dispute was included within the lease set up by the defendants, and that the plaintiffs' claim was barred by limitation, dismissed the suit as against the defendants Nos. 1, 2 and 3, but allowed apportionment of rent as against the zemindar-defendant. On appeal by the plaintiffs, and on cross-appeal by the zemindar-defendant, to the [303] District Judge, he reversed the decision of the first Court, and decreed the suit as against defendants Nos. 1, 2 and 3, but disallowed apportionment of rent.

1897 SEP. 1. — APPELLATE CIVIL. — 25 C. 302.

From this decision the defendants Nos. 1, 2 and 3 appealed to the High Court.

Babu *Nil Madhub Bose* and Babu *Shib Chunder Palit*, for the appellants.

Babu *Saroda Churn Mitter* and Babu *Hara Kumur Mitter*, for the respondents.

The following judgments were delivered by the High Court (MACLEAN, C.J., and BANERJEE, J.) :—

JUDGMENTS.

MACLEAN, C.J.—In this case the plaintiffs sue to recover from the defendants certain plots of land, a portion of which is covered with water. The defence was that these plots and expanse of water were included in a certain lease from the zemindar who is a defendant in the case, and who is a common lessor both of the plaintiffs and the defendants. It has been found as a fact by the lower Court that these plots of land and expanse of water are not included in the defendants' lease. That being so, the defendants fall back upon the contention that these plots belonged to their zemindar, the zemindar who was their lessor; that they have encroached upon these plots of their landlord, and that having so encroached upon his lands they are entitled to be treated as between themselves and their landlord as his tenants, not only of the land originally included in the lease, but also of this land and expanse of water upon which they have encroached.

That no doubt is their present contention, although that is not the contention they set up in their written statement. This contention is doubtless suggested by the exigencies of the appellants' case, the Court below having found that the plots in question were not included in the appellants' lease. What we have to consider is, whether, in point of law, such contention can prevail. I think not, and I do not think I can do better than adopt, as I do, the language of Sir Richard Garth in the case of *Nuddyar Chand Shaha* v. *Meajan* (1) in which, in delivering the judgment of the Court, he [304] says: "It would indeed seem strange if, as a matter of law, a tenant were allowed, *without his landlord's permission*, to appropriate any land which adjoins his own tenure, and then when his landlord complained of the trespass, and required him to give the land up, he were allowed to take advantage of his own wrong, and insist upon retaining possession of it until the expiration of his tenure." Now, although the zemindar in this case is not the plaintiff, he is a defendant, and he supports the case of the plaintiffs who are tenants of the land in dispute, under the lease granted to them.

Reliance has been placed by the learned vakil for the appellant upon the law as laid down in the case of *Gooroo Doss Roy* v. *Issur Chunder Bose* (2). I think the rule is laid down there too broadly, and I gather that the Court in the case of *Nuddyar Chand Shaha* v. *Meajan* (1) was

(1) 10 C. 820. (2) 22 W.R. 246.

1897 SEP. 1. — APPELLATE CIVIL. — 25 C. 302.

also of that opinion. In fact the Judges who decided the latter case seem to have been so much impressed with the effect of that ruling that they apparently consulted Mr. Justice Mitter, who was one of the Judges who decided the case of *Gooroo Doss Roy* v. *Issur Chunder Bose* (1), for I find this passage in the judgment of the Court (I. L. R., 10 Calc., p. 882): "We have consulted our brother Mitter as to this," that is as to the ruling in the case of *Gooroo Doss Roy* v. *Issur Chunder Bose* (1), "and we find that it was by no means the intention of the Court in that case to lay down the rule thus broadly." As regards the case of *Gooroo Doss Roy* v. *Issur Chunder Bose* (1) I am quite unable to agree with what the Court there lays down as to what is the rule of English law in cases of encroachment by a tenant. I allude to the passage in which Mr. Justice Markby says: "The true presumption as to encroachments made by a tenant during his tenancy *upon the adjoining lands of his landlord* is that the lands so encroached upon are added to the tenure and form part thereof, for the benefit of the tenant so long as the original holding continues, and afterwards for the benefit of his landlord, unless it clearly appeared by some act done at the time that the tenant made the encroachment for his own **[305]** benefit." If that be intended to lay down the rule of English law upon the point I respectfully dissent from it. The rule as there laid down is applicable to cases where the encroachment is upon waste land or land of third parties, but I am not aware of any authority in the English Courts, which lays down that rule as applicable to the case of an encroachment by a tenant on *other lands of his own landlord*, or that if such encroachment be made the tenant can by that encroachment constitute himself the tenant of his landlord of the land he has encroached upon. It strikes me as an odd result that a tenant of plots A and B can by encroaching on plot C which also belongs to his landlord successfully claim by that action on his part to be entitled as between himself and his landlord to be treated by the latter as the tenant of the plot C; in other words by his own wrongful act to force himself upon his landlord *nolens volens* as tenant of plot C. I am aware of no authority for such a proposition, nor do I regard the proposition as in accordance with law. The appeal on this point of law fails and must be dismissed with costs.

BANERJEE, J.—I am of the same opinion. I only wish to add this, that where a tenant encroaches upon the land of his landlord, though the landlord may, if he chooses, treat him as a tenant in respect of the land encroached upon, the tenant has no right to compel the landlord against his will to accept him as a tenant in respect of that land. No authority has been cited in support of the contention that the tenant has such a right, and it would be contrary to reason and common sense to hold that a tenant has that right.

S. C. G. *Appeal dismissed.*

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(1) 22 W.R. 246.

25 C. 305=2 C.W.N. 150.

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APPELLATE CIVIL.

Before Sir Francis William Maclean, Kt., Chief Justice, and Mr. Justice Banerjee.

BINDUBASHINI DASSI AND OTHERS (*Defendants*) *v.* HARENDRA LAL ROY (*Plaintiff*).* [26th November, 1897.]

Voluntary payment—Contract Act (IX of 1872), s. 69—Arrears of rent—Payment made to save the putni *taluk from sale—Payment made by a mortgagee.*

[306] The plaintiff, who was the mortgagee of a certain *putni taluk*, obtained a consent decree for Rs. 35,000, on his mortgage bond, on the 13th August 1888. In the *solenamah* it was stipulated that if the decretal amount were not paid within a certain date, it was to be increased to Rs. 52,000 On the 14th March 1891 the plaintiff applied for execution of that decree and claimed the larger amount, as admittedly the smaller amount was not paid within the stipulated period. The Subordinate Judge allowed the plaintiff's claim. The defendant appealed to the High Court, and on the 31st September 1891, the order of the Subordinate Judge was reversed, and an inquiry was directed as to the conduct of the plaintiff in the matter. On the 31st August 1892, the Subordinate Judge held that the plaintiff had been guilty of misconduct and that the decree had been fully satisfied. The plaintiff appealed from this order to the High Court, and on the 4th January 1894 the appeal was dismissed, and he preferred an appeal to Her Majesty in Council. In the meantime, on the 13th May 1892, the plaintiff had paid a certain sum of money to protect the *putni taluk* from sale for arrears of rent due to the landlord. In a suit brought to recover from the defendant the amount so paid :

Held, that the payment was not a voluntary payment, and that the plaintiff was interested in the payment of the money, and therefore he was entitled to recover it.

[F., 26 C. 826 (829) ; Rel. on, 19 C.L.J. 72 (75)=18 C.W.N. 778=21 Ind. Cas. 207 (209) ; R., 16 C. 156=13 Ind. Cas. 144 : 9 Ind. Cas. 615 ; 11 Ind. Cas. 155; 11 O.C. 279 (284) ; D., 5 C.L.J. 59 (61); 7 O.C. 146 (149).]

THE facts of the case, so far as they are necessary for the purposes of this report and the arguments, appear sufficiently from the judgment of the High Court.

Babu *Horendra Narayan Mitter*, for the appellants.

Dr. *Rash Behary Ghose* and Babu *Akshoy Kumar Banerjee*, for the respondent.

The following judgments were delivered by the High Court (MACLEAN, C,J., and BANERJEE, J.) :—

JUDGMENTS.

MACLEAN, C.J.—The question we have to decide upon this appeal is whether the plaintiff in this suit is entitled to recover a sum of Rs. 383 odd under the following circumstances. The plaintiff was the mortgagee of a *putni* tenure ; the defendants were the mortgagors. On the 13th August 1888, the mortgagee having instituted a suit to enforce his mortgage security, a consent decree was made. The decree was for Rs. 35,000, but it went on to provide that, if that sum were not paid within a certain date which was mentioned in the *solenamah* which was embodied in the decree, the amount was to be increased to Rs. 52,000, which [307] the defendants were to be held liable to pay. On the 14th March

* Appeal from Appellate Decree, No. 537 of 1896, against the decree of Babu Chakradhur Proshad, Additional Subordinate Judge of Faridpore, dated the 18th of December 1895, affirming the decree of Babu Chundra Bhooshun Banerjee, Munsif of Madaripore, dated the 30th of March 1894.

1897 Nov. 26. — Appellate Civil. — 25 C. 305 = 2 C.W.N. 150.

1891 the plaintiff applied for execution of that decree upon the footing that the smaller amount had admittedly not been paid within the stipulated period, and consequently that the larger amount was due to the plaintiff.

The Subordinate Judge of Backergunge, who heard that application, made an order on the 14th March 1891, disallowing the defendant's objections, and in effect allowing the present plaintiff's claim. That order was appealed from, and, on the 31st September 1891, the High Court reversed that order and directed an inquiry as to the circumstances under which, as it was alleged, the plaintiff had prevented or obstructed the sale of certain property, and an inquiry as to the conduct of the plaintiff in the matter.

On the 31st August 1892 the Subordinate Judge held that the plaintiff had been guilty of misconduct and that the decree had been fully satisfied.

The present plaintiff appealed from that order to the High Court, and on the 4th January 1894 it was heard by this Court and dismissed. I understand from what has been said at the bar that that order is now under appeal to Her Majesty in Council.

In the meantime, on the 13th May 1892, the plaintiff had paid a sum of Rs. 318 and odd to prevent the sale by the superior landlord of the *putni* interest which was included in his mortgage. That payment was made on the very day fixed for the sale; and it had the effect of stopping the sale. Admittedly the defendants were not in a position to make the payment, and if it had not been made, the sale would have gone on. If the auction sale had not been stayed the plaintiff, assuming he were entitled to the larger of the above sums, in other words that his contention was correct, would have lost the benefit of his security for the balance due to him, and the defendants their interest in the equity of redemption. The payment was for the benefit of the defendants. But it is contended that, inasmuch as the effect of the judgment of the High Court on the 4th January 1894 was that the plaintiff must be taken to have been paid in June 1891 all he was entitled to, he had no interest whatever in the payment of this money; that it was a voluntary payment, and therefore the defendants cannot be required to **[308]** repay it. This does not appear to me to be a very equitable contention, when the result of the payment was to benefit the defendants by saving their equity of redemption from being sold. It has not been suggested in argument before us that at that time the equity of redemption was of no value, or that it was not for the benefit of the defendants that the sale should be stopped. Can it be said that at the time the payment was made, the plaintiff was not interested in the payment of the money? The position was this: The Subordinate Judge in the first instant had decided in his favour. When the payment was made, no doubt an inquiry had been directed by the High Court by their order of the 31st September 1891, which inquiry was still pending. But the litigation was going on, the plaintiff was contending that he was entitled to the larger sum owing to the default of the defendants, and until the point which was then *sub judice* was decided, it can scarcely be said that he was not interested in the payment of this money. The point at issue was whether the plaintiff was entitled to the larger or to the smaller sum. If entitled only to the smaller sum, it is not contested that he had been paid off in June 1891. I am not prepared to hold that because after he had paid the money the judgment of the Court was against him he was not interested in the payment at the time he made it. I think he was interested in the payment of this money within the meaning of s. 69 of the Indian Contract Act. If

the decision had been, as yet possibly it may be, in his favour, the effect of the payment was to preserve his security. This view appears to me consistent with the law as laid down by the Privy Council in the case of *Dakhina Mohan Roy* v. *Saroda Mohan Roy* (1) and also consistent with the case of *Nobin Krishna Bose* v. *Mon Mohun Bose* (2).

On these grounds I am of opinion that the view taken by the learned Judge in the Court below was correct, and this appeal must be dismissed with costs.

BANERJEE, J.—I am of the same opinion. The question raised in this appeal is shortly this, namely, whether the plaintiff who was the mortgagee of a *putni* tenure belonging to the **[309]** defendants, and who had paid a certain sum of money to save the *putni* tenure from sale under Reg. VIII of 1819, and to protect the interest he was then claiming as mortgagee, can recover that sum from the defendants, notwithstanding that it has since been found by the Court that the mortgage-debt had been satisfied before the date of the payment.

Having regard to the facts of the case, I think this question ought to be answered in the affirmative. The provision of the law that governs this case in my opinion is s. 69 of the Contract Act which says: " A person who is interested in the payment of money which another is bound by law to pay, and who, therefore, pays it, is entitled to be re-imbursed by the other."

There can be no question that the defendants were bound to pay the *putni* rent. In fact if they had not paid that money, the *putni* tenure would have been sold and lost to them. The only point that is disputed before us is, whether the plaintiff can be said to have been, at the time of the sale, a person interested in the payment of the *putni* rent. It is argued that as upon the finding of the Court ultimately arrived at in the proceedings in execution of the mortgage decree which were then pending, it appears that the mortgage debt had been satisfied before the date of the payment by the plaintiff, we must take it that he was not interested in the payment of the money. Now, the circumstances under which the Court ultimately came to the finding that the mortgage-debt had been satisfied, were of a somewhat peculiar nature. The compromise decree upon the mortgage bond provided that if a certain sum was paid within a certain time, the decree would be satisfied; but if that amount was not paid within that time, a larger amount would be recoverable by the mortgagee. As a matter of fact the smaller amount was not actually paid within the stipulated time; but what was found was this, that by reason of the acts and conduct of the mortgagee, decree-holder, either in not helping the mortgagor, judgment-debtor, or in actively opposing him, in selling the mortgaged property with a view to realize money for the payment of the mortgage-debt, the decree-holder had become disentitled to recover the larger amount; and it was by reason of this decision, arrived at some time after the payment now in question, that the **[310]** learned vakil for the appellants contends we must hold that the mortgagee, plaintiff, was not interested in the payment of the money at the time when he paid it. I am not prepared to say that this contention is sound.

If the case had rested upon the determination of the simple question of fact as to whether the amount had or had not been paid within the stipulated time, the case might have stood on a different footing; but here, if we were to hold that the mortgagee was not interested in the

(1) 21 C. 142. (2) 7 C. 573.

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payment of the money, because it was eventually found that the debt had been satisfied before the date of such payment, we must not only hold that the mortgagee knew the facts that led to the adverse decision in the proceedings in execution of the mortgage decree, but we must further hold that he was bound to anticipate the conclusion of the Court upon a mixed question of law and fact that was ultimately arrived at. I do not think that that would be a right view to take of the matter. It is clear that there was a disputable question awaiting the determination of the Court with reference to the rights of the mortgagee; and, so long as that question remained undetermined, it cannot be said that the mortgagee was not interested in the payment of the money which was necessary to be paid to protect the interest which he was claiming as mortgagee.

The view I take is amply supported by the decision of this Court in the case of *Nobin Krishna Bose* v. *Mon Mohun Bose* (1), and by the decision of the Privy Council in the case of *Dakhina Mohan Roy* v. *Saroda Mohan Roy* (2). Some reliance was placed upon the case of *Ramtuhul Singh* v. *Biseswar Lal Sahoo* (3), as showing that the mere fact of a payment going to benefit the defendant would not be sufficient to entitle the party making the payment to recover it from the defendant. The facts of that case were very peculiar, and very different from those of this case. Here the defendants not only had the benefit of the payment made, but they would, as a matter of fact, have lost their property were it not for that payment.

[311] That being so, I think upon the provisions of s. 69 of the Contract Act, as well as on general principles of justice, equity and good conscience, the decree made in favour of the plaintiff is right and ought to be affirmed with costs.

S. C. G. *Appeal dismissed.*

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25 C. 311 = 1 C.W.N. 671.

APPELLATE CIVIL.

Before Sir Francis William Maclean, Kt., Chief Justice, and Mr. Justice Banerjee.

BHOLA NATH BHUTTACHARJEE (*Judgment-debtor*) *v.* KANTI CHUNDRA BHUTTACHARJEE (*Decree-holder*).* [1st June, 1897.]

Mortgage—Decree absolute for foreclosure—Transfer of Property Act (IV of 1882), *ss.* 87 *and* 88—*Whether time to redeem would run from the date of the preliminary decree, or from the date of the decree of the appellate Court, when it simply confirms the decree of the first Court.*

Where, in a suit on a mortgage, the decree of the appellate Court simply dismisses the appeal, leaving the decree of the first Court untouched, the time for redemption would run from the date of the decree of the first Court.

[Appr., 11 C.W.N. 679 (680); R., 31 M. 28 (30) = 17 M.L.J. 495 = 3 M.L.T. 26; 17 C.L.J. 120 = 17 C.W.N. 457 = 18 Ind. Cas. 747; D., 12 C.P.L.R. 101 (102).]

THE facts of the case, so far as they are necessary for the purposes of this report, and the arguments, appear sufficiently from the judgments of the High Court.

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* Appeal from Order, No. 368 of 1896, against the order of B. G. Geidt, Esq., Additional District Judge of 24-Pergunnahs, dated the 26th of June 1896, reversing the order of Babu Mati Lal Haldar, Munsif of Alipur, dated the 13th of March 1896.

(1) 7 C. 573. (2) 21 C. 142.

(3) 15 B.L.R. 208 = 2 I.A. 131 = 23 W.R. 305.

1897 JUNE 1. APPELLATE CIVIL. 25 C. 311 = 1 C.W.N. 671.

Babu *Golap Chunder Sircar*, for the appellant.

Babu *Nilmadhub Bose*, and Babu *Shib ChunderPalit*, for the respondent.

The following judgments were delivered by the High Court (MACLEAN, C. J., and BANERJEE, J.).

JUDGMENTS.

MACLEAN, C.J.—This is a suit to enforce a mortgage security. On the 8th September 1893, the usual preliminary mortgage decree was made, giving the defendant three months' time within which to redeem, the three months to run from the date of that decree. On the 24th of July 1894 an appeal by the defendant against that decree was heard and dismissed, thus leaving the decree untouched. On the 30th of July 1894, an application was made by the plaintiff for foreclosure absolute, and notice [312] of that application was served on the 8th of August of the same year on the mortgagor, the present appellant. On the 15th September in the same year the foreclosure was made absolute. No objection was then made by the defendant. It appears that the Court was satisfied that notice had been served upon him ; this appears upon the face of the order of the 15th September 1894. On the 16th November 1894, possession was given to the plaintiff by the Court, and on the 8th of April 1895 satisfaction was entered up by the Court, which practically terminated the suit. Some time in April 1895, the defendant made an application to the Munsif to set aside his own foreclosure order absolute of the 15th September 1894, and the ground for his application was that the three months given for payment under the decree of the 8th September 1893 run, not from the date of that decree, but from the date of the appellate Court's decree of the 24th July 1894. The Munsif acceded to that view and set aside his own order. An appeal was taken to the District Judge, who reversed the order of the Munsif. Hence the appeal to us.

To my mind it is not necessary for us to go into the question whether the three months for redemption run from the date of the original decree or from the date of the appellate decree. In my judgment, if the defendant desired to raise that point, the proper time to raise it was when the matter came before the Munsif upon the application by the plaintiff for foreclosure absolute. He ought then to have raised it; he ought then to have invited the Court to hold that the three months for payment ought to run from the 24th July 1894, and not from the 8th September 1893, and that as that period had not expired, the foreclosure ought not to be made absolute. He did nothing of the sort. To my mind it is too late for him to raise the question now. I have been at a loss to appreciate, and I invited the learned vakil for the appellant to assist me, upon what ground, or perhaps I should say upon the exercise of what jurisdiction, the Munsif had the power to discharge the order of the 15th September 1894, having regard to the circumstances under which that order was made. Upon that point the learned vakil has not been able to afford me any assistance. In my [313] opinion, the Munsif had no such power. In this view of the case it becomes unnecessary, as I said before, to discuss the question as to the period from which three months for payment commenced to run, though it is not to be inferred from my silence that I do not concur with the view upon that point of the Court below.

There is one other fact to which I ought to refer, namely, that there was an application by the present appellant to the Munsif to review the order of the 15th September 1894. That application was unsuccessful.

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I think the Court below was quite right, and the appeal must be dismissed with costs.

BANERJEE, J.—I am of the same opinion. I only wish to add that if it were necessary to go into the question raised, namely, whether the time for redemption should run from the date of the first Court's decree, or from the date of the decree in appeal. I should not have felt much hesitation in answering it in favour of the respondent, and saying that the time should run, having regard to the terms of the decree in the appellate Court, from the date of the decree of the first Court. No doubt, as there was an appeal here, the final decree in the case is the decree of the appellate Court. But the decree of the appellate Court simply dismisses the appeal, leaving the decree of the first Court untouched, and I find very great difficulty in understanding how it can be said that, although the decree of the first Court, which is thus left untouched, provided that, if payment was not made within three months from the date thereof, the mortgage should be foreclosed, the mortgagor, by simply preferring an unsuccessful appeal, and without obtaining any order from the appellate Court to that effect, gets, necessarily, and by the mere fact of the appeal, an extension of time, namely, three months from the date of the appellate Court's decree.

Great reliance was placed upon the decision of this Court in the case of *Noor Ali Chowdhuri* v. *Koni Meah* (1) as showing that the time in such cases should run from the decree of the appellate Court, notwithstanding that that decree merely confirms [314] the first Court's decree. But the case just referred to depended upon the construction of s. 52 of Bengal Act VIII of 1869. That section enacts that "in all cases of such suits for the ejectment of a ryot or the cancelment of a lease, the decree shall specify the amount of the arrear, and if such amount, together with interest and costs of suit, be paid into Court within fifteen days from the date of the decree, execution shall be stayed." The provision for stay of execution upon payment of arrears forms no part of the decree; it is a provision contained in the Rent Law; that law enacts that if payment is made within fifteen days from the date of the decree, execution should be stayed; and the Court held that the date of the decree there meant the date of the final decree in the case. That may be so; but there is no reason why a decree for foreclosure should be taken subject to any similar limitation. Here the time has to be fixed by the decree itself. The first Court's decree fixed a certain time, namely, three months from the date thereof. The decree of the appellate Court left that decree untouched, and merely dismissed the appeal. There is no reason then for saying that the mere fact of the appeal being preferred has the effect of extending the time for redemption.

Another case was relied upon, namely, the case of *Daulat* v. *Bhukandas Manek Chand* (2), but there the learned Judges based their decision upon what they presumed to have been the intention of the decree of the appellate Court. There being no indication here in the appellate Court's decree of any intention to alter or extend the time fixed by the first Court, and there being nothing in ss. 86 and 87 of the Transfer of Property Act, which governs this case, to show that the time allowed is other than that expressly and definitely fixed by the Court, I do not see any reason for holding that the time in this case runs from any date other than that of the decree of the first Court.

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(1) 13 C. 13. (2) 11 B. 172.

The law makes ample provision for preventing hardship. The Court which makes the decree is authorized by s. 87 of the Act to enlarge the time upon good cause being shown. Here, **[315]** as has been pointed out in the judgment of the learned Chief Justice, far from any good cause being shown, no cause whatever was shown, nor even was any application made, for extension of time, before the decree absolute was made. I, therefore, think the order appealed against is quite right, and should be confirmed with costs.

Appeal dismissed.

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APPELLATE CIVIL.

25 C. 311= 1 C.W.N. 671.

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25 C. 315.

APPELLATE CIVIL.

Before Sir Francis William Maclean, Kt., Chief Justice, and Mr. Justice Banerjee.

KALI PADO MUKERJEE (*Decree holder*) *v.* DINO NATH MUKERJEE (*Judgment-debtor*).* [29th June, 1897.]

Execution of decree—Code of Civil Procedure (Act XIV of 1882), *ss.* 223 *and* 649—*Bengal, North-Western and Assam Civil Courts Act* (*XII of* 1887), s. 13—*Redistribution of local areas, Effect of—Jurisdiction of Munsif.*

A obtained a decree against B in the Court of the first Munsif of Howrah. After the decree, the local area, within which the cause of action arose, and the judgment-debtor resided, was transferred from the first to the second Munsif. On an application by *A* for the execution of his decree in the Court of the second Munsif which allowed execution:

Held, that the second Munsif had no jurisdiction to entertain the application and allow execution, and that the application ought to have been made in the Court of the first Munsif which passed the decree.

[F., 27 C. 272 (275); R., 30 M. 537 (539)=17 M.L.J. 417=2 M.L.T. 466; 9 O.C. 281; 26 M.L.J. 189=(1914) M.W.N. 205=22 Ind. Cas. 899; D., 28 C. 238=5 C.W.N. 150; 35 C. 974 (977)=12 C.W.N. 859.]

THE facts of the case, so far as they are necessary for the purposes of this report, and the arguments, appear sufficiently from the judgment of the High Court.

Babu *Mohendra Nath Roy*, for the appellant.

Babu *Purna Chunder Shome*, for the respondent.

The following judgments were delivered by the High Court (MACLEAN, C.J., and BANERJEE, J.).

JUDGMENTS.

MACLEAN, C. J.—This suit was instituted before the first Munsif of Howrah, and was a suit for an account in which eventually a money decree was given in favour of the plaintiff.

[316] I will assume for the purposes of this judgment that the local area within which the cause of action arose and the judgment-debtor resided was transferred from the first to the second Munsif. The decree-holder applied for execution to the second Munsif, who directed execution to issue. From that order an appeal was taken to the District Judge, who held that the Court of the first Munsif was the one which ought to

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* Appeal from Order, No. 112 of 1897, against the order of J. F. Bradbury, Esq., District Judge of Hooghly, dated the 8th of December 1896, reversing the order of Babu Probodh Chunder Dutt, Munsif of Howrah, dated the 12th of September 1896.

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have made the order, and that the Court of the second Munsif had no jurisdiction to make it. Hence the present appeal.

The appellant relies mainly upon the latter portion of s. 649 of the Code of Civil Procedure, which says that, "where the Court which passed the decree to be executed has ceased to exist or to have jurisdiction to execute it, the Court which, if the suit wherein the decree was passed were instituted at the time of making the application for execution of the decree, would have jurisdiction to try such suit," would be the Court which would have jurisdiction to execute the decree. Now, it is clear that in order to enable the appellant to succeed under that portion of s. 649 which I have read he must make out one of two alternatives—either that the Court which passed the decree to be executed has ceased to exist, or that it had ceased to have jurisdiction to execute it. It is quite clear that the Court has not ceased to exist, and I have heard no argument from the learned vakil who appears in support of this appeal to induce me to hold that the Court had no jurisdiction to execute it. On the other hand, I think it clear that that Court had jurisdiction to execute it.

But then it is said that if that be so, although that Court may have had that jurisdiction, it did not follow that the Court of the second Munsif had not also that jurisdiction, and reliance is placed upon sub-s. (3) of s. 13 of the Bengal, North-Western and Assam Civil Courts Act (XII of 1887). But in my judgment that section does not give the Court of the second Munsif of Howrah the jurisdiction for which the appellant contends.

All that that section says is, if I may paraphrase it, that when there has been a certain distribution of civil business by the District Judge, any decree or order passed by the Subordinate [317] Judge or by the Munsif shall not be invalid only by reason of, practically, that distribution. That section does not appear to me to confer upon the Court of the second Munsif in this case the jurisdiction which the appellant claims. In my opinion the proper Court to execute this decree, even assuming that there has been that fresh distribution of civil business by the District Judge, since the date of the decree, was the Court of the first Munsif. Upon these grounds, I think that the judgment of the Court below is correct, and that this appeal must be dismissed with costs.

BANERJEE, J.—I am of the same opinion. Two points have been pressed before us by the learned vakil of the decree-holder, appellant: *first*, that the Court of appeal below is wrong in holding that the second Munsif of Howrah had no jurisdiction to entertain this application for execution of a decree passed by the first Munsif of that place, when, by reason of a redistribution of local areas between the first Munsif and second Munsif, the first Munsif had ceased to have jurisdiction in the case and under s. 649 of the Code of Civil Procedure the second Munsif had acquired jurisdiction over the same; and, *second*, that even if s. 649 of the Code of Civil Procedure does not cover this case, the Court of appeal below was wrong in holding that the second Munsif of Howrah had no jurisdiction to entertain this application for execution, when it ought to have held that he had such jurisdiction under the provisions of sub-s. 3 of s. 13 of the Bengal, North-Western and Assam Civil Courts Act (XII of 1887).

The decree was passed by the first Munsif of Howrah. It was a decree for a certain sum of money due on an account, and the cause of action arose within the jurisdiction of the first Munsif of Howrah, and, admittedly, within the local area that was assigned to the first Munsif of

Howrah. The decree under the provisions of s. 223 of the Code of Civil Procedure could, therefore, be executed by the Court of the first Munsif of Howrah which passed it, or by any other Court if it was sent to such other Court for execution under the provisions of the Code of Civil Procedure.

There was no transfer of the execution case by the Court [318] which passed the decree; so no question arises here as to whether the second Munsif had or had not acquired jurisdiction by reason of the transfer of this particular execution case.

The ground, however, upon which the learned vakil for the appellant contends that it was the second Munsif's Court at Howrah, and that Court alone, which had jurisdiction to entertain this application for execution, is that, by reason of a redistribution of local areas between the date of the decree and the date of the present application for execution, the local area within which the cause of action arose which led to the suit, has now been assigned to the second Munsif of Howrah, and that consequently the first Munsif of Howrah ceased to have jurisdiction to execute the decree, and the Court of the second Munsif of Howrah has acquired jurisdiction to execute it, as it is the Court in which the suit should have been instituted if it had been instituted at the present day; and in support of this argument, paragraph 2 of s. 649 of the Code is relied upon.

There is nothing in either of the judgments of the Courts below to show that there has been this redistribution of business that is referred to in the argument, though there is a remark in certain reasons recorded as additional reasons by the learned District Judge, which goes to show that there has been such a redistribution. Assuming then that there has been such a redistribution, is it clear that s. 649 applies to this case, and gives to the second Munsif of Howrah the jurisdiction he is said to have acquired?

In my opinion this question ought to be answered in the negative. For the two contingencies that paragraph 2 of s. 649 contemplates are: *first*, that the Court which passed the decree should cease to exist; and, *second*, that it should cease to have jurisdiction to execute the decree. In the present case the Court which passed the decree has clearly not ceased to exist. There is still a Court of the first Munsif of Howrah. Nor has the Court ceased to have jurisdiction to execute the decree that it made, notwithstanding that there has been a redistribution of areas. For on reference to s. 13 of Act XII of 1887, under the second sub-section of which this redistribution must have been [319] made, I find that the third sub-section enacts that, "when civil business arising in any local area is assigned by the District Judge under sub-s. (2)" (I quote only so much of the section as bears upon the present argument) "to one of two or more Munsifs, a decree or order passed by the Munsif shall not be invalid by reason only of the case in which it was made having arisen wholly or in part in a place beyond the local area, if that place is within the local limits fixed by the local Government under sub-s. (1)," and that in the present case the cause of action arose within the local limits fixed by the local Government under sub-s. (1) is not disputed. Sub-section (1) enacts that "the local Government may, by notification in the official Gazette, fix and alter the local limits of the jurisdiction of any Civil Court under the Act." It is, then, the local limits fixed by the local Government under sub-s. (1) of the section that determine the jurisdiction of the Court, the distribution of business by reference to local areas made by the District Judge under sub-s. (2) having relation merely to the convenience of transaction of business. That being so, the re-distribution of local areas referred

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to in the argument could not affect the jurisdiction of the first Munsif to entertain this application, when he had full jurisdiction under sub-s. (1) of s. 13.

The first Munsif's Court, therefore, not having ceased to have jurisdiction to execute the decree, within the meaning of s. 649 of the Code of Civil Procedure, the first point urged before us must fail.

Then, as to the second point, the contention is, that the second Munsif had jurisdiction, as the third sub-section of s. 13 says, "a Munsif having jurisdiction in any case under sub-s. (1) can make a valid order in the case, notwithstanding that the case in which it is made had arisen wholly or in part in a place beyond the local area assigned to him." But I do not see how that can help the appellant's contention. Sub-section (3) saves the jurisdiction of each of two Munsifs having jurisdiction within the same local limits, only where their area is, for the convenience of transacting business, divided by an order of the District Judge It does not, however, give to either of two Munsifs having jurisdiction over [320] the same local area, power to pass an order, when his competency to pass that order is affected, not by virtue of any order or distribution made by the District Judge, but by virtue of some provision of the law; and here there is a clear provision of the law in s. 223 of the Code of Civil Procedure, which declares that the Court which has jurisdiction to execute this decree is the Court which passed it, or some other Court to which it may be sent for execution. The second Munsif, therefore, not having any jurisdiction to execute the decree by reason of the provisions of s. 223 of the Code, sub-s. (3) of s. 13 of the Act cannot vest him with any jurisdiction in the matter.

The result then is that both the contentions urged before us fail, and the appeal must consequently be dismissed with costs.

S. C. G. *Appeal dismissed.*

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25 C. 320 = 2 C.W N. 59.

APPELLATE CIVIL.

Before Sir Francis William Maclean, Kt., Chief Justice, and Mr. Justice Banerjee.

RADHA RANI DASSI (*Objector*) *v.* BRINDABUN CHUNDRA BASACK (*Petitioner*).* [16th August, 1897.]

Appeal—Succession Certificate Act (*VII of* 1889), *ss.* 9 *and* 19—*Order granting certificate, conditional, upon giving security.*

Where, on an application for a certificate of succession under the Succession Certificate Act (VII of 1889), an order was made granting the certificate conditionally upon the applicant's giving security :

Held, that this was an order "granting, refusing or revoking a certificate" within the meaning of s. 19 of the Act, and that therefore an appeal would lie therefrom.

Bhagwani v. *Manni Lal* (1) dissented from.

[Diss., 26 A. 173 (175) = 23 A.W.N. 225; 5 O.C. 213 (214); 25 M.L.J. 365 = (1914) M.W.N. 323 = 23 Ind. Cas. 424; F., 139 P.R. 1908 = 4 P.L.R. 1909 = 156 P.W.R. 1908; R., 5 C.W.N. 494 (496).]

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* Appeal from Order, No. 305 of 1896, against the order of S. J. Douglas, Esq., District Judge of Dacca, dated the 11th of August 1896.

(1) 13 A. 214.

THE facts of the case for the purposes of this report appear sufficiently from the judgment of the High Court. 1897 AUG. 16.

Babu *Lal Mohun Das*, and Babu *Sarat Chunder Dutt*, for the appellant. APPELLATE

Babu *Hari Mohun Chuckerbutty*, and Babu *Harendra Narayan Mitter*, for the respondent. CIVIL.

[321] The following judgments were delivered by the High Court (MACLEAN, C. J., and BANERJEE, J.). 25 C. 320 = 2 C.W.N. 59.

JUDGMENTS.

MACLEAN, C.J.—A preliminary objection is taken that no appeal lies. the ground being that, inasmuch as this order of the 11th August 1896 was an order conditional upon the applicant finding security, it was not an order that was appealable within the meaning of s. 19 of the Succession Certificate Act. In my opinion, an order is not the less an order because there is a condition attached to it that security is to be given by the person in whose favour it is made. It is still an order. The appellant not unnaturally relies upon the case of *Bhagwani* v. *Manni Lal* (1). With great respect to the learned Judges who decided that case, I regret I am unable to concur in that decision. It seems to me to be rather a narrow view to take of the term "order" in s. 19.

That disposes of the preliminary point.

Upon the merits, the learned Judge in the Court below has granted this certificate without a title of evidence to show that the promissory notes referred to in the order were the property of the deceased son-in-law of the applicant. I do not think that is a right course to adopt. I think he is bound to enquire into the matter and require at least some evidence to show that there is a *prima facie* case that the property, in respect of which the certificate is granted, belonged to the deceased person. This order has been made without any evidence whatever. I think the proper course is to remand the case to the Court below with this intimation of our opinion. The appellant is entitled to his costs in this Court.

The principle of this judgment, upon the merits, will, it is admitted, apply to appeal No. 444 of 1896. That case, therefore, will also be remanded to the Court below. The appellant in this case also must have his costs.

BANERJEE, J.—I am of the same opinion. I do not think that the preliminary objection based upon s. 19 of the Succession Certificate Act and upon the case of *Bhagwani* v. *Manni Lal* (1) is a valid one. Section 19 says that "subject to the other provisions of this Act an appeal shall lie to this Court from an order [322] of the District Court granting, refusing or revoking a certificate under the Act." The order appealed against says: "Brindaban Chundar Basack will be granted a certificate with regard to eight Government promissory notes named in the petition, provided that he gives security to the amount of rupees six thousand five hundred." This to my mind is undoubtedly an order granting a certificate within the meaning of s. 19, though it is coupled with a condition, which the Court, by s. 9 of the Act, is authorised to impose, the contition, namely, that the applicant must give security. I must, therefore, respectfully dissent from the view taken by the Allahabad High Court in the case cited for the respondent.

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(1) 13 A. 214.

1897 AUG. 16. — APPELLATE CIVIL. — 25 C. 320 = 2 C.W.N. 59.

Upon the other point, namely, that it was necessary for the Court below to make some enquiry before granting the certificate, especially when the application was opposed, I do not think it necessary for me to add anything to what has already been said in the judgment of the learned Chief Justice, and to what I have said in the case of *Hurri Krishna Panda* v. *Balabhadra Panda* (1).

S. C. G. *Appeal allowed, case remanded.*

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25 C. 322.

APPELLATE CIVIL.

Before Sir Francis William Maclean, Kt., Chief Justice, and Mr. Justice Banerjee.

BANKU BEHARY SANYAL AND ANOTHER (*Judgment-debtors*) *v.* SYAMA CHURN BHUTTACHARJEE (*Decree-holder*).*
[30th August, 1897.]

Execution of decree—Stay of execution—Decree for arrears of rent—Decree for money—Code of Civil Procedure (Act XIV of 1882), s. 546.

A decree for arrears of rent is a "decree for money" within the meaning of s. 546 of the Code of Civil Procedure.

ONE Syama Churn Bhuttacharjee obtained a decree for arrears of rent against one Banku Behary Sanyal, in the Court of the Munsif of Faridpore, and it was confirmed on appeal. The judgment-debtor preferred a second appeal to the High Court, which was admitted under s. 551 of the Code of Civil Procedure. On the decree-holder's taking out execution, and the property of [323] the judgment-debtor having been advertised for sale, he applied to the Munsif under 546 of the Code of Civil Procedure to stay the sale. The Munsif allowed the application and stayed the sale. On appeal, the Subordinate Judge reversed the decision of the Munsif, holding that s. 546 of the Code of Civil Procedure did not apply to rent decrees or to sales in pursuance of such decrees.

From this decision the judgment-debtor appealed to the High Court.

Babu *Kishory Lall Sarkar*, for the appellant.

No one appeared for the respondent.

The following judgments were delivered by the High Court (MACLEAN, C. J. and BANERJEE, J.).

JUDGMENTS.

MACLEAN, C. J.—I feel no difficulty about this case. In my opinion the expression "decree for money" used in the last paragraph of s. 546 of the Code of Civil Procedure applies to a case where a decree has been made for payment of arrears of rent. Arrears of rent are "money." It would be a very narrow construction to hold otherwise, especially as regards the operation of this particular section, which deals with the case of staying execution of a decree pending an appeal on certain terms as to giving security. Why that should not apply to a case where the decree is for arrears of rent, as well as to any other case of a money decree, I fail to see.

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* Appeal from Order, No. 220 of 1897, against the order of B. C. Mitter, Esq., Offg. District Judge Faridpore, reversing the order of Babu Chundra Bhusan Banerjee, Munsif of that District, dated the 20th of January 1897.

(1) 23 C. 431.

I think the appeal must succeed and the order of the Munsif be restored with costs. **1897 AUG. 30.**

BANERJEE, J.—I am of the same opinion. There is no reason why a decree for rent should not be held to be included within the meaning of the expression "decree for money" in the last paragraph of s. 546 of the Code of Civil Procedure, nor is there anything in the Bengal Tenancy Act to show that the provisions of s. 546 should not apply to a case like the present. Section 143 of the Bengal Tenancy Act makes the Civil Procedure Code generally applicable to rent suits, subject only to certain exceptions; and none of the exceptive provisions of the Bengal Tenancy Act, such as those in ss. 148, 163 and 170, goes to show that s. 546 was intended not to have any application to the execution of a rent decree. **APPELLATE CIVIL. 25 C. 322.**

S. C. G. *Appeal allowed.*

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25 C. 324.

[324] APPELLATE CIVIL.

Before Sir Francis William Maclean, Kt., Chief Justice, and Mr. Jutice Banerjee.

AZIM SIRDAR AND OTHERS (*Defendants*) v. RAMLALL SHAHA AND OTHERS (*Plaintiffs*).* [30th June, 1897.]

Landlord and tenant—Suit for rent—Tenant settled on the land by a trespasser, Position of—Joint landlords—Payment of rent by a tenant to some of the landlords, whether sufficient discharge from liability to other landlords—Bengal Tenancy Act (VII of 1885), *ss.* 157 *and* 188.

A suit was brought by the plaintiffs against a tenant for the entire rent, making the co-sharer landlords also defendants to the suit. The defence of the tenant, defendant No. 1, was denial of relationship of landlord and tenant, and payment to the co-sharer landlords. The co-sharer landlords *inter alia* pleaded that, as the tenant-defendant was settled on the land by them at a time when they were claiming to be entitled exclusively to the possession thereof, under a title derived from their auction-purchase, they must be taken to have been trespassers on the land, so far as the plaintiffs' share was concerned, and that consequently defendant No. 1, who was settled on the land by them, must also be treated as a trespasser as against the plaintiffs.

Held, that the defendant No. 1 could not be treated as a trespasser as against the plaintiffs, and that the plaintiffs were entitled to claim rent for use and occupation from the defendant No. 1.

Nityanund Ghose v. *Kissen Kishore* (1); *Lalun Monee* v. *Sona Monee Dabee* (2); *Lukhee Kanto Doss Chowdhry* v. *Sumeeruddi Lusker* (3); *Surnomoyee* v. *Deno Nath Gir* (4); *Binad Lal Pakrashi* v. *Kalu Pramanik* (5), referred to.

Held, also, that the payment to the co-sharer landlords, defendants Nos. 2 and 3, was not sufficient to discharge the defendant No. 1 from liability to the plaintiffs.

Ahamudeen v. *Grish Chunder Shamunt* (6), distinguished.

[R., 17 C.L.J. 431=17 C.W.N. 348=17 Ind. Cas. 587; 17 C.W.N. 311=17 Ind. Cas. 646.]

[325] THE facts of the case, so far as they are necessary for the purposes of this report, and the arguments, appear sufficiently from the judgment of the High Court.

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* Appeal from Appellate Decree No. 1574 of 1895, against the decree of A. Ahmad Esq., Officiating District Judge of Nuddia, dated the 20th of June 1895, modifying the decree of Babu Ananda Charan Sen, Munsif of Kushtia, dated 27th of September 1894.

(1) W.R. (1864), Act. X. Rul. 82.
(2) (1874) 22 W.R. 334.
(3) (1874) 13 B.L.R. 243=21 W.R. 208.
(4) 9 C. 908.
(5) 20 C. 708.
(6) 4 C. 350.

1897 JUNE 30. — APPELLATE CIVIL. — 25 C. 324

The Advocate General (Sir *Charles Paul*), Babu *Saroda Churn Mitter*, and Babu *Hurkumar Mitter*, for the appellants.

Mr. *C. P. Hill*, Dr. *Rash Behary Ghose*, and Babu *Jasoda Nundan Pramanick*, for the respondents.

The following judgments were delivered by the High Court (MACLEAN, C J., and BANERJEE, J.) :—

JUDGMENTS.

BANERJEE, J.—This is an appeal arising out of a suit brought by the plaintiffs-respondents asking the Court to pass a decree against the defendant No. 1 for the entire sixteen annas of the rent due from him in respect of certain lands held by him under the plaintiffs and the defendants Nos. 2 and 3, and to award to the plaintiffs a 7 annas, or 7-16th share of the amount decreed, that being their share, and to award to their co-sharers, the defendants Nos. 2 and 3, the remaining 9-16ths of the amount. There was also a prayer, in the alternative, for a decree against the defendants Nos. 2 and 3 for so much of the amount appertaining to the plaintiffs' share as might be found to have been realised by those defendants.

The allegations upon which the claim is based are shortly these: That the plaintiffs are the *putnidars* of village Amlah, jointly with the defendants Nos. 2 and 3, the share of the plaintiffs being seven annas; that, in the village Amlah, there was a non-transferable *rayati* holding in the name of one Ram Dhone Ghose, which the defendants Nos. 2 and 3 are alleged to have purchased; that the plaintiffs brought a suit in the Civil Court against the defendants Nos. 2 and 3 to have it declared that the alleged purchase by the said defendants of the *jote* of Ram Dhone Ghose was invalid, and that the plaintiffs were entitled to *khas* possession of the land covered by the said *jote*, jointly with the defendants Nos. 2 and 3, and the suit was decreed in favour of the plaintiffs; that the defendant No. 1 holds a portion of the land which formed the *jote* of Ram Dhone Ghose in respect of which rent is claimed in this suit; that notwithstanding that he was served with notice from the plaintiffs, **[326]** requiring him to pay rent to them, the defendant No. 1, in collusion with defendants Nos. 2 and 3, withheld payment of rent to the plaintiffs; and that as the defendants Nos. 2 and 3 refused to join with the plaintiffs in bringing this suit, the plaintiffs have been compelled to institute this suit making the tenant and their co-sharers defendants in it.

The defence of the tenant-defendant was that there was no relation of landlord and tenant subsisting between him and the plaintiffs; that the rate at which the plaintiffs claimed rent was in excess of that at which rent was payable by him; and that the rent that was payable by him had been paid by him in full to the defendants Nos. 2 and 3.

The co-sharer-defendants, that is, the defendants Nos. 2 and 3, in their defence, supported the tenant-defendant, and urged that there was no relation of landlord and tenant between the plaintiffs and the defendant No. 1; that they were not liable for the plaintiffs' claim; and that the plaintiffs' suit was liable to dismissal under the provisions of the Road Cess Act, Bengal Act IX of 1881.

The first Court held that the relation of landlord and tenant between the plaintiffs and the defendant No. 1 had been made out; that the provisions of the Road Cess Act were no bar to this suit; that the amount of rent payable by the tenant-defendant was proved, inasmuch as the quantity of land held by the defendant No. 1 and the rate of rent per

bigha of such land were established by the evidence; but the first Court dismissed the plaintiffs' suit on the ground that the tenant-defendant had paid all that was payable by him to the defendants Nos. 2 and 3; and that the plaintiffs were not entitled to recover anything from the tenant-defendant, nor anything from the defendants Nos. 2 and 3 in a suit for arrears of rent.

Against this decision, the plaintiffs preferred an appeal, but no objection appears to have been raised at the hearing against the decision of the first Court upon any of the points which had been decided in favour of the plaintiffs by that Court. The lower appellate Court was of opinion that the first Court was wrong in holding that payment to the defendants Nos. 2 and 3 was sufficient to discharge the tenant-defendant from liability to the [327] plaintiffs, and it accordingly gave the plaintiffs a decree for the rent due to them on account of their share.

Against that decree of the lower appellate Court, this second appeal has been preferred jointly by the tenant-defendant and the co-sharer defendants, and it is contended on their behalf, *first*, that upon the facts found, the Courts below ought to have held that the relation of landlord and tenant between the plaintiffs and the defendant No. 1 was not established; *secondly*, that the Court of appeal below ought to have held that payment to the defendants Nos. 2 and 3 was sufficient to discharge the defendant No. 1 from liability to the plaintiffs; *thirdly*, that the Court of appeal below ought to have held that the provisions of s. 20 of Bengal Act IX of 1881 were a bar to the present claim; *fourthly*, that the Court of appeal below ought not to have made any decree in favour of the plaintiffs without determining the amount of rent payable by the defendant No. 1, when a question had been raised as to the amount of rent payable; and, *fifthly*, that the suit, in so far as it relates to the rent due for one instalment of the year 1300, ought to have been dismissed as premature.

Upon the first point there is no question that the plaintiffs are entitled to a seven annas share in the *patni* mehal, Amlah, the village in which the land in suit is situated, nor is there any question that the plaintiffs have been declared entitled to that share of the land in dispute jointly with the defendants Nos. 2 and 3; but it is contended that as the tenant-defendant was settled on the land by the defendants Nos. 2 and 3 at a time when they were claiming to be entitled exclusively, to the possession thereof, under a title derived from their auction-purchase of the *jote* of Ram Dhone Ghose, the defendants Nos. 2 and 3 must be taken to have been trespassers on the land, so far as the plaintiffs' seven annas share was concerned, and that consequently the defendant No. 1, who was settled on the land by them, must also be treated as a trespasser as against the plaintiffs, and not as their tenant.

I do not think that there is any force in this contention. Tenancy in this country is created not only by contract, but also by occupation of land, so far as agricultural lands are concerned. [328] As was observed by this Court in the case of *Nityanand Ghose* v. *Kissen Kishore* (1): "Here it is a very usual thing for a man to squat on a piece of land, or to take into cultivation an unoccupied or waste piece of land. Tenancy in a great many districts in Bengal commences in this way, and where it so commences it is presumed that the cultivator cultivates by the permission of the landlord, and is under obligation to his landlord to pay him a fair

(1) (1864) W. R. Act X. Rul. 82.

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rent, when the latter may choose to demand it. Thus the established usage of the country regards these parties as landlord and tenant, and unless the landlord chooses thus to treat him, the cultivator is not regarded, as he would be by the law as administered in England, as a trespasser, but as a tenant, and he would be so although he may never have expressly acknowledged the landlord's rights, or entered into express contract with him for the payment of rent. If he chooses to cultivate the zemindar's lands, and the zemindar lets him, there is an implied contract between them creating a relationship of landlord and tenant."

So in the case of *Lalun Monee* v. *Sona Monee Dabee* (1), Mr. Justice Jackson observes: "If these parties are in possession they make themselves tenants by use and occupation of the land." In the Full Bench case of *Lukhee Kanto Das Chowdhry* v. *Sumeeruddi Lusker* (2), where the landlord sued a *raiyat* for rent alleged to be due under a *kabulyat* and the plaintiff was unable to prove the *kabulyat*, the question arose whether, as the defendant had occupied the land under the zemindar, the latter was entitled to recover some rent or compensation for the use of the land, and the learned Judges held that he was so entitled. And following the two last mentioned cases Garth. C. J., in the case of *Surnomoyee* v. *Deno Nath Gir* (3) observes: "As the plaintiff is willing in this case to waive the dispossession and to consider the defendant as her tenant, we think that upon the authority of those cases we may give the plaintiff a decree for use and occupation."

The principle of law enunciated in those decisions has now been [329] embodied in s. 157 of the Bengal tenancy Act, upon which reliance was placed by the learned counsel for the respondent in answer to the appellants' contention. If the success of the plaintiffs, so far as this point is concerned, depended solely upon the provisions of s. 157 of the Bengal Tenancy Act, there would have been a difficulty in the plaintiffs' way, created by s. 188 of that Act, which enacts that "where two or more persons are joint landlords, anything which the landlord is under this Act authorised to do must be done by both or all of those persons acting together, or by an agent authorised to act on behalf of both or all of them," and the present suit is brought, not by the entire body of landlords nor by an agent authorised to act on behalf of them all, but by only some of them. But quite independently of the provisions of s. 157 of the Bengal Tenancy Act, according to the law as it has always been understood in this country, as will appear from the cases to which I have referred, the relationship of landlord and tenant has been held to exist, at any rate as regards agricultural lands, between the person who is the proprietor of such lands and the actual cultivator when there is no intermediate tenure existing between the two. And in the case of *Binad Lal Pakrashi* v. *Kalu Pramanik* (4), which was decided by a Full Bench of this Court after the passing of the Bengal Tenancy Act, it was held that a person being settled on certain land as a *raiyat* by a trespasser, and being sued in ejectment by the true owner, was entitled to resist the action on the ground of his being a non-occupancy *raiyat*. Sir Comer Petheram, whose judgment was concurred in by the other members of the Full Bench, observes: "The possession of the land in question for the purpose of cultivating it was acquired a good many years ago by the defendant from the persons who at that time were in actual possession of the zemindari within which it was situated, and who

(1) 22 W. R. 334.
(2) 13 B. L. R. 243=21 W. R. 208.
(3) 9 C. 908.
(4) 20 C. 708.

were the only persons who could give possession of the lands of the zemindari to cultivators. It is not suggested that the defendants did not then obtain possession as tenants under the *bona fide* belief of the title of their landlords, but since then it has been ascertained by a judgment of a Court of law that the zemindari did not belong to these persons, but to [330] the plaintiffs, and the question is whether, now that the plaintiffs have established their right to the zemindari, they can treat all cultivators who have been settled on the lands by the persons whom they have ousted from its possession as trespassers, and obtain *khas* possession of all the *raiyati* lands from them at any moment without any notice and without any compensation even for the crops on the land. I am of opinion that they cannot." It follows then that the plaintiffs are incompetent to treat the defendant No. 1 as a trespasser and to eject him. That being so they must be held entitled to claim as against him rent for use and occupation. The first contention raised before us must therefore fail.

As regards the second contention, the only authority cited in its support is the case of *Ahamudeen* v. *Grish Chunder Shamunt* (1). But that case is clearly distinguishable from the present. There the ground upon which the payment of rent to some of the co-sharers was held to be payment to them all was, as appears from the judgment, this,—that the tenant had paid his rent, as he had been accustomed to do, to the joint owners, that is, to some of the joint owners. The ground then of the decision in that case was that the fact of all the co-sharers having let some members of their body realize the whole rent for a long period of time raised the presumption that the co-sharers who had been realising the rent were doing so with the consent of the other co-sharers. In the present case that fact is wholly wanting; on the contrary, we have it upon the finding of the lower appellate Court that notice was given to the defendant No. 1 by the plaintiffs after they had recovered their decree against the defendants Nos. 2 and 3, declaring their rights, that they had acquired a right to a 7 annas share of the land; and if in spite of such notice the tenant continued to pay rent to defendants Nos. 2 and 3 who had previously been in receipt of rent, not as some of the co-sharers, but as persons claiming to be the exclusive landlords, such payment by the tenant must be taken to have been made at his risk, and cannot exonerate him from liability to the plaintiffs' claim.

With reference to the third contention this is how the facts stand: The tenant-defendant, against whom, and against whom alone, the decree of the lower appellate Court has been made, [331] did not raise any objection to the suit on the ground of its being opposed to the provisions of the Road Cess Act. The objection was raised on behalf of the co-sharer defendants; and though it is quite true that an issue was raised on the point, the first Court decided that issue in favour of the plaintiffs, holding that the return filed was a sufficient compliance with the provisions of s. 20 of Bengal Act IX of 1880, when the land, in respect of which rent is now claimed, had been entered in such return. Against this decision of the first Court no objection appears to have been raised before the lower appellate Court either on behalf of the tenant-defendant or on behalf of the co-sharer defendants. That being so, we do not think that the appellants ought now to be allowed to raise this objection before us, and we take this view, not only because this objection is of a purely

(1) 4 C. 350.

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technical character, but also because the peculiar circumstances of this case go to show that it would not be right and proper that the appellants should be allowed to raise the objection now. The circumstances, to which I refer, are those stated in the following passage of the judgment of the first Court upon the second issue. "Both parties were called upon to file the return, and the party defendants Nos. 2 and 3 having filed it first, the return from the plaintiffs seems to have been not accepted as only superfluous; the return by the party defendants Nos. 2 and 3 appears to have been filed some time after the date of the High Court's decree, passed on appeal in suit No. 45 of 1887. In that return the names of these tenant-defendants have not been given, but the lands comprised in the *jote* in the name of Ram Dhone Ghose have been inserted as if still standing in the name of Ram Dhone, though said to be held in possession by two of the party defendants Nos. 2 and 3. Thus it comes to this, that the return in respect of the *patni taluk* has been filed in respect of the *patni taluk*, and the lands in suit have also been mentioned therein, though not the names of the tenants sued." So that, although the present plaintiffs had put in a road cess return, that return was not accepted, because another return had already been filed by their co-sharers, the defendants Nos. 2 and 3; and there has been no inquiry as to what the nature of the return was which the plaintiffs wanted to file. The defendants Nos. 2 and 3, evidently for their own [332] benefit, inserted in the return filed by them the name of Ram Dhone Ghose, as the person in whose name the holding stood covering the land in dispute, and they ignored the names of the tenants who are now sued.

In this state of things, it would be obviously unjust to visit the plaintiffs with any penalty by reason of the Road Cess return, put in by their co-sharers, not containing the name of the tenant-defendant. As the tenant-defendant is evidently making common cause with the defendants Nos. 2 and 3, to give effect to this objection would virtually be to enable the defendants Nos. 2 and 3 and defendant No. 1, who is acting in collusion with them, to take advantage of their own wrong. For these reasons we think it right not to allow the objection to be raised in this Court. And I may add that even if it had been open to the appellants to raise this objection, it is not at all clear that they would have been entitled to succeed.

As to the fourth contention, no doubt the lower appellate Court has not come to any determination as to the rate of rent; but then the first Court determined that question, inasmuch as it found the quantity of land, which was in the possession of the tenant-defendant and also the rate at which rent was payable in respect of such land; and that finding was not questioned before the lower appellate Court. That being so, and the plaintiffs-respondents being quite willing to have the decree of the lower appellate Court modified so as to reduce the amount of the decree to what it ought to be, having regard to the area and the rate found, we think the decree of the lower appellate Court ought to be modified accordingly.

The fifth point raised before us need not detain us long, as the learned counsel for the plaintiffs respondents admits that the claim for the last quarter of the year 1300 is premature.

That being so, the decree of the Court below will be modified in the two respects mentioned above, but as the objections raised in this case on behalf of the appellants have for the most part been of a purely technical character, and as the claim of the plaintiffs has been resisted on

grounds which are by no means fair, we think it right to direct that the appellants should pay the costs of the respondents. **1897 JUNE 30. — APPELLATE CIVIL. — 25 C. 324.**

[333] It is admitted that this judgment will govern the remaining six appeals, that is, second appeals Nos. 1575 and 1622 to 1626, both inclusive. In the view we have taken above of these cases it becomes unnecessary to consider the question whether the petitions of compromise filed by the tenants in some of these cases, and subsequently withdrawn by them, are binding upon them.

MACLEAN, C.J.—I concur in the judgment which has just been delivered.

S. C. G. *Decree varied.*

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25 C. 333=2 C.W.N. 11.

CRIMINAL REVISION.

Before Mr. Justice Banerjee and Mr. Justice Wilkins.

DEPUTY LEGAL REMEMBRANCER (*Petitioner*) v. AHMAD ALI (*Opposite-party*).* [28th October, 1897.]

Reformatory Schools Acts (V of 1876), *ss.* 2 *and* 7 *and* (*VIII of* 1897), *s.* 1. *cls.* 2—3 *and* 8—*Criminal Procedure Code* (*Act X of* 1882), *s.* 3 *and s.* 399—*Criminal Procedure Code* (*Act X of* 1872), *s.* 318—*General Clauses Consolidation Act* (*X of* 1897)—*Effect of the repeal of a repealing statute—Construction of statute.*

The accused was convicted of the offence under s. 457 of the Penal Code by the Deputy Magistrate of Barisal, who found that the accused was a boy of fourteen or fifteen years, decidedly under sixteen, and passed the following order :—

"I find Ahmad Ali, boy, guilty of house breaking by night for the purpose of committing theft, and instead of being imprisoned in the jail under s. 457 of the Penal Code, I direct under s. 399 of the Criminal Procedure Code and s. 7 of Act V of 1876, that Ahmad Ali be confined in the Calcutta Reformatory for two years for training in some branch of useful industry."

Held, that the order could not be sustained under s. 7 of Act V of 1876 as that Act had been repealed before the date of the order and the commission of the offence, nor under s. 8 of Act VIII of 1897, as the order did not comply with the provisions of the latter Act.

Held, further, that s. 318 of the Criminal Procedure Code (Act X of 1872) having been repealed by s. 2 of Act V of 1876, the corresponding [334] s 399 of the present Criminal Procedure Code (Act X of 1882) must also be held by virtue of s. 3 of the Code to have been repealed in the provinces, including Bengal, to which Act V of 1876 was extended.

The repeal of a statute repealing another statute does not revive the repealed statute. The law in India as embodied in s. 7 of the General Clauses Act (X of 1897) is the same as the law in England.

Queen-Empress v. *Madasami* (1) and *Queen-Empress* v. *Manaji* (2), referred to and approved of.

[R., 21 A. 391 (399) (F.B.)=19 A.W.N. 138; 1 L B.R. 68.]

THE facts of the case appear fully from the judgments of the High Court.

The Officiating Deputy Legal Remembrancer (Mr. *Abdur Rahim*), for the Crown.

No one appeared for the accused.

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* Criminal Revision No. 682 of 1897, made against the order passed by Babu Chandra Kumar Dutta, Deputy Magistrate of Barisal, dated the 3rd of May 1897.

(1) 12 M. 94. (2) 14 B. 381.

1897 Oct. 28. — Criminal Revision. — 25 C. 333 = 2 C.W.N. 11.

The following judgments were delivered by the High Court (BANERJEE and WILKINS, JJ.) :—

JUDGMENTS.

BANERJEE, J.—This is a rule calling upon the accused person and the Magistrate of the district to shew cause why the sentence passed in this case should not be set aside as being contrary to law, and a proper sentence passed.

The sentence passed by the learned Deputy Magistrate on the 3rd of May 1897, runs in these words: "I find Ahmed Ali, boy, guilty of house-breaking by night for the purpose of committing theft, and instead of being imprisoned in the jail under s. 457 of the Penal Code, I direct under s. 399 of the Criminal Procedure Code and s. 7 of Act V of 1876 that Ahmad Ali be confined in the Calcutta Reformatory for two years for training in some branch of useful industry."

No cause is shown either by the accused or by the District Magistrate.

The order of the Deputy Magistrate, so far as it refers to s. 7 of Act V of 1876, is clearly wrong, as before the date of the order (3rd May 1897) and that of the commission of the offence (27th April 1897) that Act had been repealed by s. 2 of Act VIII of 1897, which came into operation on the 11th March 1897. The question then is whether s. 399 of the [335] Code of Criminal Procedure or any provision of the present Reformatory Schools Act (VIII of 1897) will sustain the order.

Act VIII of 1897 does not warrant the sentence as it stands, as the least period for which detention in a Reformatory School can be ordered under that Act is by s. 8 of the Act fixed at three years, whereas the term for which detention is here directed is two years only.

Section 399 of the Code of Criminal Procedure, if it stood alone, would no doubt warrant the order made in this case, the accused having been found to be "a boy of fourteen or fifteen years, decidedly under sixteen." But then the question arises, what is the effect of s. 399 read with s. 3 of the Code of Criminal Procedure, and with s. 2 of Act V of 1876? And how far is that effect modified by ss. 2 and 3 of Act VIII of 1897?

Section 2 of Act V of 1876 enacted that on and from the day on which that Act was extended to any Province by the local Government, s. 318 of the Code of Criminal Procedure (that is, Act X of 1872 the Code then in force) should be repealed therein. Section 399 of the present Code of Criminal Procedure corrosponds to, and is in fact a reproduction almost word for word of, s. 318 of the former Code; and s. 3 of the present Code enacts that in every enactment passed before that Code comes into force in which reference is made to any section of the Code of Criminal Procedure (Act X of 1872), such reference shall so far as practicable be taken to be made to the corresponding section of the present Code. Therefore s. 399 of the present Code must be taken to stand repealed to the extent to which s. 318 of the fromer Code had been repealed by s. 2 of Act V of 1876, that is in the Provinces to which the last mentioned Act had been extended; and it remains operative only as regards the rest of British India.

It might appear somewhat anomalous that after having provided in s. 2 of Act V of 1876 for the gradual repeal of s. 318 of the Criminal Procedure Code of 1872, the Legislature should re-enact this last mentioned section in an unmodified form in the Code of 1882. But the anomaly is explained when it [336] is remembered that s. 399 of the Code of Criminal Procedure is a general provision applicable to all cases except those otherwise specially provided for, while the provisions of Act V of 1876 and

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Act VIII of 1897 are of a special character applicable only to certain defined classes of cases. This view is in accordance with the decision of the Madras High Court in *Queen-Empress* v. *Madasami* (1).

The repeal of Act V of 1876 does not revive s. 399 of the Criminal Procedure Code in places in which it had been repealed by the first mentioned Act, regard being had to the provisions of s. 7 of the General Clauses Act (X of 1897), which, in fact, embodies the rule of English law applicable to the subject (see Maxwell on the Interpretation of Statutes, 3rd Ed., p. 585).

Nor does s. 3 of Act VIII of 1897 really raise, as it might at first sight seem to do, any inference that s. 399 of the Code of Criminal Procedure is in force throughout British India, and is repealed in any Province only from the date of the notification mentioned in the section, such notification having reference, as s. 1, sub-s. 3 shows, only to the Punjab and Coorg, and not to any other part of British India.

Section 399 of the Code of Criminal Procedure must therefore be held to have no force in the Provinces to which Act V of 1876 was extended, and to be in force only in the rest of British India. Now Act V of 1876 was extended to Bengal on the 1st of March 1878 by a notification, dated the 14th of February 1878 (see the *Calcutta Gazette* for 1878, Part I, p. 138). Therefore s. 399 has no force in Bengal, and the order of the Court below directing the accused to be confined in the Calcutta Reformatory for two years is not warranted by law, and must be set aside.

The question then remains what sentence should be passed on the accused. There being no clear finding that the accused was at the date of conviction "under the age of fifteen years," the limit of age prescribed by the present Reformatory Schools Act VIII of 1897, the provisions of that Act do not apply to him, and there is no other provision of law under which he can be detained in a reformatory. We therefore set aside the sentence passed **[337]** on the accused as being contrary to law; and having regard to all the circumstances of the case we sentence the accused under s. 457 of the Penal Code to rigorous imprisonment for six months, the sentence taking effect from the date of this order.

WILKINS, J.—This is a rule calling upon the District Magistrate of Backergunge and the accused Ahmed Ali to show cause why the order of the Deputy Magistrate of Barisal, dated the 3rd May last, directing that the accused (whom he had convicted under s. 457 of the Penal Code) be detained in the "Calcutta Reformatory" for a term of two years, should not be set aside as being contrary to law, and a proper sentence passed.

The order purports to have been made "under s. 399 of the Criminal Procedure Code and s. 7 of Act V of 1876."

The rule was granted to the Deputy Legal Remembrancer at the instance of the Local Government. It has been duly served upon the parties concerned, of whom the District Magistrate admits that the order is illegal, but the accused does not appear to show cause.

As to the illegality of the order, so far as it depends upon the Reformatory Schools Act V of 1876, there can be no question; *firstly*, because that Act has been repealed by s. 2 of the Reformatory Schools Act VIII of 1897; and, *secondly*, because, even if the Act of 1876 were still in force, the order is in contravention of Rule I of the Rules* made by the Governor-General in Council under the provisions of s. 22 of that Act;

* Notification No. 340, Home Department, dated 13th March 1878.

(1) 12 M. 94.

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this being a first conviction of the accused, and the latter being over ten years of age, the minimum period for which he could be sentenced to detention in a Reformatory School would be three years; and, as he appears to be close upon sixteen years of age, it would follow that he could not legally be sent to a Reformatory School at all.

It remains to be seen whether the order is a good order under s. 399 of the Criminal Proeedure Code.

[338] The question as to the effect of the Act of 1876 upon the provisions of s. 399 of the Criminal Procedure Code in any Province to which the former Act had been extended, was discussed by a Full Bench of the Madras High Court in the case of *Queen-Empress* v. *Madasami* (1). So far as the question now before us is concerned the position is much the same as when that case was decided in 1888. But it will be advisable to refer briefly to certain provisions of the Act of 1897 when discussing the question.

The entire Act of 1897 extends to the whole of British India "except the territories for the time being administered by the Lieutenant-Governor of the Punjab and the Chief Commissioner of Coorg, but either of the said local Governments may at any time by notification in the local official Gazette, extend" the whole Act to their territories from any date fixed in such notification. This is provided by sub-s. (3) of s. 1.

Again, s. 3 declares that from the date so fixed, s. 399 of the Criminal Procedure Code "shall be repealed in the Province to which the notification relates."

It will be observed, therefore, that the Act is silent as to whether s. 399 of the Criminal Procedure Code is still in force in the Provinces to which the Act applies by virtue of s. 1, sub-sec. (3); for example in this Province of Bengal.

The reason for this silence is not very clear. It may be that the Legislature, when enacting Act VIII of 1897, assumed that s. 399 of the Code of Criminal Procedure had been already repealed by Act V of 1876 in all territories to which that Act had been extended; or, it may be, as pointed out by Muttusami Ayyar, J., in *Queen-Empress* v. *Madasami*, that it allowed s. 399 of the Criminal Procedure Code to remain in force side by side with the Reformatory Schools Act, so as to reserve to itself the power to provide in the future "reformatories" for the benefit of female juvenile offenders, the special Act dealing only with male juvenile offenders.

[339] The inconsistency, however, of leaving s. 399 of the Criminal Procedure Code in force in some Provinces, and of altogether repealing it in others, would seem to furnish an argument against the adoption of the second of these conjectures.

And, indeed, it appears to me that s. 399 of the Criminal Procedure Code has already been practically repealed in Bengal by Act V of 1876; and, of course, the repeal of the latter Act would not have the effect of reviving the section which it repealed.

I base this opinion upon the following reasons: When Act V of 1876 was passed, the Procedure Code in force was that of 1872. Section 318 of that Code, which is practically word for word the same as s. 399 of the present Code, was repealed in Bengal on and from the day upon which Act V of 1876 came into force in this Presidency by notification (see ss. 1 and 2, Act V of 1876). That s. 318 of the Code of 1872 was reproduced

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(1) 12 M. 94.

as s. 399 of the present Code was perhaps due (partially at least) to the fact that Act V of 1876 had not in 1882 been extended to every Province in British India, and that it was necessary to leave some such provisions in force in the Provinces to which this special Act had not been extended. But the result would not be to revive the provisions of s. 318 of Act X of 1872, or, in other words, to make s. 399 of the present Code to be in force in Provinces (such as Bengal), in which the Reformatory Schools Act of 1876 was in force. This would be prevented by the provisions of the first paragraph of s. 3 of the Criminal Procedure Code, which runs as follows: "In every enactment passed before this Code comes into force, in which reference is made to, or to any chapter or section of, the Code of Criminal Procedure Act XXV of 1861, or Act X of 1872, or to any other enactments hereby repealed, such reference shall, so far as may be practicable, be taken to be made to this Code or to its corresponding chapter or section." So that, where s. 2 of Act V of 1876 refers to s. 318 of Act X of 1872, as being repealed, that reference must, "so far as may be practicable," be taken to be made to the corresponding section, *viz.*, s. 399, of the Code of 1882 now in force. In other words, Act **[340]** V of 1876 repealed, not only s. 318 of Act X of 1872, but also s. 399 of the present Code, in all territories to which the Act of 1876 has been extended.

It consequently follows that the order of the Deputy Magistrate of Barisal purporting to be under s. 399 of the Criminal Procedure Code and s. 7 of Act V of 1876 is an illegal order under both these sections.

There is yet another matter in which that order is at least irregular. The age of the accused is not clearly ascertained. In his statement to the Court, he is declared to be fifteen years old; in the judgment the Deputy Magistrate says "that he is a boy of fourteen or fifteen years, decidedly under sixteen." Now, even if the Act of 1876 had been in force, the Magistrate should have clearly determined the age of the boy before directing his detention in the reformatory school. This has been laid down in the case of *Queen-Empress* v. *Manaji* (1), and the present Act of 1897, s. 11, prescribes that there should be a preliminary enquiry and a finding in this respect.

For the above reasons, I also think that the order of the Deputy Magistrate should be set aside, and in lieu thereof that Ahmed Ali should be sentenced under s. 457 of the Penal Code to rigorous imprisonment for six months.

S. C. B.

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(1) 14 B. 381.

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APPELLATE CIVIL.

25 C. 340.

25 C. 340.

APPELLATE CIVIL.

Before Mr. Justice Banerjee and Mr. Justice Wilkins.

KUNJO BEHARI GOSSAMI AND ANOTHER (*Defendants*) *v.* HEM CHUNDER LAHIRI (*Plaintiff*).* [4th January, 1898.]

Probate—Jurisdiction in probate cases—Transfer of a probate case by the District Judg, in whose Court it was instituted, to that of a Subordinate Judge—The Bengale North-Western Provinces and Assam Civil Courts Act (*XII of* 1887), *s.* 23, *sub-s.* 2, *cl.* (*d*)—*Probate and Administration Act* (*V of* 1881), *s.* 52.

An application was made for probate of the will of a deceased testator [341] in the Court of the District Judge, who transferred the case to that of the Subordinate Judge. The opposite party *inter alia* objected that the Subordinate Judge had no jurisdiction to try the case.

Held, that the case came within the scope of s. 23, sub-s. 2, cl. (*d*) of the Bengal, North-Western Provinces and Assam Civil Courts Act (XII of 1887), and therefore the Subordinate Judge had jurisdiction to try it.

THE facts of the case, so far as they are necessary for the purposes of this report, and the arguments, appear sufficiently from the judgment of the High Court.

Babu *Saroda Churn Mitter* and Babu *Indu Bhusan Mazumdar*, for the appellants.

Sir *Griffith Evans* and Babu *Shib Chunder Palit*, for the respondent.

The judgment of the High Court (BANERJEE and WILKINS, JJ.) was as follows:—

JUDGMENT.

This appeal arises out of an application by the respondent, Hem Chunder Lahiri, for probate of the will of the late Jibun Kristo Gossami, uncle of the petitioner's wife's father, by which the petitioner and his wife have been appointed executors.

The will propounded by the petitioner is dated the 20th September 1895, that is, about six months before the death of the testator. The application for probate was opposed by the appellants, Kunjo Behari and Debendernath Gossami, two of the nephews of the testator, mainly on the grounds that the testator was not of sound disposing mind at the time the will propounded is alleged to have been executed, and that he was completely under the influence of the petitioner and his wife; and that the execution of the will should be held to have been brought about by coercion and undue influence.

The case was transferred by the District Judge, in whose Court it had been instituted, to the Court of the Subordinate Judge under the provisions of s. 23, sub-s. 2, cl. (*d*) of Act XII of 1887. Upon the case being so transferred, an objection was taken on behalf of the defendants to the jurisdiction of the Subordinate Judge to try the case. The learned Subordinate Judge has overruled that objection, and upon the evidence he has held [342] that the will propounded had been duly executed by the testator, and that it was not invalid by reason of any want of mental capacity on his part or by reason of the execution of it having been brought about by coercion and undue influence; and he has accordingly ordered probate to be granted upon security being given by the petitioner under s. 78 of the Probate and Administration Act.

* Appeal from Original Decree, No. 35 of 1897, against the decree of Babu Abinash Chundra Mitter, Subordinate Judge of Hooghly, dated the 22nd of December 1896.

In appeal it is contended on behalf of the objectors, *first*, that the Court below was wrong in holding that it had jurisdiction to try the case; and, *secondly*, that upon the merits it ought to have held that the will was invalid by reason of want of mental capacity on the part of the testator, and also by reason of the execution of it having been brought about by coercion and undue influence on the part of the petitioner and his wife.

It is further contended that the Court below was wrong in making the objectors bear their own costs, and that, having regard to all the circumstances of the case, it ought to have directed that their costs should come out of the estate of the testator.

In support of the first contention, it was argued that the provision of Act XII of 1887 that has been relied upon, applies only to incidental proceedings, such as those relating to the testing of security and the like, and that it does not authorize the trial of a probate case by a Subordinate Judge, jurisdiction to hear such cases being vested exclusively in the District Judge, and in the District Delegate where the proceeding is not a contentious one.

We are of opinion that this contention is not correct. Section 23, sub-s. 2, cl. (*d*) enacts that the High Court may, by "general or special order"—we quote only so much of the section as bears upon the present case—"authorize any Subordinate Judge to take cognizance of or any District Judge to transfer to a Subordinate Judge under his administrative control, proceedings under the Probate Act, 1881, which cannot be disposed of by District Delegates."

The proceeding in the present case is one under the Probate and Administration Act (V of 1881), and is one which the District Delegate cannot dispose of having regard to the provisions of [343] s. 52 of that Act. The case, therefore, comes clearly within the scope of s. 23, sub-s. 2, cl. (*d*). A slight contention was raised as to whether a probate case, where there is contention, can come within the meaning of the term "proceeding" in s. 23, the argument being that such a case is really a "suit" and not a "proceeding"; but the very section of the Probate and Administration Act (s. 83) which says that a contentious probate case shall take as nearly as may be the form of a suit, itself describes the case as a "proceeding." There is nothing then in the language of cl. (*d*) of s. 23 of Act XII of 1887 to take the present case out of its operation and scope. And if one looks to the reason of the enactment, it becomes clear that it was intended to cover cases of this description.

The object of s. 23, as we understand it, is to enable a District Judge, in whose Court, and in whose Court alone, certain proceedings are ordinarily to be instituted, to transfer these proceedings under a general or special order of the High Court to a Subordinate Judge. In regard to probate proceedings, the District Judge may transfer them in certain cases to the District Delegate, but then such transfer is limited to non-contentious proceedings only. As regards contentious proceedings, the only way in which a District Judge may be relieved is by acting under cl. (*d*) of sub-s. 2 of s. 23.

We are, therefore, of opinion that the Court below had jurisdiction to entertain this case, and that the first contention urged on behalf of the appellants must fail.

We now come to the second contention raised before us. The learned vakil for the appellants has very properly not thought it fit to raise any question as to whether the will propounded by the petitioner was signed by the testator. There is ample evidence to show that the will was signed

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by the testator and presented for registration by the testator on the very day it was signed. The contention of the appellants was mainly directed to showing that the mental condition of the testator was such that it ought not to be held that the execution of the will by him was an intelligent execution; or, in other words, that he was not of sufficient mental capacity to execute a will. And it was further contended that, as [344] regards the execution of this will, he was entirely under the influence and guidance of the petitioner and his wife Promoda Sundari, the person to whom the whole of the testator's property has been bequeathed.

In support of this contention, the evidence of the witness Gopal Chunder Gossami, a medical practitioner, examined on behalf of the petitioner, has been relied upon as showing that the testator was not of sufficient mental capacity to execute a will; and other witnesses examined for the petitioner and for the objectors have also been referred to as supporting the statements of the witness just named.

Upon a careful consideration of the evidence, the conclusion that we arrive at is this, that, though by reason of old age and disease aggravated by an accident that injured his leg, and the taking of opium to which the testator was very much addicted, his mental capacity was somewhat enfeebled about the time of the execution of the will, it cannot be said that he had not sufficient capacity to execute a will such as the one that has been propounded in this case. Their Lordships of the Privy Council observe in the case of *Sajid Ali* v. *Ibad Ali* (1): "Even in cases where the mental faculties of the person affected have been greatly enfeebled by physical weakness, he may still be capable of devising and intelligently executing a will of a simple character, although unfit to originate or to comprehend all the details of a complicated settlement." And then their Lordships say: "Nothing can be more simple than the changes which were made by the will impeached upon the terms of the second will which it was intended to supersede."

These remarks, we think, apply with full force to the present case. For we find that the will propounded is not the only will that the testator executed. Before that, he had already executed two wills. By one of them dated the 27th September 1875, executed in favour of his wife, he left all his property absolutely to her, with power to her to adopt a son if she felt inclined to do so. Then upon the death of his wife, he executed a second will on the 14th December 1891, by which he bequeathed almost the whole of his property to [345] Promoda Sundari, the legatee under the present will, and made certain provisions for the maintenance of the worship of the family idol, and for a few other matters of minor importance. And the only points of difference between this last-mentioned will and the one now under consideration, are the omission of a certain provision for the maintenance of Omesh Chunder Gossami, one of the nephews of the testator; a slight variation in the direction for the expenditure of a sum of Rs. 1,000 for the performance of the first *sradh* of the testator; and the omission to make any binding provision for the worship of the family idols. These differences are, in our opinion, of such a slight character that they cannot go to show, as the learned vakil for the appellants contends they do, that the present will was not intelligently executed by the testator, if the will immediately preceding had been really executed by him.

[Their Lordships then considered the evidence and concluded.]

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(1) 23 C. 1 = 22 I. A. 171.

Upon the whole then we are of opinion that neither the allegation as to want of sufficient mental capacity, nor that of coercion and undue influence, has been established ; and that, on the contrary, the evidence clearly goes to show that the testator, though enfeebled in body and also to some extent in mind through old age and disease, still had sufficient mental capacity to execute this will.

Upon the question of costs, we are of opinion, having regard to a portion of the evidence at any rate brought forward by the objectors, which we must say is not true, that the learned Subordinate Judge in the Court below was right in making the objectors bear their own costs. He has shown sufficient consideration to the fact of their being the heirs-at-law of the testator, and, as such, persons interested in seeing that the will is duly proved, when he has exonerated them from liability to pay the petitioner's costs. The cross-appeal on this point has very properly been abandoned.

It remains now to dispose of the question relating to the costs of this appeal. Considering the fact that the judgment of the Court below, which is a very clear and a very strong judgment, was against them, we cannot say that the appellants are entitled **[346]** to be exonerated from paying the costs of the respondent altogether. At the same time, having regard to the fact that this appeal was argued by the learned vakil for the appellants very temperately, and no point was unduly pressed before us, we think the assessment of costs ought to be moderate. We accordingly order that the appeal be dismissed with costs, the hearing fee being assessed at ten gold mohurs. The cross-appeal not being pressed is dismissed without costs.

S. C. G. *Appeal dismissed.*

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25 C. 346.

APPELLATE CIVIL.

Before Mr. Justice Macpherson and Mr. Justice Wilkins.

COLLECTOR OF DINAGEPORE (*First Party*) *v.* GIRJA NATH ROY AND OTHERS (*Second Party.*)* [27th August 1897.]

Land Acquisition Act (I of 1894), ss. 6, 18, 23, *cl.* 4, 24, 48—*Compensation—Acquisition of land " injuriously affecting other property "—Right to compensation for loss of a ferry by reason of acquisition of adjacent land Land Clauses Consolidation Act* (8 *Vict.*, *c.* 18), s. 63.

The word " acquisition," as used in s. 23 of the Land Acquisition Act, includes the " purpose " for which the land is taken as well as the actual taking. And the words " at the time " in cl. 4 of the same section must be taken to mean the time when the damage takes place and the right to compensation arises,

London and Brighton Railway Company v. *Truman* (1), *Hopkins* v. *Great Northern Railway Cmpany* (2). *Ricket* v. *Metropolitan Railway Company* (3), *Cowper Essex* v. *Acton Local Board* (4), referred to.

The District Board of Dinagepore erected a bridge over the river Tulai, in consequence of the erection of which a ferry, which was within 100 cubits of the bridge and owned by the Maharajah of Dinagepore who was also the owner of the land taken for the construction of the bridge, ceased to exist : *Held*, that

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* Appeal from Original Decree, No. 70 of 1896, against the decree of R. R. Pope, Esq., District Judge of Dinagepore, dated the 23rd of November 1895.

(1) (1885) L.R. 11 App. Cas. 45.
(2) (1877) L.R. 2 Q.B.D. 224=46 L.J. (Q.B.) 265.
(3) (1867) L.R. 2 E. & I.A. 175.
(4) (1889) L.R. 14 App. Cas. 153.

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the owner of the ferry was entitled under the Land Acquisition Act as to compensation for the loss of the ferry.

[F., 4 Bur L. T. 250=12 Ind. Cas. 202; R., 31 C. 470=5 C.L.J. 669=11 C.W.N. 356; 12 C.L J. 56=6 Ind. Cas. 343.]

THE facts of the case are fully stated in the judgment of the High Court.

[347] The Senior Government Pleader (Babu *Hem Chunder Banerjee*) and the Junior Government Pleader (Babu *Ram Charan Mitter*), for the appellant.

Mr. *Hill*, Babu *Jasoda Nandan Pramanik*, Dr. *Rash Behary Ghose* and Babu *Nalini Ranjan Chatterjee*, for the respondents.

Babu *Ram Charan Mitter*, for the appellant, contended that the Maharajah was not entitled to any compensation for the loss of the ferry, regard being had to the provisions of ss. 23 and 24 of the Land Acquisition Act. The ferry ghat was not on the land actually acquired by Government. The Maharajah might have an equitable claim for damages in the Civil Court. Supposing the Maharajah had suffered loss by the erection of the bridge, could he under the Land Acquisition Act claim damages for the loss of his income from the ferry? His remedy, if any, would lie in a Civil Court by a regular suit. If another person had plied a ferry in competition with the Maharajah's ferry, that would not have entitled him to claim damages from the owners of the rival ferry—*London and Brighton Railway Co.* v. *Truman* (1), *Hopkins* v. *Great Northern Railway Co.* (2), *Ricket* v. *Metropolitan Railway Co.* (3). Unless the injury or loss was by reason of the acquisition of the land itself, and unless the Maharajah had a statutory right, no action for damages would lie: see Cripps on Compensation, 3rd ed., p. 147.

Mr. *Hill*, for the respondent.—The case has been rightly decided by the lower Court and the Maharajah is entitled to full compensation. We are dealing with the question of "injuriously affecting *other* property by reason of the acquisition" as contemplated by s. 23, cl. 4 of the Land Acquisition Act. The ferry ceased to exist by reason of the construction of the bridge, and it cannot be said that the acquisition of this land for the bridge did not injuriously affect the ferry—*Hammersmith and City Railway Co.* v. *Brand* (4), *Duke of Buccleuch* v. *Metropolitan Board of Works* (5), *Glasgow Union* [348] *Railway Co.* v. *Hunter* (6), *Cowper Essex* v. *Local Board for Acton* (7), *The Queen* v. *Cambrian Railway Co.* (8), *Great Western Railway Co.* v. *Swinton and Cheltenham Railway Co.* (9), *Secretary of State for India* v. *Shanmugaraya Mudaliar* (10).

It is essential to know the purpose for which the land is to be acquired, because the purpose is very much to affect the question of compensation for the land. The moment it was declared that the land was required for the bridge the injury ensued, the value of the ferry having been diminished—Land Acquisition Act, s. 6, referred to.

Babu *Ram Charan Mitter* in reply.—Section 23, cl. 4 of the Land Acquisition Act supports the view that the injury must be by reason of the acquisition of the land. The injury in this case was due, not

(1) (1885) L.R. 11 App. Cas. 45.
(2) (1877) 46 L.J. (Q. B.) 265.
(3) (1867) L.R. 2 E. & I. A. 175.
(4) (1868-69) L.R. 4 H.L. 171.
(5) (1872) L.R. 5 H.L. 418 (458).
(6) (1870) L.R 2 H L. Sc. App. 78 (82).
(7) (1889) L.R. 14 App. Cas 153 (161, 164, 176).
(8) (1871) L.R. 6 Q B. 422.
(9) (1884) L.R. 9 App. Cas. 787 (802).
(10) 16 M. 369= 20 I.A. 80.

to the acquisition of the land, but to the *use* to which the land when acquired was put; and under the law—the Land Acquisition Act—the Court cannot take into consideration the mode of using the land. Considerable time elapsed between the declaration by the Collector and taking possession of the land; the damage must be assessed at the time when the Collector took possession and not at any subsequent time. No doubt a declaration was made that the land was required for a bridge, but the respondent suffered no loss simply by reason of the acquisition. Moreover, the Government after the acquisition of the land might use it for a different purpose. The English cases cited were under a differently worded Statute and had no application to the present case. The sole question was whether the loss to the claimant was by reason of the acquisition of the land.

The judgment of the High Court (MACPHERSON and WILKINS, JJ.) was as follows:—

JUDGMENT.

This is an appeal from an award made by the District Judge of Dinagepore under the Land Acquisition Act (I of 1894) upon a reference made to him under s. 18 of that Act.

[349] It appears that the District Board of Dinagepore erected a bridge over the Tulai river on the road from Dinagepore to Krishnagunge. Near the place where that road strikes the river, and where the bridge now stands, there used to be a ferry owned by the Maharajah of Dinagepore through whose estate the river Tulai flowed. That ferry ceased to exist when the bridge was erected and in consequence of its erection. Under these circumstances, the District Board proposed to offer to the Maharajah, upon whose land the bridge had been erected, the sum of Rs. 3,458-15-9 as compensation for the loss of his ferry, but the proposal was vetoed by the Commissioner of the Division, with the result that the land upon which the bridge stood was acquired under the Act, and that the Maharajah made a free gift of it to the public. He, however, claimed Rs. 6,000 as compensation for the injury sustained by him in the loss of his ferry. As this claim was opposed at the instance of Government and rejected by the Collector, the case was referred to the District Judge under s. 18 of the Act for the determination of the amount of the compensation, and the District Judge has, for reasons recorded in his judgment, awarded to the Maharajah the exact sum which the District Board originally proposed to offer to him as compensation for the loss of his ferry.

In this appeal the Collector under the Act is the appellant; and his contention is that the respondents, *i.e.*, the Maharajah and the zemindars, are not entitled in law to any compensation by reason of the ferry having been injuriously affected.

Although the bridge was constructed before the land was acquired or any proceedings taken for its acquisition, we must take it that the Act was put in force for the purpose of testing the Maharajah's claim for compensation for the loss of his ferry, and we must regard the acquisition as relating back to the time when possession of the land was taken. The circumstance has not been referred to on either side as one which should in any way affect the decision of the case.

In this appeal the question at issue is one purely of law, the determination of which depends upon the proper construction of [350] the Act. Section 23 sets out the matters which the Court is bound to take into consideration in determining the amount of compensation to be awarded

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for land acquired under the Act. The claim in this case is based upon cl. 4 of sub-s. (1) of that section, which is to the following effect: "The damage (if any) sustained by the person interested at the time of the Collector's taking possession of the land, by reason of the acquisition injuriously affecting his other property, moveable or immoveable, in any other manner, or his earnings."

It is contended for the appellant that the claim is unsustainable because no action could have been maintained by the Maharajah in respect of the bridge if it had been opened without the authority of the Act, and because the damage, if any, sustained is attributable, not to the acquisition of the land, but to the user of it when the bridge had been constructed and opened. In support of these contentions certain English cases have been cited, *viz.*, *London and Brighton Railway Co.* v. *Truman* (1), *Hopkins* v. *Great Northern Railway Co.* (2) and *Ricket* v. *Metropolitan Ry. Co.* (3).

It seems to us that no question of an actionable right here arises, and that it is unnecessary to consider the English cases in which there has been much discussion and some difference of opinion as to the rights of persons whose land had not been acquired but who claimed compensation under certain provisions of the Land Clauses Consolidation Act and the Railway Clauses Consolidation Act in consequence of their lands or interests having been injuriously affected by the exercise of the powers conferred by those Acts. Many of them turned on the construction of the Acts, the language of which is different from that of the Act now under consideration. There is a difference between the claim of a person whose land had not been acquired for compensation for injury caused to his property or interests by the acquisition, and the claim of a person part of whose land had been acquired for compensation for injury caused by the acquisition to the remainder of his **[351]** land, and this was pointed out by Lord Halsbury in *Cowper Essex* v. *Acton Local Board* (4).

We are dealing now with the latter class of cases only. A piece of the Maharajah's land was acquired for the construction of a bridge; a bridge has been constructed upon it and opened for traffic, and he claims compensation for the loss of the income derived from his ferry which was worked within a very short distance of the spot on which the bridge has been constructed and within the limits of his estate. The ferry which is his property has undoubtedly been injuriously affected, he has suffered loss in consequence, and the only question is whether his claim comes within the 4th clause of the 23rd section of the Act.

Mr. Hill for the respondent has also referred us to other English cases bearing upon the construction of a somewhat similar provision in the Land Clauses Consolidation Act. Section 63 of that Act provides that in estimating the purchase money or compensation to be paid regard shall be had, not only to the value of the land to be purchased or taken, " but also to the damage, if any, to be sustained by the owner of the lands by reason of the severing of the lands taken from the other lands of such owner *or otherwise* injuriously *affecting such other lands* by the exercise of the powers." of the Act. The only case to which we need refer is that of *Cowper Essex* v. *Acton Local Board* (4) mentioned above. There a piece of the claimant's land had been acquired for sewage purposes, and the question was whether he was entitled to compensation for damage sustained by reason of the injuriously affecting his other lands by the exercise

(1) (1885) L. R. 11 App. Cas. 45.
(2) (1877) 46 L.J. Q.B. 265=L, R, 2 Q.B. 224,
(3) (1867) L.R. 2 E. and I. A. 175.
(4) (1889) L.R. 14 App. Cas. 153.

of the statutory powers. It was argued that the damage, if any, would result only from the future use or abuse of the land, and that if the land had been acquired without statutory powers no action would have lain for the construction of the works.

Their Lordships held that the claimant was entitled to compensation, and the ground of their decision was that the contemplated or intended use of the land for the purpose for which it was taken caused a depreciation in the value of the claimant's other land, [352] although the sewage works might be so conducted as to cause no nuisance. Lord Watson says: "A proprietor is entitled to compensation for depreciation of the value of his other lands in so far as such depreciation is due to the anticipated legal use of works to be constructed upon the land which has been taken from him under compulsory powers."

We have, however, to construe a section of the Indian Act, and in doing so cases bearing upon the construction of a somewhat similar provision of an English Act different in its language can be of little or no assistance. We have alluded to the *Cowper Essex* case as showing that the contemplated legal use of the land for the purpose for which it was taken might be within the meaning of the English Act an "injurious affecting" (these words being the same in the Indian Act) of the other land of the person, part of whose land had been compulsorily taken. It does not of course follow that it is so under the Indian Act. The damage which must be taken into consideration under the 4th clause of s. 23 is the damage sustained at the time of the Collector taking possession of the land by reason of the acquisition injuriously affecting the other property in any other manner, or the earnings of the person interested. There is no limit as to the nature of the "injurious affecting" except in so far as this is provided for by the other clauses of the section; the difficulty is as to the time when the damage is sustained.

The words "at the time when the Collector takes possession of the land" cannot mean that compensation can only be given for the damage which had actually at that time been sustained without reference to a continuing damage caused by the acquisition The damage must be by reason of the acquisition; but this is only complete when possession is taken, for till then the Government could withdraw from it under s. 48. The Collector could moreover take possession if he chose on the very day the award was made. The whole proceedings from the declaration under s. 6 to the taking of possession might be completed within a month, and on any such construction a person deprived of earnings or an annual income would get nothing or next to nothing.

[353] The words must be taken to mean the time when the damage takes place, and the right to compensation arises, and it is, we think, sufficient to bring a case within this provision if, when possession is taken, there is other property or earnings injuriously affected so as to cause some damage to the person interested. Here the ferry was in existence. In the corresponding provision of the repealed Act (X of 1870) the words were "at the time of awarding compensation." That was open to abuse, as the award might have been, and very frequently was, made long after possession had been taken. Under the present Act the Collector makes his award whether the persons interested do or do not agree to take the compensation awarded, and the Collector can take possession immediately on making his award. The alteration in the law does not affect the construction of the section for the purpose of this case.

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Then, was the damage sustained by reason of the acquisition, injuriously affecting the ferry? It is said that the word "acquisition" means the mere taking of the land without any regard to the purpose for which it was taken, and that the ferry was not in any way injuriously affected by the acquisition of the land, however much it may have been injured by the construction of the bridge when the bridge was constructed and opened to traffic. We think it is clear that the word "acquisition" as used in s. 23 includes the purpose for which the land is taken as well as the actual taking.

Under s. 6 the declaration of the intended acquisition must state the purpose for which the land is needed; after it has been published the Collector is to take order for the acquisition. He is to measure, mark out and make a plan of the land, to give notice that the Government intends to take possession of it, that he will receive claims to compensation for all interests in it, and that all persons interested must attend at a specified time and state the nature of their respective interests and the amount and particulars of their claims to compensation. He is then to inquire into the respective interests and claims and to make his award, and in determining the amount of compensation he is to be guided by the provisions of ss. 23 and 24.

If he is not to take into consideration the purpose for which [354] the land is taken, it is difficult to see how he is to determine the amount of the compensation with reference to many of the matters which he is bound to consider under s. 23.

It may be true that if the bridge had never been constructed, or if constructed never opened for traffic, the actual injury to the ferry might have been comparatively speaking small. But it is impossible to say that it was not injuriously affected by the acquisition in such a way as to cause some damage to the owner of it. The declaration of the Government that the land was wanted for a purpose which would entirely destroy that ferry, the proceedings taken, and the actual acquisition of the land for that purpose, must have considerably affected the letting or selling value at the time of the acquisition.

The intention of the Legislature to be gathered from the Act seems to have been that persons, a part of whose land has been compulsorily taken from them, should, apart from its actual value, be compensated for injury done to their other property by the taking.

We must hold, therefore, that the Maharajah was entitled under the Act to compensation for the loss of the ferry, and that the decision of the District Judge is right. No question as to the amount of the compensation is raised in this appeal, and the appeal is dismissed with costs.

B. D. B. *Appeal dismissed.*

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Before Sir Francis William Maclean, Kt., Chief Justice, and Mr. Justice Banerjee.

JAGANNATH PRASAD GUPTA (*Defendant*) *v.* RUNJIT SINGH (*Plaintiff*).* [22nd July, 1897.]

Limitation Act (XV of 1877), *sch. II, arts.* 119 *and* 124—*Suit for possession of immoveable property by a Hindu, on the allegation that he was the reversionary heir by adoption of the last owner - Suit for the office of a shebait by the reversionary heir—Hindu Law—Mitakshara—Marriage in approved form—Stridhana property, Inheritance of—Order granting letters of administration—Suit for possession by establishment of title.*

In a suit brought by the plaintiff to recover possession of certain immoveable properties, on the allegation that he was the great grandson [355] by adoption of one *R*, who was the brother of one *V*, to whose adopted son the said properties originally belonged, the defence was that the suit was barred by limitation under art. 119, sch. II of the Limitation Act.

Held, that art. 119 of sch. II applies only to a suit for a declaratory decree as to the validity of an adoption, and that the present suit, which was one for possession of immoveable property, was not barred under that article, notwithstanding that the plaintiff had to establish the validity of an adoption as the basis of his title.

Parvathi v. *Saminatha* (1), dissented from. *Lala Parbhu Lal* v. *Mylne* (2), *Basdeo* v. *Gopal* (3), *Ganga Sahai* v. *Lakhraj Singh* (4), *Nathu Singh* v. *Gulab Singh* (5), *Padajirav* v. *Ramrav* (6), *Fannyama* v. *Manjaya Hebbar* (7), and *Hari Lal Prantal* v. *Bai Rewa* (8), referred to.

Where a *shebait* does not appoint his or her successor as provided in the will of the founder, and where there is no other provision for the appointment of *shebait*, the management of the endowment must revert to the heirs of the founder; and the limitation applicable to a suit for possession of such an office is twelve years under art. 124, and not six years under art. 120 of the Limitation Act.

Jai Bansi Kunwar v. *Chattar Dhari Singh* (9), and *Gossamee Sree Greedhareejee* v. *Ruman Lolljee* (10), referred to.

Under the Hindu law of the Benares School, in the absence of any evidence to the contrary, a marriage must be presumed to have taken place in one of the approved forms; therefore the heir of a woman to her *stridhana* property is the nearest kinsman of her husband and not of her father. *Thakoor Deyhee* v. *Rai Baluk Ram* (11), *Gojabai* v. *Shahajirao Malaji Raje Bhosle* (12), and *Gridhari Lal* v. *Government of Bengal* (13), referred to.

Where letters of administration were granted to the defendant, in preference to the plaintiff, the order granting the letters of administration is not a bar to the plaintiff bringing a suit for the purpose of determining any question of inheritance or of the right to be appointed as *shebait*, the decree in which will supersede the grant.

Arunmoyi Dasi v. *Mohendra Nath Wadadar* (14), referred to.

The Viramitrodaya cannot be referred to where the Mitakshara is clear.

[**Diss.**, 26 M. 291 (296); 68 P.R. 1903 = 13 P.L.R. 1904; **F.**, 24 A. 195 = 22 A.W.N. 10; 27 C. 242 = 4 C W.N. 405; 8 A.L.J. 1063 = 11 Ind. Cas. 235; 13 C.L.J. 547 = 15 C.W.N. 1021 = 10 Ind. Cas. 434; 5 Ind. Cas. 426 = 6 N.L.R. 3; 39 P.R. 1909 = 59 P.L.R. 1909 = 55 P.W.R. 1909 = 1 Ind. Cas. 720; **Appl.**, 36 M. 116 = 12 Ind. Cas. 128 = 21 M.L.J. 850 = 10 M.L.T. 494 = (1911) 2 M.W.N. 168; **Appr.**, 31 B. 583 = 9 Bom. L.R. 560 (564); **R.**, 20 Ind. Cas. 557 = 9 N.L.R. 102; 26 A. 40 (54) = 23 A.W.N. 163; 24 B. 260 (276) (F.B.); 30 C. 990 (997) = 7 C.W.N. 864; 39 C. 319 (339) = 15 C.L.J. 23 = 15 C.W.N. 1036 = 11 Ind. Cas. 872; 32 M. 512 = 3

* Appeal from Original Decree, No. 232 of 1895, against the decree of Babu Kally Charan Ghosal, Subordinate Judge of Moorshedabad, dated the 16th of May 1895.

(1) 20 M. 40. (2) 14 C. 401. (3) 8 A. 644. (4) 9 A. 253.
(5) 17 A. 167. (6) 13 B. 160. (7) 21 B. 159. (8) 21 B. 376.
(9) 5 B.L.R. 181 = 13 W.R. 396. (10) 16 I.A. 137 = 17 C. 3.
(11) 11 M.I.A. 139. (12) 17 B. 114.
(13) 1 B.L.R.P.C. 44 = 10 W.R.P.C. 31. (14) 20 C. 888.

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Ind. Cas. 541=19 M.L.J. 656=6 M.L.T. 183 ; 1 Bom. L.R. 799 ; 15 C.L.J. 97 =15 C.W.N. 524=7 Ind. Cas. 427 ; 11 C.L.J. 2 (12)=3 Ind. Cas. 408 ; 9 C.W. N. 222 (224) ; 4 Ind. Cas. 1167=5 M.L.T. 262; L.B.R. (1893—1900) 653; 56 P.R. 1903=93 P.L.R. 1903 ; R., 203 P.L.R. 1914=104 P.W.R. 1914=81 P.R. 1914 ; D., 1 P.R. 1907=31 P.W.R. 1907.]

[356] THE facts of the case, so far as they are necessary for the purposes of the report and the arguments, appear sufficiently from the judgment of the High Court.

Babu *Golap Chunder Sarkar* and Babu *Saroda Charan Mitter*, for the appellant.

Mr. *W. C. Bonnerjee*, Dr. *Rash Behary Ghose*, Babu *Lal Mohun Das*, Babu *Girija Sunker Mozumdar* and Babu *Sridhar Das Gupta*, for the respondent.

The following judgments were delivered by the High Court (MACLEAN, C. J., and BANERJEE, J.)

JUDGMENTS.

BANERJEE, J.—The suit, out of which this appeal arises, was brought by the plaintiff-respondent to recover possession and mesne profits of certain properties, seven in number, namely, two revenue-paying estates (in one of which only an 8 annas share is claimed), two dwelling-houses, a temple and a garden, and a tank. The material allegations on which the plaintiff bases his suit are shortly these: That the properties in dispute originally belonged to Kumar Ram Chunder, the adopted son of Rajah Udmanta Sing, who was the brother of Rajah Hanumant Singh; that the plaintiff was the great grandson by adoption of the said Rajah Hanumant Singh, having been duly adopted on the 24th of August 1866 by the widow of Rajah Kirti Chand, grandson of Rajah Hanumant Singh; that Kumar Ram Chunder, having dedicated properties Nos. 1 and 2 of the schedule to the plaint (that is the two revenue-paying estates) to the worship of a certain idol, and having appointed Rani Annapurna, widow of Rajah Udmanta Singh, to be the *shebait*, died, leaving him surviving his widow Rani Ananda Moye and the said Rani Annapurna; that Rani Annapurna purported to make a gift of a 2 annas share of property No. 2 in favour of the defendant, who claims to be her sister's adopted son; that by her last will and testament, dated the 6th July 1877, Rani Annapurna purported to dedicate property No. 1, and the remaining six annas of property No. 2, to certain idols, and to appoint Rani Ananda Moye as *shebait*; that on the death of Rani Annapurna, Rani Ananda Moye obtained probate of the said will and remained in possession of the properties in dispute; that on the death of Rani Ananda [357] Moye in September 1883, the defendant and the Court of Wards, on behalf of the plaintiff who was then a minor, made separate applications for letters of administration to the estate, and the application of the defendant was granted, while, owing to the neglect of the manager under the Court of Wards to adduce evidence, the application on behalf of the plaintiff was disallowed; that the defendant has since then gradually taken possession of the properties in dispute, and has been misappropriating the profits of the endowed properties; and that according to the Hindu law of the Benares School, which governs the family, the plaintiff, as the reversionary heir to Kumar Ram Chunder after the death of his widow Rani Ananda Moye, is entitled to the properties in dispute. And the plaintiff seeks to recover possession of the said properties as the heir to Kumar Ram Chunder. And he makes an alternative prayer that if it be held that the properties Nos. 1

and 2 were the absolute property of Rani Annapurna, he may be awarded possession of property No. 1 and of a six annas of property No. 2 as heir of the said Rani and as *shebait* of the idols to whom she dedicated those properties.

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The defendant pleaded limitation and *res judicata* in bar of the suit, denied the adoption of the plaintiff and his title as heir to Kumar Ram Chunder and to Rani Annapurna, and alleged that the properties in dispute were the *stridhana* or absolute property of Rani Annapurna, and that the defendant as her sister's adopted son was entitled as her heir to all of them except No. 7, which had been dedicated by her to public use. He also denied the charge of misappropriation of the profits of the endowed properties. There were certain other points raised in the defence which are not necessary to be considered for the purposes of this appeal.

Upon these pleadings several issues were framed in the Court below; and that Court has held that the suit is not barred by limitation or by the principle of *res judicata*; that the plaintiff is the validly adopted son of Rajah Kirti Chand, and the defendant the validly adopted son of Annapurna's sister; that the plaintiff is the heir of Kumar Ram Chunder and of Rani Annapurna in preference to the defendant; that the defendant has committed **[358]** waste of the income of the endowed property; that the properties Nos. 1, 2 and 3 belonged absolutely to Annapurna, who made a gift of 2 annas of No. 2 to the defendant and dedicated No. 1 and the remaining 6 annas of No. 2 to the idols Lakshminarayan and Radhamohun; that the remaining properties belonged to Kumar Ram Chunder; and that the plaintiff had no cause of action against the defendant as regards property No. 7. And in accordance with these findings, the lower Court has given the plaintiff a decree for possession of properties Nos. 1 and 3 and a 6 annas share of property No. 2 as *shebait* of Thakurs Lakshminarayan and Radhamohun, and for possession of the remaining properties in suit except a 2 annas share of property No. 2 in his own right, the claim for an account having been abandoned.

Against this decree the defendant has preferred this appeal, and the plaintiff has filed a cross-appeal.

At the hearing, the cross-appeal was not pressed. In the appeal of the defendant, the only grounds pressed are, *first*, that the Court below should have held that the whole suit was barred by limitation under art. 119 of sch. II of the Limitation Act; *second*, that the Court below should have held that the suit, so far as the plaintiff sought to oust the defendant from the office of *shebait* and to recover possession of the endowed properties as *shebait*, was barred by limitation under art. 120 of sch. II of the Limitation Act; *third*, that the Court below should have held that the suit, so far as the plaintiff seeks to recover possession of properties other than those of Rani Annapurna, was barred by limitation under art. 144 of the said Schedule; *fourth*, that the Court below should have held that the defendant was the heir to the *stridhana* of Rani Annapurna in preference to the plaintiff; *fifth*, that the Court below should have held that the charge of waste and misappropriation of the income of the endowed property was not established against the defendant, and that the plaintiff was not entitled to oust the defendant from the office of *shebait*; and, *sixth*, that the Court below should have held that the defendant had acquired a valid title to property No. 6 under his purchase at a sale in execution of decree.

We shall consider these grounds in the order in which they have been stated above.

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[359] In support of the first ground, the learned Vakil for the appellant argued that, as the plaintiff could not, in any view of the case, succeed without establishing the validity of his adoption, and as a suit to obtain a declaration that his adoption was valid was barred under art. 119 of sch. II of the Limitation Act by reason of the time allowed by that article having expired, the whole suit must be held to be barred by limitation, and he relied upon the cases of *Jagadamba Chaodhrani* v. *Dakhina Mohun Roy Chaodhri* (1), *Mohesh Narain Munshi* v. *Taruck Nath Moitra* (2) and *Parvathi* v. *Saminatha* (3). On the other hand, it was contended for the respondent that art. 119 applied only to a suit to obtain a declaration that an adoption was valid, and that it had no application to a suit like the present for possession of immoveable property, and in support of this contention the case of *Fannyama* v. *Manjaya* (4) and the cases therein cited were referred to.

After giving our best consideration to the point, we come to the conclusion that the contention of the appellant is not correct.

If art. 119 applied to this suit it would be barred, assuming that the rights of the plaintiff, as the adopted son of Rajah Kirti Chand, were interfered with by the order of the High Court dated the 11th September 1885, granting the defendant's application for letters of administration to the estate of Rani Annapurna, and refusing that of the plaintiff, as the present suit was brought more than six years after that date, and more than three years after the plaintiff attained majority. But we do not think that art. 119 applies to a suit like the present, which is brought for recovery of possession of immoveable property, though the plaintiff has to establish the validity of his adoption as the basis of his title. That article, as its language shows, applies only to a suit to obtain a declaration that an adoption is valid. The view contended for by the learned Vakil for the appellant is not only opposed to the plain language of the article in question, but would **[360]** lead to obvious anomaly and hardship. Thus, while a son claiming the immoveable property of his father from a person who denies his legitimacy has twelve years within which to bring his suit, an adopted son making a similar claim against a person who denies the validity of the adoption would in that view have only six years allowed to him. Again, an adopted son claiming by inheritance the immoveable property of a collateral kinsman by adoption years after his adoption took place, would in that view have only six years from the time the succession opens within which to bring his suit, whereas if he had been a blood relation of his deceased kinsman, he would have had the ordinary period of twelve years. We do not think it reasonable to suppose that the Legislature could have intended this.

It was argued by the learned Vakil for the appellant that his view was supported by the cases he cited. Two of these being decisions of the Privy Council, if they are in point, we are bound to follow them. But they were both cases in which the contention was that the suit was barred by limitation because it was too late for the plaintiff "to set aside" the adoption of the defendant, or, in other words, to displace the title by adoption under which the defendant claimed to hold the immoveable property in dispute; whereas the contention in the present case is, that the suit is barred by limitation, because it is too late for the plaintiff to "establish" his adoption, or, in other words, to have it declared that his title by adoption under which he

(1) 13 C. 308. (2) 20 C. 487. (3) 20 M. 40. (4) 2 B. 159.

seeks to recover the immoveable property in dispute, is valid. The provision of law relied upon in the two cases cited was that portion of art. 129 of Act IX of 1871, which corresponds to art. 118 of Act XV of 1877 and not the portion corresponding to art. 119, upon which the present appellant's contention rests. Though these two articles of the present Act into which art. 129 of the former Act has been broken up, relate to cognate matters, and though the two contentions mentioned above are in some respects analogous, it is by no means clear that precisely the same considerations apply to both. The reasons which led their Lordships of the Privy Council in *Jagadamba Chaodhrani* v. *Dakhina Mohun Roy* (1) **[361]** to conclude that the expression "suit to set aside an adoption" includes a suit for possession of land after displacing a title by adoption, as well as a suit for a declaration that an adoption was invalid, do not warrant the conclusion that the expression "suit to establish an adoption" includes also a suit for possession of immoveable property upon a title by adoption, when the property claimed is, as it is in this case, that of a collateral relation by adoption.

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Moreover, both the cases referred to were cases governed by the old law (Act IX of 1871), the language of the corresponding provision of which (art. 129) was very different. In the earlier of the two cases, *Jagadamba Chaodhrani* v. *Dakhina Mohun Roy* (1), which was a suit by a reversioner after the death of the widows of the last full owner, to recover possession of immoveable property from the defendant who was holding it as his adopted son, their Lordships observe: "It thus appears that the expression 'set aside an adoption' is, and has been, for many years applied in the ordinary language of Indian lawyers to proceedings which bring the validity of an alleged adoption under question, and applied quite indiscriminately to suits for possession of land and to suits of a declaratory nature. It is worth observing that in the Limitation Act of 1877, which superseded the Act now under discussion, the language is changed. Article 128" (evidently a misprint for 118) "of Act XV of 1877, which corresponds to art. 129 of 1871, so far as regards setting aside adoptions, speaks of suits 'to obtain a declaration that an alleged adoption is invalid or never in fact took place,' and assigns a different starting point to the time that is to run against it. Whether the alteration of language denotes a change of policy, or how much change of law it affects, are questions not now before their Lordships. Nor do they think that any guidance in the construction of the earlier Act is to be gained from the later one, except that we may fairly infer that the Legislature considered the expression 'suit to set aside an adoption' to be one of a loose kind, and that more precision was desirable."

"If then the expression is not such as to denote solely, or even to denote accurately, a suit confined to a declaration that an alleged **[362]** adoption is invalid in law or never took place in fact, is there anything in the scope or structure of the Act to prevent us from giving to it the ordinary sense in which it is used, though it may be loosely, by professional men?" And this question is answered in the negative. This shows that, though their Lordships did not decide what the effect of the change in the law was, they decided that a suit for possession which could succeed only if a title by an alleged adoption was displaced, was governed by art. 129 of the earlier Act, because the loose expression

(1) 13 C. 308.

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"suit to set aside an adoption" used in that article, applied indiscriminately to suits for possession of land and to suits of a declaratory nature, and did not denote solely or even accurately a suit of the latter description. Can the same thing be said of arts. 118 and 119 of the present Act, which taken together correspond to art. 129 of the Act of 1871? Evidently not. The language is altered and made more precise so as to apply only to suits of a declaratory nature, and the time is reduced from twelve years (which is the period generally allowed in the enactments for suits for possession of immoveable property) to six years, a much shorter period. To our minds their Lordships' observations quoted above go to support the view taken of art. 119 of the present Limitation Act in the argument for the respondent rather than that taken on the other side.

The learned vakil for the appellant argued that the next case cited, *Mohesh Narain Munshi* v. *Taruck Nath Moitra* (1) went clearly to support the view taken by him of the meaning and effect of art. 119 of the Act of 1877; and the passage in the judgment most strongly relied upon is the one in which their Lordships say: "It was suggested that the Act of 1871, having been superseded by the Act of 1877, the question of limitation should be determined with reference to the provisions of the later statute, in which the language used is somewhat different, the suit there referred to as necessary to save the limitation being described as one 'to obtain a declaration that an alleged adoption is invalid or never in fact took place.' It seems to be more than doubtful whether **[363]** if these were the words of the statute applicable to the case, the plaintiff would thereby take any advantage." We do not think that the concluding sentence in the above passage, which is only a *dictum* in guarded language and not a decided opinion of their Lordships, bears out the appellant's contention that the change in language adopted in arts. 118 and 119 of Act XV of 1877 has not effected any change in the law. What their Lordships considered to be more than doubtful even if the language of the old law (art. 129 of Act IX of 1871) were the same as that of the present law (art. 118 of Act XV of 1877) was not whether that would make any change in the law, but whether the plaintiff would take any advantage, that is, whether the plaintiff in the case before their Lordships would succeed under the circumstances of the case. That this is the meaning of the above passage appears to us to be clear, not only from the language used, but also from the fact that the High Court held that the suit was barred by adverse possession, and their Lordships in an earlier part of the judgment say that they decide the question upon the construction of art. 129 of Act IX of 1871 without expressing any dissent from the view of the High Court that the suit was barred by adverse possession.

The case of *Parvathi* v. *Saminatha* (2) no doubt is in favour of the appellant. But as against that case there has been a strong current of decisions the other way. See *Lala Parbhu Lal* v. *Mylne* (3), *Basdeo* v. *Gopal* (4), *Ganga Sahai* v. *Lakhraj Singh* (5), *Natthu Singh* v. *Gulab Singh* (6), *Padajirav* v. *Ramrav* (7), *Fannyama* v. *Manjaya* (8), and *Hari Lal* v. *Bai Rewa* (9).

For the reasons given above, and upon the authority of the cases we have referred to, we must respectfully dissent from the **[364]** case of *Parvathi* v. *Saminatha* (2), and hold that art. 119 of sch. II of Act XV of

(1) 20 C. 487. (2) 20 M. 40. (3) 14 C. 401.
(4) 8 A. 644. (5) 9 A. 253. (6) 17 A. 167.
(7) 13 B. 160. (8) 21 B. 159. (9) 21 B. 376.

1877 applies only to a suit for a declaratory decree, and that the present suit, which is one for possession of immoveable property, is not barred under that article.

The second ground of appeal, namely, that the suit, so far as the plaintiff seeks to oust the defendant from the office of *shebait* and to recover possession of the endowed properties, should have been held as barred under art. 120 of sch. II of the Limitation Act, is based upon the case of *Jagannath Dass* v. *Bir Bhadra Dass* (1). But that case is quite distinguishable from the present. What was held there was that a suit to oust a *shebait* from his office which is not hereditary, and the appointment to which is made by nomination, is governed by the six years' rule of limitation under art. 120. In the present case the late *shebait* Rani Ananda Moye, not having appointed her successor as provided in the will of the founder, Rani Annapurna (Ex. B.), and there being no other provisions for the appointment of *shebait*, the management of the endowment must revert to the heirs of the founder (See *Jai Bansi Kunwar* v. *Chattardhari Singh* (2), *Gossamee Sree Greedharreeje* v. *Rumanlolljee Gossamee* (3)), and the office of *shebait* henceforth must be hereditary in the founder's family. The limitation applicable to a suit for possession of such an office is twelve years under art. 124, and not six years under art. 120, and the suit being brought within twelve years from the date when the defendant took up the management of the endowed properties, is well within time.

In support of the third ground, namely, that the suit, so far as it is one for possession of properties other than those of Rani Annapurna, should have been held as barred under art. 144 of sch. II of Act XV of 1877, the learned vakil for the appellant argued that as Kumar Ram Chunder died in 1859, it was possible for his widow Rani Ananda Moye to have been barred by limitation under Act XIV of 1859, before Act IX **[365]** of 1871, which superseded that Act and allowed the reversioners to reckon limitation from the date of the widow's death, came into operation, that is, before April 1873; and if the widow was so barred, the reversioner was also barred under the old law [see *Nobin Chunder Chuckerbutty* v. *Gurupersad Doss* (4)], and his right being once barred could not be revived by Act IX of 1871 or Act XV of 1877 as is expressly provided by s. 2 of the latter Act. The view of the law upon which this argument proceeds is correct [see *Drobomoyi Gupta* v. *Davis* (5), *Shamlall Mitra* v. *Amarendro Nath Bose* (6)], but the argument assumes that Rani Ananda Moye's possession within twelve years before April 1873 is not proved—an assumption which is disproved by the admission of the defendant in paragraph 10 of his written statement. No doubt the admission is qualified; but except as heir to her husband we fail to see how Rani Ananda Moye could have been in possession of these properties which belonged to her husband, and had not been dedicated to the idols. That being so, the third ground before us must fail.

Upon the fourth ground, namely, that the defendant ought to have been held to be the heir of Rani Annapurna's *stridhana* in preference to the plaintiff, the argument on behalf of the appellant is two-fold. In the first place, it is argued that if Annapurna had been married in one of the disapproved forms, the defendant as her sister's son was unquestionably her heir in preference to the plaintiff, her husband's kinsman; and as the

(1) 19 C. 776.
(2) 5 B.L.R. 181=13 W.R. 396.
(3) 16 I.A. 139=17 C. 3.
(4) B.L.R. Sup. Vol. 1008=9 W.R. 505.
(5) 14 C. 323.
(6) 23 C. 460.

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burden of proof lay on the plaintiff, and he had adduced no evidence on the point, his claim should be dismissed; and in the second place it is contended that even if the marriage of Annapurna be assumed to have been in an approved form, still the defendant, as her sister's adopted son, was her heir in preference to the plaintiff. We shall consider these two branches of the argument separately.

Upon the first branch of the argument, it is suggested that the marriage of Rani Annapurna took place in the disapproved [366] form called *Asura*, allowable for the *Vaisya* or mercantile caste to which the parties belong. But though the parties may belong to the *Vaisya* caste, as stated by one of the plaintiff's witnesses, Mohant Krishnanand Ram Goswami, and though some consider the *Asura* form of marriage allowed for that caste, Manu is strong in his condemnation of it, and he prohibits it altogether: see Manu III, 25, 51, IX, 98. As Rajah Udmanta Singh, the husband of Rani Annapurna, belonged to a highly respectable Hindu family, as is shown by the fact of his having the title of Rajah, it is improbable that he should have contracted a marriage in the *Asura* form. It would be unreasonable, therefore, to assume, in the absence of evidence (and it was admitted in the argument that there was no evidence on the point) that the marriage of Rani Annapurna took place in the *Asura* or in any other disapproved form. In *Takoor Deyhee* v. *Rai Baluk Ram* (1), in which a similar question arose, their Lordships of the Privy Council, in the absence of evidence to the contrary, held that the marriage in dispute was according to one of the four approved forms. And the same view was taken by the Bombay High Court in the recent case of *Gojabai* v. *Shahajirao Moloji Raye Bhosle* (2), in which Telang, J., observed: "It must be assumed, as in the absence of all evidence it was rightly assumed by the Subordinate Judge, that Anundbai's marriage was in one of the approved forms."

The first branch failing, it becomes necessary to consider the second branch of the argument upon the fourth ground, namely, that if Annapurna was married in one of the four approved forms, even then the defendant was the heir to her *stridhana* in preference to the plaintiff. The parties are admittedly governed by the Hindu law of the Benares School; and there can be no question that the Mitakshara is the highest authority in that school; and the Mitakshara in chap. II, s. XI, paragraph 11, says: "Of a woman dying without issue as before stated and who had become a wife by any of the four modes of marriage denominated *brahma*, *daiva*, *arsha* and *prajapatya*, the (whole) property as before described belongs in the first place to her husband. On [367] failure of him it goes to his nearest kinsman (*sapinda*). But in the other forms of marriage called *asura*, *gandharva*, *rakshasa* and *paisacha*, the property of a childless woman goes to her parents, that is to her father and mother. The succession devolves first (and the reason has been before explained) on the mother who is virtually exhibited (first) in the elliptical phrase *pitrigami* implying that it goes (*gachhati*) to both parents (*pitarau*) that is to the mother and to the father. On failure of them, their nearest kinsman takes the succession." This clearly shows that if the marriage of Annapurna was, as in the absence of evidence we must assume it was, in one of the four approved forms, the plaintiff, who is the nearest kinsman of her husband now living, and not the defendant who is her father's kinsman, is her heir.

(1) 11 M.I.A. 139.

(2) 17 B. 114.

But it is argued by Babu Golap Chunder Sarkar for the appellant that, though the Mitakshara is clear on the point, a doubt arises as to the correctness of the rule laid down in the passage quoted above, by reason of that rule being in conflict with a text of Brihaspati quoted in the Viramitrodaya (G. C. Sarkar's Translation, p. 243), a text of a sage which is recognised as an authority; and there being a doubt thus raised, the Viramitrodaya, which is a work of authority in the Benares School, should, as observed by the Privy Council in *Gridhari Lal Roy* v. *The Government of Bengal* (1), be followed, and following the Viramitrodaya, the defendant should be held to be the heir of Annapurna's *stridhana* in preference to the plaintiff. In support of this argument the case of *Thakoor Deyhee* v. *Rai Baluck Ram* (2) is cited as furnishing an instance in which a text of the sage, Katyayana, not referred to in the Mitakshara, was followed upon a point on which the Mitakshara lays down a different rule.

We are unable to accept this argument as sound. What their Lordships of the Privy Council said in the case of *Gridhari Lall Roy* v. *The Government of Bengal* (1) was that, when the text of the Mitakshara was doubtful upon any point, the Viramitrodaya as a work of authority in the Benares School might be referred to for the **[368]** purpose of removing the doubt. But their Lordships do not say, and there is neither reason nor authority for saying, that where the Mitakshara is as it is here, clear on the point, the text of any sage, which is in conflict with the rule therein laid down, can be referred to for the purpose of creating a doubt, as the learned vakil for the appellant contends. To allow such a course would be to upset altogether the Hindu Law of the Benares School, and indeed of every other school. The Mitakshara is the guiding authority of the Benares School, and we cannot, in administering the law of that school, question the correctness of that authority because of its conflict with the text of some ancient sage. Nor is the case of *Thakoor Deyhee* v. *Rai Baluk Ram* (2) cited for the appellant at all a case in point. There Katyayana's well known text was referred to upon the question as to the widow's right to alienate the property inherited by her from her husband, because upon that question the Mitakshara is silent, or at best doubtful. We should add that upon the question of succession to the *stridhana* of a childless woman, the Viramitrodaya, following the text of Brihaspati referred to above, places in the line of heirs certain kinsmen on the father's side (the sisters' son being one of them) before several near relations of the husband, and thus gives an order altogether inconsistent with that given in the Mitakshara. The view we take is in accordance with the opinion of the Bomby High Court in *Gojabai* v. *Shahajirav Malaji Raye Bhosle* (3).

We must in this case follow the Mitakshara, and hold that the plaintiff is the heir to the property of Rani Annapurna in preference to the defendant.

Coming now to the fifth ground, namely, that the charges of waste and misappropriation of the endowed property have not been established, and that the plaintiff is not entitled to oust the defendant from the office of *shebait*, we are of opinion that the first part of it is immaterial, even if it be well founded, and the second part is altogether untenable.

Granting that the charges of waste and misappropriation of endowed property are not established against the defendant, **[369]** that does not

(1) 1 B.L.R. P.C. 44 = 10 W.R. P.C. 31. (2) 11 M. I. A. 139. (3) 17 B. 114.

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materially affect the result. The late *shebait*, who was authorized to appoint her successor, having omitted to do so, and there being no other provision on the point in the deed of dedication, the management, as has been said above, reverts to the heirs of the founder, see *Jai Bansi Kunwar* v. *Chattardhari Singh* (1) and *Gossamee Sree Greedhareejee* v. *Rumanlolljee Gossamee* (2). The plaintiff as the next heir to Rani Annapurna is therefore entitled to be appointed *shebait*.

It was contended for the appellant that the grant of letters of administration to the defendant by the order of the High Court, dated the 11th of September 1885, is a bar to the appointment of the plaintiff as *shebait*, so long as the grant of administration is not revoked. We do not consider this contention to be of much force. The order granting letters of administration to the defendant is, under s. 41 of the Evidence Act and s. 59 of the Probate and Administration Act, conclusive proof of the representative title of the defendant against all debtors of the deceased, Rani Annapurna, and all persons holding property which belonged to the deceased. But the object of the proceedings under the Probate and Administration Act is to determine only the question of representation of the deceased for the purpose of administering the estate, and not for the purpose of determining any question of inheritance or of the right to be appointed as *shebait*. A reference to ss. 2, 3, 4, 6 and 37 of the Probate and Administration Act, which authorize the grant of letters of administration to persons who may not be the heirs of the deceased, well bears out the view we take, which also receives support from the observations in the judgment of this Court in *Arunmoyi Dasi* v. *Mohendra Nath Wadadar* (3). The order granting letters of administration to the defendant is therefore no bar to this suit, the decree in which will supersede the grant.

The sixth ground, namely, that the defendant has acquired a valid title to property No. 6 by his purchase at a sale in execution of a decree, need not detain us long. The Court below on [370] this point says: "Now it has been decided before, and defendant has himself admitted that Sri Narain Singh was not validly adopted by Rani Anandmoyi, so the purchase by defendant of his son's right cannot avail him." This view is, we think, quite correct and no reason has been shown to induce us to dissent from it.

The grounds urged before us, therefore, all fail, and the appeal must consequently be dismissed with costs. The cross-appeal not being pressed, must also be dismissed with costs.

MACLEAN, C. J.—The above is the joint judgment of Mr. Justice Banerjee and myself. I only wish to add one word on the second point. I entertain some doubt whether the defendant can, upon this particular point, successfully set up the Statute of Limitation as against the present plaintiff. The defendant was never appointed, and never was, *shebait*. He held the property and managed it as administrator, and as administrator alone, and in fact stood in a fiduciary position towards the person who was legally entitled to be *shebait*. The plaintiff is that person, and when the plaintiff comes forward and as *shebait* claims the property, I feel a difficulty in saying that the defendant, holding it as he did, in a fiduciary capacity, can successfully set up the Statute of Limitation as against him. The point was urged before us by Mr. Bonnerjee for the respondent, and

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(1) 5 B.L.R. 181 = 13 W.R. 396. (2) 16 I.A. 137 = 17 C. 3. (3) 20 C. 888.

though it is unnecessary to decide it, I refer to it, to show that it has not escaped me. In making these observations, I am not unmindful of the decision in the case of *Balwant Rao* v. *Puran Mal* (1).

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S. C. G. *Appeal dismissed.*

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[371] APPEAL FROM ORIGINAL CIVIL.

Before Sir Francis William Maclean, Kt, Chief Justice, Mr. Justice Macpherson and Mr. Justice Trevelyan.

SARAL CHAND MITTER (*Defendant*) v. MOHUN BIBI (*Plaintiff*).*
[17th January, 1898.]

Minor—Fraudulent Representation by minor that he was of age—mortgage—Civil Procedure Code (Act XIV of 1882), ss. 42, 45, 53—*Plaint, Amendment of.*

A sum of money was advanced to a minor by a mortgagee, secured by a mortgage of house property, on the representation by the minor that he was of age. and the mortgagee was deceived by such false representation:

Held that the mortgagee was entitled to a mortgage decree against the property of the infant.

Dhanmull v. *Ram Chunder Ghose* (1) distinguished and doubted (2).

Held, also, that on the question of amending a plaint, s. 53 of the Civil Procedure Code should be read with ss. 42 and 45 : that it is the intention of the Legislature that all matters in dispute should be disposed of in the same suit. The proviso to s. 53 is not intended to interfere with this.

Nelson v. *Stocker* (2) *per* Turner, L.J., applied.

[**F.**, 13 C.L.J. 228=15 C.W.N. 239=9 Ind. Cas. 110; **Rel.**, A.W.N. (1907) 203; **R.**, 3 Bur. L.T. 16=8 Ind. Cas. 600; 9 Ind. Cas 124=4 S.L.R. 250; **D.**, 8 A.L.J. 1058=8 Ind. Cas. 838.]

APPEAL from a decision of Jenkins, J., dated 27th July 1897.

The defendant by an instrument of mortgage, dated 14th November 1893, mortgaged his right, title and interest, in a house and premises, No. 5, Syed Salleh's Lane, Machua Bazar, in the Town of Calcutta, and in a house and premises No. 9, Canal West Road, Sealdah, in the District of the Twenty-four Pergunahs, in favour of the plaintiff to secure the re-payment of a sum of Rs. 5,000, with interest at 24 per cent. per annum with quarterly rests, lent to him by the plaintiff. At the time the mortgage was given, the defendant admittedly was a minor, but he would have come of age six or seven months later, if it had not been for an order of 1st February 1894, which appointed a guardian of the person and property of the infant and thereby extended the period of minority to the age of 21. The defendant was a young man of [372] dissolute habits, and being in want of money went to the plaintiff and asked for the loan. The plaintiff, being suspicious as to the defendant's age, asked for proofs, and the plaintiff thereupon produced an affidavit of a relative stating that he was of age and also a document purporting to be a certificate of the death of his father, and this certificate was produced before the Registrar of Assurances at Sealdah, who, on seeing it, was satisfied and registered the mortgage. The money was then handed over to the defendant. On the institution of this suit to obtain a mortgage decree, in answer to the plaint a written statement was put in, on 17th April 1895, by the guardian of the infant, disclosing the fact that, at the time of the advance, the defendant was a minor. At

* Appeal from Original Civil, No. 30 of 1897, in Suit No. 110 of 1895.
(1) 6 A. 1. (1) 24 C. 265. (2) (1859) 4 De G. and J. 458.

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the hearing, on 6th July 1897, a question was raised as to the amendment of the pleadings, it being suggested that if, at the date of the mortgage, the defendant was an infant, the plaintiff should be allowed to raise an alternative case to the effect that he had been induced to part with his money upon the fraudulent representation of the infant defendant, and an order giving leave to make the amendment was granted to the plaintiff.

The judgment appealed from was as follows :—

JENKINS, J.—On the 14th November 1893 the defendant executed, in favour of Luckhinarain Singh, the original plaintiff in the suit, a mortgage of certain immoveable properties, which had devolved on the defendant under the will of his grandfather, and on the 20th February 1895 this suit was instituted, whereby it is prayed—

"(a) That the defendant may be decreed by this Honourable Court to pay to the plaintiff the sum of Rs. 5,000, together with the interest due thereon, and the costs of this suit on some day to be fixed by this Honourable Court, and that in default thereof the right to redeem the said mortgaged premises may be foreclosed.

"(b) That the said premises may be sold, and the sale-proceeds applied in and towards the repayment of the said sum of Rs. 5,000, and the interest thereon, and the costs of this suit.

[373] "(c) That if the sale-proceeds be not sufficient for the payment in full of the said amounts, the said defendant be decreed and ordered to pay to the plaintiff the amount of such deficiency.

"(d) That for such purpose such directions may be given and such accounts may be taken as to this Honourable Court may seem necessary.

"(e) For such further and other relief as the nature of the case may require."

Luckhinarain having died, the plaintiff Sreemutty Mohun Bibee, as his administratrix, was substituted in his place.

On the 1st February 1894 Kaliprosonno Ghose was appointed guardian on the allegation that the defendant was an infant, and on the 17th of April 1895 he put in a written statement, pleading infancy and submitting the matter to the Court.

This was the state of the record when the case came on for trial. On that occasion, however, it was stated that the defendant had reached the age of 21, and it was arranged that the guardian should be discharged.

Thereupon it was asked by the plaintiff whether the defendant intended to affirm his mortgage, and to this there was a reply in the negative.

On this the plaintiff contended that it was not open to the defendant to rely on his infancy, on the ground that the mortgagee had been induced by his fraud, and that, at any rate, the decision gave rise to such rights as are indicated by ss. 64 and 65 of the Indian Contract Act. It was further pointed out that until then there had been no avoidance of the mortgage, and leave was asked to file a supplemental written statement. The defendant objected, but I acceded to the application. In coming to this conclusion I was influenced by the fact that to refuse it would simply necessitate the institution of a fresh action without any advantage to the defendant, as I have given him all the time he required to meet the allegations of fraud ; and next because this supplemental written statement

was, so far as the plaintiff sought to rest on his mortgage, really in the nature of a replication seeing that there had been no prior avoidance of the mortgage.

[374] In this state of things the following issues were raised :—

1. Was the mortgage deed executed by the defendant?

2. Was the defendant an infant at the date thereof?

3. Was the plaintiff induced to lend the money under the circumstances alleged in the written statement?

4. Apart from the question of fraud are the plaintiffs entitled to recover under the sections of the Contract Act (64 and 65)?

There really can be no question that the defendant executed the mortgage, nor have I any doubt that at its date the defendant was under the age of 18 and consequently a minor. I accordingly decide the 1st and 2nd issues in the affirmative. In deciding the 3rd issue, I have to deal with a conflict of evidence of a most direct character going to the very heart of the matter in dispute.

There are, however, certain matters which are practically beyond question, and it will be best to state them, so as to see which of the conflicting cases best accords with the established facts. Those facts I take shortly to be as follows :—

Some days prior to the mortgage, arrangements were made for an advance by Luckhinarain Singh to the defendant on the security of the property which has been actually charged. In the course of the negotiations there were produced to Luckhinarain the death certificate and affidavit which are alleged to have contained the false representation. The death certificate and affidavit were afterwards placed before Aushootosh Bose, a pleader of the Alipore Court, by Luckhinarain, who requested him to advise whether, having regard to them, money could be advanced. Subsequently, Aushootosh Bose, in accordance with instructions, prepared a draft and engrossed mortgage mentioned in the plaint. On the 14th of November 1893 Luckhinarain accompanied by Aushootosh and Gunput met the defendant and Hari Churn Mitter at the Sealdah Registry; the defendant signed the mortgage and the defendant, Luckhi, Ashootosh, and Gunput went upstairs and presented the deed for registration.

The Registrar, who was a friend of the defendant's family, doubted whether the defendant was a major, nor were his doubts removed by the production of the affidavit of Achintanath Biswas; [375] so the parties went downstairs and Hari, Luckhi, and Gunput went away in a garry, and after the space of an hour brought back the death certificate. The parties once more went before the Registrar, the certificate was handed to him, and he, apparently being satisfied as to the defendant's majority, registered the deed. On this 5,000 rupees in notes was paid into the defendant's hands and the parties again went downstairs, leaving the death certificate and the affidavit with the Registrar. Notes to the amount of Rs. 200 were handed to Aushoo and then Luckhinarain and Aushootosh left in a garry, leaving the others there. A few days after Saral went to the Registry and obtained the affidavit that had been left there.

The facts which I have so far stated are beyond dispute, and it will now be convenient to examine shortly the several versions of the plaintiff and the defendant as to what occurred over and above this.

According to Gunput's evidence Saral himself took part in the negotiations for a loan, and himself produced to the plaintiff the certificate

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and affidavit. After stating that Saral came with Suren Das to Luckhinarain 15 or 20 days prior to the mortgage, Gunput proceeds as follows:—

"Suren said to Luckhinarain Singh in defendant's presence: 'Here is Saral Babu; will you advance him the Rs. 2,000 on a promissory note, which you have promised to advance;' upon that Luckhinarain Singh said: 'The other day you told me something about his age; where are the affidavit and certificate of death of his father.' Saral thereupon produced two pieces of paper from his pocket and handed them over to Luckhinarain Singh, who read them and handed them over to me." The witness then identified these two documents as being the death certificate and the affidavit. Gunput further describes how the two came again the next day, and that it was ultimately arranged that Rs. 5,000 should be advanced on mortgage. After this, according to Gunput, the defendant obtained a return of the death certificate and affidavit on his furnishing the copies which have been produced here. Gunput beyond this connects Saral with the transaction before its completion by stating that he handed to him a draft of the mortgage.

[376] I now pass to the plaintiff's version of what happened at the Sealdah Office.

According to it the defendant was present in the Registry, and on the Registrar, Hem Chunder, expressing doubts as to his majority, produced the affidavit to the Registrar. Babu Hem Chunder being still in doubt, Hari Mitter was sent by the defendant to get the death certificate, and for that purpose went away with Luckhinarain Singh and Gunput, dropped them at their house, went on, and brought back the certificate, picking up Luckhinarain and Gunput on the way. Then it is said that it was on production of the certificate by the defendant to Hem Chunder that the deed was registered and the 5,000 rupees paid. It is admitted that after leaving the Registrar's room notes to the amount of Rs. 200 were handed to Aushoo, but it is sworn that this was to discharge the expenses in connection with the transaction, and Aushootosh's remuneration, amounting in all to Rs. 140, and that Rs. 60 was then and there repaid to the defendant. Beyond this it is absolutely denied that any payment was made by Saral.

The version put forward on the part of the defence is widely different. Saral swears that he knew nothing about the mortgage till the day before it was executed, that he took no part in the negotiations for the loan, and did not produce the certificate and affidavit, and he further disclaims prior possession of them or even knowledge of their existence. He further swears that he did not know, though he was present, why Hem Chunder declined at first to register the document, that he did not produce either the affidavit or certificate to Hem Chunder, that he did not know the nature of those documents when they were produced, or what the affidavit was when he went to the office afterwards and took it away, and he denies that he sent Hari Mitter for the certificate. On the other hand he states that, after leaving the Registry, he paid Rs. 2,000 to Luckhinarain, Rs. 1,100 to Gunput, and did not receive Rs. 60 or any other sum back in respect of the Rs. 200 paid to Aushoo. Then the question comes, which version am I to adopt. Now I absolutely decline to believe Saral's disavowal of all connection with the certificate and affidavit. In the first place it is proved to my satisfaction that documents undistinguishable from [377] these had been previously shown to Preonath Shastri on the occasion of Saral's obtaining a loan from him. Then I find it impossible to

believe that the defendant did not know for what purpose those documents were produced to Hem Chunder. There can be no question that Hem Chunder did express his doubts as to Saral's age, and when it is borne in mind that he was a friend of Saral's family and was well acquainted with Saral himself, it is beyond my capacity to believe that Hem Chunder should not have said a word to Saral on the point, and that Saral remained in absolute ignorance of that which admittedly was going on in his presence. I find it equally difficult to accept his account of what happened when the affidavit was taken away from the Registry. He states that in consequence of Gunput's persuasion he accompanied him to get the affidavit; still he declares that, though it was he who went to the Registrar and asked for the document, he did not know what it was; that he only described it to the Registrar as "the first document which was produced to you in connection with the loan;" that the Registrar told the clerk to get it; that it was handed to him folded, and that he did not open it. The purpose of this evidence is to support the defendant's theory of his ignorance and freedom from guile, but when I consider the improbability of the tale, and the fact that during the cross-examination of Gunput no suggestion was made of his having accompanied Saral on the occasion when the affidavit was taken away, I do not hesitate to say that the defendant's evidence on the point is undeserving of credit.

The conclusion to which I come is that the defendant was perfectly well aware of the purport of these two documents, and the purpose to which they were put in connection with the transaction. It is the defendant's case that he had nothing to do with the case, and that Hari Mitter acted for him. Yet he does not call Hari as a witness, though he is a friend of the defendant's and was in Court during the trial. The evidence appears to me to demand the conclusion that Saral took part in the negotiations for the loan, and that he used the death certificate and affidavit fraudulently, being well aware of their falsity, for the purpose of inducing Luckhinarain to believe that he, Saral, had attained his majority, and so of procuring from him the advance which was made.

[378] After the best consideration I have been able to give I further come to the conclusion that Luckhinarain was deceived into making the loan by the defendant's fraudulent misrepresentation. In arriving at this conclusion I have not overlooked the arguments based on the rate of interest and on the assertion that Luckhinarain is a money-lender. But I cannot find in those circumstances anything to justify me in coming to the conclusion that the defendant's fraud had not its intended and natural result on Luckhinarain's mind. It has also been a prominent point in the defendant's argument in this connection that the advance was made on a first class security, but I am bound to disregard it as there is not a title of evidence in its support. As bearing to a certain extent on this part of the case I will here deal with the defendant's statement that he only got Rs. 1,700. The balance of Rs. 3,300 the defendant accounts for as follows:—

He says Rs. 2,000 was paid to Luckhinarain: but as to the remaining Rs. 1,300 there has been a departure from the original suggestion. At first it was suggested that Rs. 300 was paid to Aushoo which would have left a balance of Rs. 1,000 for Gunput; later, however, the Rs. 300 dropped to Rs. 200, with a corresponding rise in the amount paid to Gunput, though Sital, who was called by the defendant, adhered to the original figure of Rs. 1,000, his evidence in this respect being consistent with the earlier rather than with the later account suggested by the

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defendant. Now, as to the Rs. 2,000, it is sworn by Saral that he paid that amount to Luckhinarain, and Sital's testimony is to the same effect. On the other hand Gunput and Aushoo, who were both there and must have seen the payment, if made, deny that it ever was made. As to Rs. 1,100 Gunput swears it was not paid; the defendant declares that it was; while according to Sital it was Rs. 1,000 that was paid to Gunput. Both the defendant and Sital agree in stating that Gunput went in a garry with them from the Registry to Lal Bazar, where change was obtained. This account naturally suggested the question why was it necessary to take Gunput to Lal Bazar for the purpose of changing the notes, seeing that even after the alleged payments to Luckhinarain and Aushoo there were notes to pay the sum Gunput is said to have received whether it was Rs. 1,100 or Rs. 1,000.

[379] Saral's explanation is that Gunput was paid Rs. 1,000 when he got into the garry, but as he was to pay Sital Rs. 25 and the coachman Rs. 10, Sital suggested that the Rs. 100 should be kept till the change was got. Sital, on the other hand, says that before the garry was driven away no money was given to Gunput, and that the notes were given to Gunput at Lal Bazar. While Gunput was in the box, for some reason or other, doubtless a very good one, no suggestion was made to him in cross-examination that he had gone to Lal Bazar, and it is a curious fact that, though Saral says that he informed his father-in-law of all this before he put in his written statement as guardian *ad litem*, still there is not a suggestion in the written statement of this alleged iniquitous conduct on the part of Gunput and Luckhinarain.

Mr. Hyde says that it was unnecessary to do more than plead infancy, and that is the explanation he gives.

I do not for a moment suggest that the silence of the written statement is in any sense conclusive, still I think it is a factor to which one may have regard in determining which version should be accepted in this conflict of testimony.

Apart, however, from this, I certainly would place credence in the testimony of Gunput and Aushoo, rather than of Saral and Sital. The last-named struck me as a most unsatisfactory witness, and when I bear in mind the accounts he gave of how Gunput had promised him the Rs. 25, and his mode of giving evidence, I am able to place little (if any) reliance on his statements. While as to Saral, not only did he, in my opinion, practise a deliberate fraud on Luckhinarain in the mode I have already indicated, but he has come here and given an absolutely false account of the part he took in the whole transaction. In a conflict of testimony he is not a witness on whom I would rely, and I decline to accept his account of what occurred. I accordingly hold that the Rs. 2,000 and Rs. 1,100 were not paid as Saral has suggested, and further that the Rs. 60 was paid back. So much for the facts of the case: I next have to consider what result should follow from those facts.

On the part of the defendant it is contended that, notwithstanding the defendant's fraud, infancy is a complete answer both [380] to the claim for personal payment and also to the relief by foreclosure or sale on the mortgage. In support of this contention reliance is placed on *Dhanmull* v. *Ram Chunder Ghose* (1), a decision of the appellate Court by which, of course, I am bound.

(1) 24 C. 265.

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It has not been suggested that in relation to this point the Indian differs from English law, and it is perfectly obvious that in England infancy affords a complete answer to that which before the Judicature Acts would have been called an action at law on the contract; and it is equally clear that a decree for personal payment on the contract expressed or implied in a mortgage could not be made against an infant however fraudulent he might be. The liability of a fraudulent infant to a decree for sale or foreclosure is however a perfectly different thing, and it is necessary to examine the case of *Dhanmull* v. *Ram Chunder Ghose* to see whether the learned Judges in that case were dealing with anything more than the right to a decree for personal payment against a fraudulent infant. From the report of the case it appears that it was a suit brought to recover the sum of Rs 13,000 and interest due on a mortgage executed by the defendant on the 26th March 1886. The plaintiff alleged that the defendant at the time of execution represented himself to be of full age, and thereby induced the plaintiff to advance the mortgage money, and he contended that, in the event of the defendant establishing that he was a minor at the date of the mortgage, then his representations amounted to a fraud, and were wilfully made with a view to deceive the plaintiff, and that the plaintiff should in any event be held entitled to recover the money. The prayer of the plaint was for the usual mortgage decree and for a money decree. The defendant pleaded minority, and denied the alleged fraudulent representation.

The case was heard before Mr. Justice Norris, who found that the plea of minority was proved, but that the defendant falsely pretended, and allowed other persons in his presence and on his behalf to state to the plaintiff that he was of full age; that such statements were false to the knowledge of the defendant, and operated upon the plaintiff's mind, so as to induce him to [381] advance the money. It was admitted at the Bar that if the plea of minority was established the plaintiff could not be entitled to a mortgage-decree, but it was argued that, if the case of false representations was made out, he was entitled to a money decree.

The learned Judge dismissed the suit, and from that dismissal there was an appeal which was heard and decided by the Chief Justice Sir Comer Petheram, Mr. Justice Prinsep, and Mr. Justice Pigot, who affirmed the decision of Mr. Justice Norris.

Now there can be no doubt that the facts of that case must be taken for all purposes to be the same as those of the present, but that does not necessarily make it conclusive; for it is clear that a case is not a precedent for any proposition that was neither consciously nor unconsciously in the mind of the Court. Now, according to the report of the case, it was admitted at the hearing before Mr. Justice Norris that, if the plea of minority was established, the plaintiff could not be entitled to a mortgage decree. If that be so, it would be reasonable to suppose that both in the Court of first instance and the appellate Court the only point that was discussed and made matter of actual decision was whether the plaintiff could get a money decree in spite of the plea of infancy, seeing that the advance had been procured by the infant's fraud. A glance at the cases quoted, and a moment's consideration of the cases left unquoted, distinctly bear out the view that the argument of counsel and the deliberation and decision of the Courts were limited in the manner I have indicated.

This too is apparent from the judgments that were delivered. For instance the learned Chief Justice says: "No case has been cited before

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us, nor are we aware of the existence of any, in which a person has been held personally liable to pay a debt contracted by him during his infancy on the ground that he obtained the credit by fraudulent misrepresentations as to his age." Mr. Justice Prinsep adopts the reasons and conclusions of the Chief Justice. Then, if one turns to the judgment of Mr. Justice Pigot, the same thing appears. He says: "I think it is clearly established that the defendant was under age when he entered into the contract." Then later, after stating that the suit must fail, he proceeds: "Assuming it to be framed in tort an infant," as Sir F. Pollock [382] accurately says, "could not be made liable for what was in truth a breach of contract by framing the action *ex delicto*. You cannot convert a contract into a tort to enable you to sue an infant." If any doubts were left after reading this passage, it is removed by what appears in the concluding part of the judgment where the learned Judge says :—

"If we as a Court of equity as well as a Court of law were to allow the plaintiff to recover in this suit it would amount to restraining a defendant from setting up the plea of infancy in an action on contract by reason of his having made a fraudulent misrepresentation *dans locum contractui*; and in no case has this ever been done." It appears to me clear that the learned Judges were simply considering the defendant's personal liability to a money decree, that being the sole question with which they were invited to deal. The high respect I entertain for the learned Judges who decided the case of *Dhanmull* v. *Ram Chunder Ghose* wholly precludes me from supposing that they ever intended to deal with the plaintiff's right to foreclosure or sale by virtue of his mortgage—a point on which there has been an undeviating course of decision from the time of Lord Cowper down to the present day, and a point which has been familiarized by the inclusion of *Savage* v. *Foster* in the 2nd volume of White and Tudor's leading cases in Equity. I refer to those decisions as being authoritative on this point, as it is apparent from the very case of *Dhanmull* v. *Ram Chunder Ghose* that the point is one which falls to be determined by this Court administering principles of equity in accordance with the decisions of English Courts.

No doubt the report of *Dhanmull* v. *Ram Chunder Ghose* records Counsel's admission that if the plea of minority were established the plaintiff could not be entitled to a mortgage decree.

It may be that there were some special circumstances in the case that demanded such an admission, but it is obvious that, however that may be, it has no binding force, and, in my opinion, the plaintiff's right to a mortgage decree is *res integra* so far as that case is concerned.

[383] I have, therefore, to determine whether the defendant can rely on his infancy to the plaintiff's prayer for a mortgage decree.

I was in the first place referred by the plaintiff to the second case of *Ganesh Lala* v. *Bapu* (1) on the authority of which it was contended that the defendant would be bound apart from fraud by virtue of s. 115 of the Evidence Act. As, however, I find that there has been fraud, it is unnecessary for me to consider whether the principle there enunciated would govern this case.

There are, however, as I have already mentioned, a number of English cases which clearly establish that, in a Court of Equity, the disability of a party, whether arising from infancy or coverture, cannot be successfully used in defence of fraud, so that, if the rule of English Equity applies, the defendant cannot avail himself of the plea of infancy. It is

(1) 21 B. 198.

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unnecessary to do more than refer to a few of the better known of these cases, such as *Watts* v. *Cresswell* (1) decided by Lord Cowper, who held the Great Seal from 1714 to 1718 ; *Savage* v. *Foster* (2); *Teynham* v. *Webb* (3), decided by Lord Hardwicks in 1750; *Evans* v. *Bicknell* (4), decided by Lord Eldon in 1801; *Cory* v. *Gertcken* (5); *Vaughan* v. *Vanderstegen* (6) ; *Davies* v. *Hodgson* (7) ; *In re Lush's Trust*(8) ; and *Cahill* v. *Cahill* (9) *per* Lord Blackburn, from which it is apparent that the principle is one which has prevailed for 180 years, and has met with the approval of the most eminent English Judges. It further has the support of so eminent a text writer as Lord St. Leonards (10). Nor is the rule one peculiar to the English Courts, for a reference to Storey and Kent will show that it is one recognized and acted on by the Courts of the United **[384]** States. It is therefore fair to take the rule as an expression of that which is required by the principles of equity, justice and good conscience, and so a rule which should govern decisions of this Court. It may be said, however, that the special circumstances of this case forbid the innovation of the rule, and doubtless it is to that end that it has been more than once repeated in the course of the argument that Luckhinarain was a money-lender and the defendant an unfortunate young man entrapped into the transaction. I am at all times inclined to regard with suspicion this class of argument.

Even a money-lender, if such Luckhinarain was, is not beyond the pale of the law, and even in regard to him the justice of his claim must be judged by the evidence given in the case in which that claim is put forward, and not by any general appeal to the inequities, real or imaginary, of those who follow his calling.

The Evidence Act prescribes that the judgment of the Court must be based upon facts declared by the Act to be relevant and duly proved, and it would be intolerable that Courts should decide rights upon suspicions unsupported by testimony.

Then, if the conduct and behaviour of the defendant is a matter for consideration, I fear it would be impossible for me to view him in the favourable light in which he has been painted. He might perhaps find apologists for his youthful extravagances and vices, possibly even for the fraud by which he secured the loan ; but I think it would be difficult anywhere to find an excuse for his attempt to escape from the consequences of the fraud by the version which he has given this Court of his conduct —a version which I have been wholly unable to accept. Therefore, I confess that the defendant does not appear to me to be a fitting object of that sympathy which I have been invited to extend to him. On the contrary, I see no reason for withholding the application of the rule of equity by reason of those personal matters to which my attention has been called. There remains, however, another point taken on the part of the defendant which requires notice.

It is said that the result of the written statement is to convert the action from one on contract into one on tort based on deceit, and that the statute of limitation would afford a complete answer to **[385]** an action based on deceit. To the argument so stated there would be the obvious answer that it is a misconception to treat the action as one in tort, for it is

(1) 9 Vin. Abr. 415 ; 2 Eq. Cas. Abr. 515.
(2) 2 Wh. & Tud. Eq. Cas. 678.
(3) (1750) 2 Ves. Sen. 198.
(4) (1801) 6 Ves. 174 (181).
(5) (1816) 2 Madd. 40.
(6) (1854) 2 Drew. 363.
(7) (1858) 25 Beav. 177.
(8) (1869) L.R. 4 Ch. 591.
(9) (1883) L.R. 8 App. Cas. 420 (434).
(10) 3 Sugden's Vend. and Purch. 428.

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not and does not purport to be such. The plaintiff's right to succeed, notwithstanding the defendant's infancy, arises from the applicability of a principle of equity, which treats fraud as a bar to the plea of disability. The precise position was this.

The effect of the infancy was that the mortgage was voidable, not void, for that is the result of the decision of this Court by which I clearly am bound whatever my own views may be.

Accepting this as the law, the infant's right to elect whether he should affirm or repudiate the mortgage remained open until he attained his majority; and in this particular case it was not until after the infant attained his majority, which happened in the month of June, that the plaintiff could have known whether the defendant would by his repudiation render reliance on his fraud obligatory on the plaintiff. I may also further point out that even in the written-statement there is merely a plea of infancy, and a submission to the protection of the Court, and no allegation even of such a provisional repudiation as is open to an infant in relation to a voidable transaction.

But apart from this, the position is very clearly expressed by Lord Justice Turner in *Nelson* v. *Stocker* (1), where he indicates the true question is whether the false representation is such a fraud as will take away the privilege of infancy.

It seems to me, therefore, that the answer to the plea of infancy could properly be introduced under the circumstances of this case by way of replication, to use the phraseology of English pleading, as the plaintiff was not bound to assume in his plaint that it would be necessary for him to rely on the fraud of the infant. In any case, I do not think that art. 95 of the Limitation Act is, on the facts of this case, any answer to the plaintiff's claim.

Under the circumstances, therefore, I hold the plaintiff is entitled to succeed, but while I give her the benefit of the principles of equity, she must take her remedy subject to the qualifications those principles impose.

In the first place I will not allow any interest. Then, as I [386] indicated in the course of the argument, I am not inclined to charge the infant with remuneration paid to Aushootosh Bose, but as it is not clear what part of Rs. 140 was applied in payment of the expenses, and as the cost of an inquiry on the point would be disproportionate to the result, the simpler plan will be to disallow the whole of Rs. 140. I understand the plaintiff is willing to accede to this course. The mortgaged property therefore will be a security for the principal advanced after deducting the Rs. 140 and costs, and there will be an account on that footing. There will, therefore, be the usual mortgage decree with interest at 6 per cent. on decree, with the qualification that the plaintiff will not be entitled to recover the principal sum or interest otherwise than out of the mortgaged property. Costs on scale No. 2 including reserved costs.

From this decision, and also from the order giving the plaintiff leave to amend his plaint, the defendant appealed.

Mr. *Garth* (Mr. *Chakravarti* with him), for the appellant.—Although the power of making amendments under s. 53 of the Code of Civil Procedure is discretionary, the power in this case was exercised contrary to the proviso to that section. The conversion of this suit from a suit to enforce a mortgage into a suit for the recovery of money paid upon the footing of a false representation is the conversion of a suit of one character into a

(1) (1859) 4 De G. & J. 458.

suit of another and inconsistent character. As regards the facts of this case my submission is that a mortgage by an infant, like a contract, is void, if the plea of infancy is raised. Luckhinarain deliberately blinded himself to the fact that the defendant was a minor. He must shew that he took all prudent precautions which a man should take. If he cannot, a Court of Equity will not help him. The only question was whether the Registrar would be satisfied or not as to the minority. The plaintiff has failed to prove that Luckhinarain himself was deceived, or took any steps to prevent himself from being deceived. As long as he did not do so he cannot raise the plea of fraud. In this decree we are ordered to pay the money and there is no time fixed for payment. On the facts as given in *Dhanmull* v. *Ram Chunder Ghose*(1) there was no misrepresentation.

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[387] Sir *G. Evans* (with him Mr. *Dunne* and Mr. *Sinha*), for the respondent.—This is a case of deliberate fraud by a forged certificate and a false affidavit and would deceive any one. The affidavit was made by a friend and relative of the minor, Hari Babu, who was in the same office with him. The Registrar even was deceived by the certificate, and was satisfied that the boy was over age. He was as a matter of fact within 7 months of attaining his majority. As regards the case of *Dhanmull* v. *Ram Chunder Ghose* (1) it is not necessary for this Court now to overrule that case. In that case in the lower Court counsel gave up all claim under the mortgage, as they thought they would be entitled to a money decree only. The mind of the Chief Justice turned in that case upon whether a money decree could be given against the infant. Pigot, J., dealt with the case on the same lines. That case has been confined to a narrow point on account of the line taken by counsel. They cited *Ex-parte Unity Joint Stock Mutual Banking Association* (2) to shew it was a debt, but did not cite analogous cases to shew how relief can be given, which is laid down in cases cited by the Judge in the Court below. If the infant is old and cunning enough to carry on a fraud he should be made liable—*Watts* v. *Creswell* (3). Where fraud is practised by a married woman or an infant the protection thrown around them is taken away; but the Courts of Equity have not carried it so far as to make a money decree against them. A married woman's property is liable to be visited with the consequence of the fraud—*Vaughan* v. *Vanderstegen* (4); *Sharpe* v. *Foy* (5); *Hobday* v. *Peters* (6); *In re Lush's Trust* (7). The only objection to a money decree is the question whether it is available against the person. The minor cannot now turn round and say, Luckhinarain ought to have thought the document was a forgery, but if a man has got no money you cannot make **[388]** an order in a Court of Equity that he shall pay. The case of a married woman is stronger—*Cahill* v. *Cahill* (8); *Raj Coomary Dassee* v. *Preo Madhub Nundy* (9). It does not matter whether in this case the contract is void or voidable. The minor cannot take advantage of his own fraud.

The following judgments were delivered by the appellate Court (MACLEAN, C.J., and MACPHERSON and TREVELYAN, JJ.):—

JUDGMENTS.

MACLEAN, C.J.—On the 14th November 1893 the defendant mortgaged certain property to one Luckhinarain, who has since died, his

(1) 24 C. 265. (2) (1858) 3 De G. & J. 63. (3) 9 Vin. Abr. 414.
(4) (1854) 2 Drew. 363. (5) (1868) L. R. 4 Ch. App. 35. (6) (1860) 28 Beav. 354.
(7) (1869) L. R. 4 Ch. App. 591 (596, 600). (8) (1883) L.R. 8 App. Cas. 420.
(9) (1897) 1 C.W.N. 453.

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representative being the plaintiff in the suit, to secure a sum of Rs 5,000 advanced by him with interest at the rate of 24 per cent, per annum. At the time the mortgage was given the defendant admittedly was a minor, but he would have come of age six or seven months later, if it had not been for an order of the 1st February 1894, which appointed a guardian of the person and property of the infant, the effect of which was to extend the period of minority to the age of 21. On the 20th February 1895 Luckhinarain, the mortgagee, instituted this suit to enforce his mortgage, and on the 17th April 1895 a written statement was put in by the guardian of the infant, and that written statement disclosed the fact that the defendant was an infant at the date of the mortgage in question. The case came on for trial, and on the 6th July 1897, as I understand, on the suggestion of the learned Judge himself, a question arose as to the amendment of the pleadings, it being suggested that if it turned out that at the date of the mortgage the defendant was an infant the plaintiff should be allowed to raise an alternative case to the effect that Luckhinarain had been induced to part with his money upon the fraudulent representation of the infant defendant. Mr. Justice Jenkins allowed the application for the amendment, and one of the points we have to decide is whether that leave was or was not properly granted. The case proceeded and the learned Judge found as a fact that the defendant was a minor at the date of this mortgage, that he represented and represented falsely to Luckhinarain, the intending mortgagee, that he was of age, and that the [389] advance was made on the faith of that representation, and although the Judge in the Court below did not make a personal decree against the defendant for the repayment of the money advanced, he gave the plaintiff an ordinary mortgage decree. The defendant appeals from that decision.

The first point we have to consider is as to whether the learned Judge in the Court below was right in allowing the amendment which enabled the plaintiff to set up his alternative case. This point depends upon the construction of certain sections of the Code of Civil Procedure. It is urged by Mr. Garth for the appellant that, although the power of making amendments is discretionary under s. 53 of the Code, the power in this case was exercised contrary to the proviso to that section. That proviso says this: "Provided that a plaint cannot be altered so as to convert a suit of one character into a suit of another and inconsistent character."

It is urged by the appellant that the conversion of this suit from a suit to enforce a mortgage into a suit for the recovery of money paid upon the footing of a false representation, is the conversion of a suit of one character into a suit of another and inconsistent character. No doubt, in one sense, the original character of the suit was to enforce the mortgage, but the object of the suit was, after all, to recover the money. We must read the proviso with other sections of the Code, and particularly with ss. 42 and 45. Section 42 says: "Every suit shall, as far as practicable, be so framed as to afford ground for a final decision upon the subjects in dispute, and so as to prevent further litigation concerning them," while s. 45 says: "Subject to the rules contained in chap. II and in s, 44, the plaintiff may unite in the same suit several causes of action against the same defendant or the same defendants jointly." It seems to me that if the argument of the appellant were to prevail, it would virtually prevent an alternative case, which arises out of, and is immediately connected with, the same transaction, from ever being raised in the same suit. I do not think, looking at the

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sections of the Code I have referred to, that that was the intention of the [390] Legislature, nor do I think that the alternative claim, which is set up, is inconsistent with the character of the claim originally made within the meaning of the proviso in question. Reading ss. 42 and 45 of the Code, the intention of the Legislature was that, as far as possible, all matters in dispute between the parties relating to the same transaction should be disposed of in the same suit, and I do not think that the proviso to s. 53 was intended to interfere with this. I therefore think that Mr. Justice Jenkins was perfectly right in allowing, in the manner he did, the amendment of the plaint.

Now I pass to the facts of the case, and in my opinion the plaintiff has succeeded in substantiating his story. The evidence shows that the defendant was desirous of raising money. He was a young man, apparently of dissolute habits, and being in want of money he approached Luckhinarain, who for this purpose I will regard as a professional money-lender. I think the evidence shows that he went to him, and asked for the loan in question. Luckhinarain was suspicious as to the defendant's age, whereupon the defendant then and there produced an affidavit of a relative, which deposed to the date of his birth, and which, if true, would show that he was of age. He also produced what purported to be a certificate of the death of his father. The evidence shows to my mind that copies of these documents were made, and that the defendant took away the originals. The copies were then sent to the pleader who has given evidence in the case. The mortgage was settled by him, the mortgage was prepared, and ultimately, the parties concerned, the intending mortgagee, the pleader, the defendant and one or two others, went to the Registrar at Sealdah to have the transaction completed. There, according to my view of the evidence, the Registrar objected, entertaining a doubt as to whether the defendant was of age, and was not satisfied with the affidavit which had been produced. The evidence shows that Hari Mitter who was, to use the defendant's own language, his "boon companion," was sent to fetch the certificate, that he fetched the certificate, that upon that the Registrar was satisfied, the mortgage was executed, and the money handed over to the defendant. I think these facts have been made out by the plaintiff.

[391] It has been urged that the appearance of the defendant was such as would induce any prudent man about to advance him money to hesitate doing so, his appearance being, it is suggested, such as to indicate clearly that he was a minor. In these cases, the appearance of the minor is a matter of considerable importance; but in the present case there is no evidence, or practically no evidence, upon this point one way or the other, so I dismiss that as an element in this particular case.

That being the history of the case, what we have to consider is did the defendant fraudulently represent to Luckhinarain, the intending mortgagee, that he was of age, and did Luckhinarain rely and act upon that representation? I may here remark that Mr. Justice Jenkins regarded the evidence of the defendant as very unsatisfactory evidence, upon which he could place no reliance. It is clear to my mind upon the evidence that the defendant produced his affidavit and produced his certificate, the affidavit being false and the certificate a forgery, with the express object of inducing Luckhinarain to advance the money, that Luckhinarain did advance the money upon the faith of the representation, which was certainly made, and which was certainly false, that that defendant was of full age.

It has been urged by Mr. Garth that a prudent man would have made further inquiries before advancing the money, and would not have

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been satisfied either with the affidavit or with the certificate. It occurs to one at once to inquire what further inquiries could he have made.

The mother of the defendant, even if she had been accessible, would have been the last person to whom either the defendant or Luckhinarain would have been likely to apply for any information; but the mother was a *purdanashin* lady, and was not accessible to Luckhinarain for the purpose of his making inquiries from her. It is also suggested that he might have gone to the mother's house and made inquiries of the servants there: but I am quite unable to accede to this suggestion. It is said that a minute examination of the certificate would have shown that it was a clumsy forgery: but it scarcely lies in the mouth of the defendant to say that. It must be borne [392] in mind that the certificate deceived the Registrar, who had no interest whatever in the transaction.

I am not prepared to accede to the contention urged by Mr. Garth that if Luckhinarain had made further inquiries he would have ascertained that the representation made was untrue, for, in my judgment, if a person makes a positive assertion, knowing it to be false, he cannot relieve himself of the liability arising from that false assertion by saying that the person to whom it was made need not have relied, or ought not to have relied, upon it. If he made the representation, and he afterwards alleges that the person to whom it was made did not rely upon it, he ought to show that the representation was not, in point of fact, relied upon.

I see no reason then, upon the question of fact involved in this case, to differ from the conclusion at which Mr. Justice Jenkins has arrived.

But then it is urged that even if, in point of fact, the defendant did make this fraudulent representation, upon the faith of which Lukhinarain parted with his money, seeing that at the time he was an infant, he is not liable to Luckhinarain in the present suit. There is not, so far as I can discover, any distinction between the law in India and the law in England upon this subject. In my judgment, there is a current of cases decided in the Courts of Equity in England, dating back for 150 years or more, which show that, in Equity, an infant cannot take advantage of his own fraud. I think it is established that in cases of fraud by an infant the protection which the law throws around him is taken away: in other words, that the defence of infancy cannot be successfully pleaded in defence of a fraud perpetrated by the infant. I do not propose to go in detail through the various cases which have been cited; they are all referred to in the judgment of Mr. Justice Jenkins, and in my opinion they establish the proposition for which the respondent contends.

There is, however, one case, the case of *Nelson* v. *Stocker* (1), which is a decision of the Court of appeal in England, to which I will [393] refer. The judgment is that of Lord Justice Knight Bruce and Lord Justice Turner. The headnote is this: "A young man of the age of seventeen, previous to his marriage with a woman possessed of personal property, executed a marriage settlement, by which he covenanted to pay £1,000 to the trustee. Before executing it, being asked by the solicitor of the intended wife whether he was of age, he said he believed he was. The intended wife, however, knew that he was not. After the marriage he received the wife's personal estate, and after her death refused to pay the £1,000. Held, reversing the decision of the Court below, that, as the wife was not misled by the misappropriation, the settlement was not binding upon the husband when he came of age."

(1) (1859) 4 De Gex. & J. 458.

But it is clear from passages in the judgment of Lord Justice Turner —and Lord Justice Knight Bruce did not differ from him—that, if a false representation had been made and acted on, the person to whom it was made, not knowing that it was false, the liability of the defendant, although at the time he entered into the covenant he was a minor, to pay the £1,000 would have been undoubted. The Vice-Chancellor had made a decree for the payment of the money, holding that the representation was a false representation. Although the Court of appeal differed from the Court below upon the question of fact, it is, I think, apparent from Lord Justice Turner's observations (1) that he did not differ from the Vice-Chancellor upon his view of the law. He says: "If the case had depended simply upon the point of the defendant having represented himself to be of age, when he was not of age, I should have felt no doubt about it." He can only mean by that that, if the representation hade been made out, he would have had no doubt as to the liability of the defendant, although he was an infant at the time he entered into the covenant. Lord Justice Turner then goes on: "It is too much to call upon the Court to believe that this defendant could really have thought himself to be of age at the date of the settlement when he was under eighteen years of age, and, if he did not so think, the representation he made to the solicitor was false and fraudulent. Infants are no more entitled than adults [394] are to gain benefits to themselves by fraud, and had the case therefore depended upon this point alone I should have agreed most fully with the decision of the Vice-Chancellor." Now the decision of the Vice-Chancellor was a personal order against the defendant for payment of £1,000. Then the Lord Justice Turner goes on to say, and, if I may respectfully say so, I entirely agree with him: "The law has for the wisest reasons thrown around infants a protection against acts done by them during their infancy, and the policy of the law cannot be maintained if this privilege of infancy be allowed to be broken in upon on slight and insufficient grounds. If the contracts of infants with persons, who know them to be under age, are held to be binding upon the ground that the infants represented themselves to be of age, there will hardly be a case in which the plea of infancy will be of any effect, and the door will be open to all the frauds against infants, which the law was intended to protect them from." But he goes on to say: "The privilege of infancy is a legal privilege. On the one hand, it cannot be used by infants for the purposes of fraud. On the other hand, it cannot, I think, be allowed to be infringed upon by persons who, knowing of the infancy, must be taken also to know of the legal consequences which attach to it." In my opinion the observations of Lord Justice Turner in the case of *Nelson* v. *Stocker* are very pertinent to the present case.

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If in the present case, upon the facts, I had been satisfied that Luckhinarain, when he advanced this money, knew that, notwithstanding the affidavit and notwithstanding the certificate, the defendant was not of age, then I agree that he could not come into a Court administering equity and seek successfully to make the defendant liable. But in this case, upon the facts, I conclude that Luckhinarain was deceived, and deceived by the course of conduct which the defendant adopted. I think the cases establish that, in a case like the present, the defendant, though at the time when he entered into the contract he was an infant, is not entitled to take any advantage resulting from his own fraud.

(1) 4 De Gex. & J. 464 (465).

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It has been strongly urged before us that the case decided by this Court some years ago, *Dhanmull* v. *Ram Chunder* [395] *Ghose* (1) but only recently reported (2) is opposed to the view we take. As regards that case, I need only remark that what the Court decided there was that where an infant obtained a loan upon the representation (which he knew to be false) that he was of age, no suit to recover the money could be maintained against him, there being no obligation binding upon the infant which could be enforced by action upon the contract, either in law or in equity, but that the defendant should not be allowed costs in either Court.

That case only dealt with the personal liability of the fraudulent infant. In the case before us, the learned Judge in the Court below has not made a personal decree against the defendant for payment of the money, but has made an ordinary mortgage decree, and there is no cross-objection by the respondent as to his not having been granted a personal money decree against the defendant. Speaking for myself, I am by no means satisfied that that case (1) was rightly decided.

But the decree here, as I pointed out, is a decree against the property which was pledged by the infant, and which has got into the hands of the mortgagee; the decree only goes to that, and therefore, in that respect, it is distinguishable from the case of *Dhanmull* v. *Ram Chunder Ghose* (1).

I have now, I think, dealt with the various points which have been urged before us. I have dealt with the facts of the case and the law which to my mind is applicable to them. If, in this case, a money decree for personal payment had been granted, and we had differed from the view expressed in the case above mentioned (1), it would have been necessary to refer the case to a Full Bench; but inasmuch as there is the distinction I have pointed out in the decree in this case, and the point, which was decided in the other, no necessity arises for the adoption of that course. I think that Mr. Justice Jenkins was right and the appeal fails and must be dismissed with costs.

[396] MACPHERSON, J.—I agree on all the points which have been disposed of by the Chief Justice.

TREVELYAN, J.—I also agree, and I think that if the respondent had objected to there not having been a personal decree, we should, having regard to the arguments which have been placed before us, have had to refer the question to a Full Bench.

Attorney for the appellant: Mr. *Rutter*.

Attorney for the respondent: Messrs. *G.C. Chunder & Co.*

C. E. G.

(1) 24 C. 265.

(2) A report was made of this case when it was decided, but its publication was prohibited by two of the Judges who decided it, and it could not therefore then appear in the reports.—ED.

25 C. 396=2 C.W.N. 94.

1887 JUNE 6.

APPELLATE CIVIL.

25 C. 396=2 C.W.N. 94.

APPELLATE CIVIL.

Before Mr. Justice Tottenham and Mr. Justice Norris.

MODHUSUDUN NATH TEWARI (*Defendant*) *v.* HIRU RAM PANDEY AND OTHERS (*Plaintiffs*).* [6th June, 1887.]

Chota Nagpore Landlord and Tenant Procedure Act (Bengal Act I of 1879) *s.* 124—*Sale in execution of a decree for rent—Jagir tenure, Incidents of—Right, title, and interest of registered* " ilakadar"—*Joint holders.*

Where a suit was brought for the recovery of arrears of rent due in respect of a *jagir* tenure, the joint property of four brothers, governed by the Mitakshara law, the arrears having accrued during the lifetime of their father, and a decree was obtained against the eldest brother, who was the sole registered *ilakadar*, or person held responsible in the zamindar's book, it was *held* that the decree related to the arrears due in respect of the whole tenure and not merely of the judgment-debtor's individual interest, and that a sale of his right, title and interest under s. 124 of Bengal Act I of 1879 would, under the circumstances of the case and by the incidents attaching to such tenure, include the right, title and interest of any person claiming jointly with him, and whose interest was inseparably united with his.

[F., 2 N.L.R. 101 (104); R., 16 C.L.J. 271=17 Ind. Cas. 227; Expl., 4 C.L.J. 68=10 C.W.N. 176.]

THE plaintiffs alleged that they, together with their brother Dukhi Ram and their father, held the village of Kulherpat jointly till 1932 Sumbut, when it was divided among them in [397] equal shares. The family was governed by the Mitakshara law. On the 10th January 1882 the village was sold under s. 124 of Bengal Act I of 1879, in execution of a decree for arrears of rent and cesses, and purchased by one Rachia Sahu, who re-sold it to the defendant. After the defendant obtained possession the plaintiff's brother Dukhi Ram died without leaving heirs other than the plaintiffs. The present plaintiffs sued to recover possession of 12 annas of the village on the plea that the sale held under s. 124 of Bengal Act I of 1879 only passed the four-anna share of the plaintiff Hiru Ram, who was the eldest brother, against whom the decree had been obtained. The Subordinate Judge held that there had been no partition, and that as the decree was for the rent due from the father of Hiru Ram, whom he succeeded as manager, being the eldest son, the whole interest in the tenure had passed by the sale. The defendant having appealed against this decision it was set aside by the Judicial Commissioner. Against the decree of the Judicial Commissioner, the plaintiff appealed to the High Court.

Mr. *Woodroffe*, Mr. *C. Gregory* and Babu *Surendra Nath Roy* appeared for the appellant.

Dr. *Rash Behary Ghose*, Babu *Jogesh Chunder Dey* and Babu *Golap Chunder Sarkar* were for the respondents.

The judgment of the High Court (TOTTENHAM and NORRIS, JJ.) was as follows :—

JUDGMENT.

We are of opinion that this appeal must be allowed, and that the Court of first instance was right in dismissing the suit.

* Appeal from Appellate Decree No. 2007 of 1886, against the decree of F. Cowley, Esq., Officiating Judicial Commissioner of Chota Nagpur, dated the 27th of August 1886, reversing the decree of A. W. Mackie, Esq., Assistant Commissioner and Subordinate Judge of Lohardugga, dated the 20th of January 1886.

1887 JUNE 6. — APPELLATE CIVIL. — 25 C. 396 = 2 C.W.N. 94.

It was brought to recover 12 annas of a *jagir* named Kulberpat, possession of the whole of which has come into the hands of the defendant by transfer from an auction-purchaser under a decree for arrears of rent. It is alleged that the *jagir* when the sale took place was the joint property of four brothers, and that nothing passed by that sale beyond the right, title and interest of one of the brothers, Hiru Ram Pandey, against whom only the rent decree had been obtained. The plaintiffs sue to get back the other three equal shares.

It appears that the *jagir* is one governed by the provisions of [398] Bengal Act I of 1879—the Chota Nagpur Landlord and Tenant Act; that no sale of the tenure itself could take place under a decree for arrears; but that with the consent of the Commissioner the right, title and interest of the judgment-debtor could be and was sold.

The lower appellate Court thought it must be held that the consent of the Commissioner was limited to the sale of the individual right, title and interest of Hiru Ram, and that the sale conveyed nothing more. We think that the Commissioner's sanction under s. 124 must be held to apply to all the right, title and interest represented by the judgment-debtor Hiru Ram in the decree passed against him. There is no question as to his having been sued as representing the full ownership of the *jagir*. The arrears claimed had accrued in the lifetime of the father of the four brothers, and the suit was brought against the eldest of the brothers who held possession as manager, and who was the sole registered *ilakadar* or person held responsible in the zemindary books. The decree, undoubtedly, related to the arrears due in respect of the whole tenure, and the judgment-debtor was undoubtedly sued as being in possession of the whole tenure. His right, title and interest sold would, under the circumstances of the case, and by the incidents attaching to such tenures in Chota Nagpur, include the right, title and interest of any person claiming such jointly with him and inseparably united with his own.

Many authorities have been cited before us on either side in support of the opposite views taken by the parties of what really passed by the sale. But it is enough to say that the circumstances of the particular case must determine this question, and that we are satisfied that in this case the sale as sanctioned by the Commissioner disposed of the whole right, title and interst represented by Hiru Ram.

The decree of the lower appellate Court is, therefore, set aside, and that of the first Court must be restored with costs.

Appeal allowed.

25 C. 399=2 C.W.N. 96.

1892 APRIL 20.

APPELLATE CIVIL.

25 C. 399= 2 C.W.N. 96.

[399] APPELLATE CIVIL.

Before Mr. Justice Prinsep and Mr. Justice Hill.

PERTAB UDAI NATH SAHI DEV (*Plaintiff*) v. PARDHAN MOKAND SINGH AND OTHERS (*Defendants*).* [20th April, 1892.]

Chota Nagpore Landlord and Tenant Procedure Act (*Bengal Act* I *of* 1879), s. 124—*Jagir and under-tenures—Decree for arrears of rent.*

No decree for arrears of rent can be made against any person other than the actual tenant, or some one who may be security for him, and consequently there can be no decree for rent against persons holding subordinate interests in a *jagir* tenure which have been created by the *jagirdar.*

THIS was a suit brought under the provisions of Bengal Act I of 1879 for the recovery of arrears of rent and cesses due in respect of a *jagir* tenure comprising the entire pergunnah of Sisia in the district of Lohardugga. The tenure was alleged to have been granted by the father of the plaintiff, the Maharaja of Chota Nagpur, to an ancestor of the first defendant, on condition of his performing the duties of keeping watch in the *gurh.* The grant was by its terms *putra putradik*, that is limited to the grantee and the heirs male of his body, on failure of which the *jagir* would revert to the grantor free of all incumbrances. It was therefore unalienable, and could under the terms of s. 124 of Bengal Act I of 1879 be sold in execution of a decree. But it was alleged that the first defendant had nevertheless divested himself of the whole of his estate by the creation of numerous sub-tenures, which the plaintiff declined to recognize. The name of the first defendant, therefore, was alone registered in the Maharaja's *sherista*, and it was alleged that the numerous *shikmidars*, *mokuraridars*, and *zuripeshgidars* were only made parties to the suit in conformity with certain rules framed by the Commissioner of Chota Nagpur for the execution of decrees under s. 124 of Bengal Act I of 1879. The first Court had given the plaintiff a decree against the first defendant only, and it was now sought in appeal to obtain decrees against the remaining defendants.

[400] Mr. *W. R. Donogh* and Babu *B. M. Dass*, for the appellant.

Babu *Jogendra Chundra Ghose*, for the respondents.

The judgment of the Court (PRINSEP and HILL, JJ.) was as follows :—

JUDGMENT.

This is a suit for arrears of rent brought against the proprietor of a *jagir*, and together with him are included as defendants various persons said to have subordinate interests in that property created by the *jagirdar.*

An *ex parte* decree was passed against the *jagirdar* ; some of the other defendants appeared and objected to any claim as against them, but no questions relating to these defendants have been considered, nor have these defendants been made liable under the decree.

The plaintiff, not being satisfied with the *ex parte* decree against the actual tenant, has appealed to this Court, asking that the tenants of the *jagirdar*, who have been made parties to this case should also be made

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* Appeal from Original Decree No. 296 of 1890, against the decree of P.H. O'Brien, Esq., Assistant Commissioner of Ranchi, dated the 11th of June 1890.

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liable under the decree, in order that their interests might be sold at the same time as the *jagir* of the actual tenant. It has been stated that this is in accordance with the practice in Chota Nagpur, and, as authority, a circular issued by the Commissioner of Chota Nagpur has been read before us. The tenure in question, it is stated by the learned Counsel for the appellant, is one of the nature described in s. 124 of Bengal Act I of 1879—the Chota Nagpur Landlord and Tenant Procedure Act. We cannot conceive on what principle any person other than the tenant himself or one who may be security for him can be made liable under a decree for arrears of rent. The rules cited before us have not the force of law, and we may observe that it does not appear that they were so intended as they are headed. " Rules issued for the guidance of officers subordinate to the Commissioner," whose signature they bear. It is unnecessary for us to express any opinion regarding the matters stated in those rules. It is sufficient to say for the purposes of this appeal that no decree in this suit can be passed except against the actual tenant, defendant No. 1 ; and we may add that s. 124 does not contemplate a general [401] sanction for sale of the right and title of any person in the particular under-tenure, but seems to require special orders for the sale of the right and title in any such tenure in each particular case. That is a matter which has not arisen in the present stage of the case, because it may be that, in execution of the decree, the judgment-debtor will pay the amount due and so avoid any sale in execution. The appeal is dismissed with costs.

Appeal dismissed.

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25 C. 401 = 2 C.W.N. 188.

ORIGINAL CIVIL.

Before Mr. Justice Sale.

RAMJIBUN SEROWGY (*Plaintiff*) *v.* OGHORE NATH CHATTERJEE (*Defendant*).* [19th March, 1897.]

Evidence Act (I of 1872) s. 92, prov. 3—Parol evidence qualifying an engagement in a written document—Admissibility of such evidence—Reservation of question as to the admissibility of evidence.

The proper meaning of proviso 3 to s. 92 of the Evidence Act (I of 1872) is that a contemporaneous oral agreement, to the effect that a written contract was to be of no force or effect, and that it was to impose no obligation at all until the happening of a certain event, may be proved. An oral agreement purporting to provide that the promise to pay on demand in a promissory note, though absolute in its terms, was not to be enforceable by suit until the happening of a particular event, *i.e.*, that the legal obligation to perform the promise was to be postponed, is not such an agreement as falls within the proviso 3 to s. 92 of the Evidence Act.

Jugatanund Misser v. *Nerghan Singh* (1), and *Cohen* v. *Bank of Bengal* (2) followed.

Questions as to the admissibility of evidence should be decided as they arise, and should not be reserved until judgment in the case is given.

Jadu Rai v. *Bhobotaran Nundy* (3), followed.

THE facts of the case appear sufficiently from the judgment.

[402] Mr. *R. Mittra*, for the plaintiff.

Mr. *A. M. Dunne*, for the defendant.

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* Original Civil Suit No. 307 of 1896.

(1) 6 C. 433. (2) 2 A. 598. (3) 17 C. 173.

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25 C. 401 = 2 C.W.N. 188.

JUDGMENT.

SALE, J.—The point which is raised in this case has been elaborately argued, but I think it would be of no advantange if I took further time to consider the arguments, because it seems to me that the authorities, both English and Indain, are pretty clear. The claim in this suit is based on a promissory note executed by the defendant, under the terms of which there is an absolute engagement on the part of the defendant to pay on demand the sum of Rs. 7,000.

The defendant admits the execution of the note, and admits consideration for it, and the only defence is that which is set up in the 4th paragraph of his written statement. That paragraph runs as follows:—

"That in the year 1895 a settlement of accounts was come to between the plaintiff and the defendant, and it was thereupon agreed between them that the said hundis should be cancelled, and that the defendant should pay the plaintiff the sum of Rs. 4,000 in cash and give him a promissory note for the sum of Rs. 7,000 in full discharge of all his claims against the defendant in respect of the said hundis and of all other claims against the defendant up to that; and it was further agreed between the plaintiff and the defendant that the plaintiff should not bring any suit to enforce payment of the said promissory note until the defendant's share in the compensation money awarded in the Land Acquisition case No. 181 of 1892 in the Court of the District Judge of 24-Pergunnahs should be received by him."

The question is whether evidence in proof of the alleged contemporaneous oral agreement set up in that paragraph of the written statement is admissible, having regard to the terms of s. 92 of the Evidence Act.

It was suggested on the part of the defendant that the more convenient if not the right course would be to admit the evidence in the first instance, reserving the question of law as to its admissibility until the final judgment in the case. No doubt that course has advantages and is a proper enough course to follow [403] in certain cases, but having regard to the observations of the appeal Court in the case of *Jadu Rai* v. *Bhobotaran Nundy* (1) I do not think that course is open to me in the present instance.

Their Lordships expressed the view that questions as to admissibility of evidence should be determined as they arise, and the particular question as to which that opinion was expressed was a question under s. 92 of the Evidence Act. It seems to me therefore I ought to proceed to determine the question of law which has now been raised.

The oral agreement which is set up in the 4th para of the written statement, and which is sought to be proved for the purpose of limiting the defendant's liability under the promissory note, must, it seems to me, be read in one of two ways. Either it must be read in the literal sense of the words, as constituting an undertaking on the part of the plaintiff not to enforce the note by suit until the happening of a certain event, or else it must be read as meaning that the legal obligation of payment was to be postponed to, or made conditional upon, the happening of a certain event. In whichever sense the words are read, the agreement appears to me to have the effect of varying the terms of the contract as contained in the promissory note, and I think the result is the same whether the section be read in the light of the English cases which have been cited, or whether it be construed apart from those authorities.

(1) 17 C. 173.

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Under the promissory note the engagement is an absolute engagement to pay on demand. The defendant seeks to set up a contemporaneous oral agreement, the effect of which is to qualify or restrict that engagement.

The case of *Moseley* v. *Hanford* (1) is clear authority to the effect that in England the evidence of such an oral agreement would be inadmissible. In that case, which was a suit on a promissory note payable on demand, the defendant set up a stipulation that it was to be paid on the sellers giving up [404] possession of certain premises sold to him. Tenterden, C. J., regarded the stipulation as having the effect of providing that the promissory note was not to be put in suit till a given event happened, and he held that the evidence of such an agreement was inadmissible.

There are numerous other English authorities to the same effect to which I need not refer, inasmuch as the argument for the defendant is not so much that under the English law the evidence is admissible, but that proviso 3 to s. 92 of the Evidence Act has the effect of altering the English law.

Proviso 3 is as follows :—

"The existence of any separate oral agreement constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property, may be proved."

What Mr. Dunne contends is that the general law laid down by s. 92, *viz.*, that no contemporaneous oral agreement can be proved to vary the terms of a written contract, is qualified by proviso 3 to this extent, that the terms of a written contract may be varied by proof of a contemporaneous agreement if the effect of such agreement is to postpone a certain obligation under the contract or to make it conditional upon the happening of a certain event. I am of opinion that this is not the meaning of the proviso. I do not think it can be read as saying that something may be done under certain circumstances, which s. 92 says cannot be done. I do not think that it was intended by proviso 3 to permit the terms of a written contract to be varied by a contemporaneous oral agreement; but having regard to the illustrations (*b*) and (*j*), I think the proper meaning of proviso 3 is that a contemporaneous oral agreement to the effect that a written contract was to be of no force or effect at all, and that it was to impose no obligation at all until the happening of a certain event, may be proved.

Placing that construction on proviso 3 brings it into general harmony with the terms of the section, and I think this view of the proviso finds support in the opinion expressed by Garth, C. J., in [405] the case of *Jugatanund Misser* v. *Nergan Singh* (2) and also in the opinion expressed by Mr. Justice Straight in the case of *Cohen* v. *Bank of Bengal* (3). It is to be observed, moreover, that Mr. Justice Spankie, who considered that the evidence of the oral agreement sought to be proved in that case was admissible under the proviso, proceeded upon the view that such agreement did not vary the terms of the written contract on which the suit was based.

Now, in the present instance, the oral agreement sought to be proved does not provide that the promissory note was to have no force or effect until the happening of the particular event mentioned, but it purports to provide that the promise to pay on demand, though absolute in its terms, was not to be enforceable by suit until the happening of that event, or in

(1) (1830) 10 B. & C. 729. (2) 6 C. 433. (3) 2 A. 598.

other words, that the legal obligation to perform the promise was to be postponed. I think it clear that such an agreement does not fall within proviso 3 of s. 92, and that being so, the defence fails, and there must be a decree in favour of the plaintiff for Rs. 7,000, with interest at 6 per cent. from date of the note to the date of decree with costs on scale 2 and interest on decree.

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Attorney for the plaintiff: Mr. *N. C. Bose.*

Attorneys for the defendant: Messrs. *Watkins & Co.*

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25 C. 405 = 2 C.W.N. 295.

APPELLATE CIVIL.

Before Mr. Justice Macpherson and Mr. Justice Wilkins.

UPENDRA LAL BORAL (*Plaintiff*) v. HEM CHANDRA BORAL (*Defendant*).* [27th August, 1897.]

Hindu Law—Will—Construction of will—Executory bequest—Gift to an idol not in existence at the testator's death—Existence of idol—Dedication.

No valid gift or dedication of property can be made by will to an idol not in existence at the time of the testator's death.

[406] The power conferred by will to make a gift must be a power to convey property to a person in existence, either actually or in contemplation of law at the death of the testator. *Bai Motivahoo* v. *Bai Mamoobai* (1) relied upon.

[**Overruled**, 37 C. 128 (163) = 10 C.L.J. 355 = 3 Ind. Cas. 642 = 14 C.W.N. 18; **F.**, 29 C. 260 (274); 11 O.C. 271; **Rel.**, 8 C.L.J. 489 = 12 C.W.N. 808.]

THE facts of the case appear sufficiently from the judgment of the High Court.

Babu *Saroda Charan Mitter*, Babu *Karuna Sindhu Mukerjee*, and Babu *Jasoda Nandan Paramanik*, for the appellant.

Mr. *W. C. Bonnerjee*, and Babu *Kishori Lal Sarkar*, for the respondent.

Babu *Saroda Charan Mitter.*— There is a good gift to the idol to be established by the wife. At any rate there is a direction to the wife to give the property to the idol to be established by her. She must be taken to be a trustee for the idol to be established. In any case she is entitled to make a disposition of the husband's property in favour of the idol under the Hindu law, particularly as it was her husband's wish that she should do so.

Mr. *W. C. Bonnerjee*, for the respondent.—No gift can be made by a Hindu either directly or through the intervention of trustees to a person (and an idol is a juridical person), unless he was in existence at the time the gift took effect. *Tagore* v. *Tagore* (2). An idol cannot be said to have juridical existence, unless it has been consecrated by the appropriate ceremony performed and *mantra* pronounced. See *Doorga Proshad Dass* v. *Sheo Proshad Pandah* (3). A Hindu may leave authority to another to appoint his property in favour of a third person, but the person in whose favour the appointment is to be made must be in existence at the time of the Hindu's death. See *Bai Motivahoo* v. *Bai Mamoobai* (1). It is clear on all the authorities that a Hindu widow cannot dedicate the whole of her husband's property to idols to the detriment of his heirs.

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* Appeal from Original Decree No. 112 of 1896, against the decree of Babu Kaliprosunno Mukerjee, Subordinate Judge of Dinagepur, dated the 19th of March 1896.

(1) 21 B. 709 = 24 I. A. 93.

(2) 9 B. L. R. 377 = I. A. Sup. Vol. 47.

(3) 7 C.L.R. 278.

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Babu *Saroda Charan Mitter* in reply.

The judgment of the High Court (MACPHERSON and WILKINS, JJ.) was as follows:—

JUDGMENT.

[407] The appellant, in order to succeed in his suit, must show that there has been a valid gift or dedication of the property to the idol, and that he is entitled to be the *shebait*.

Behari Lal Boral, who was the former owner of the property, made a will on the 17th Bysak 1280. In it he expressed his intention to establish the service of an idol, to construct a temple, and to appoint his wife Atarmoni to be the *shebait*. In the event of his being unable to effect this, he provided that she shall, by virtue of his will and in the exercise of powers equal to his own, establish the service of an idol, and by making a will in favour of it, manage the properties, construct a temple and perform the *sheba*. Then there are certain provisions relating to the management and restricting alienation, and authorising her to appoint another person to be the *shebait*. The will concludes by providing that if Atarmoni died before doing those acts, the heirs of his spiritual preceptor and his family priest and his heirs should maintain the *sheba* and manage the properties.

On the 19th Bhadra 1280 he executed an *anumatipatro*. This refers to the will and its provisions, and authorises Atarmoni to adopt one to five sons in succession. It provides that during her lifetime she should possess and manage the properties left by him ; that on her death the *dattaka* son should be the *shebait*, and that if he died unmarried his spiritual preceptor and his priest with their sons, grandsons, &c., in succession, should be the *shebaits* and as such possess the properties and perform the *shebas*. Behari Lal died without making any further disposition of his property, and at the time of his death there was no idol in existence. Atarmoni did not take out probate of her husband's will, and in the ordinary course of succession she would as his widow and heiress take his estate. In 1875 she established an idol, and in 1883 she adopted a son who died soon after the adoption. Atarmoni died in 1887, having made a will by which she appointed the appellant to be the *shebait*. The respondent is the brother of the adopted son.

We agree with the learned Subordinate Judge that Behari Lal made no devise of his property to his widow or to the idol, and that his widow succeeded as his heiress. Reading together [408] the will and the *anumatipatro* it could at the most be said he gave a life-estate to his widow with power to make a gift to an idol to be established by her, or that he appointed her executrix with a similar power. It does not seem to us to matter much which view is taken. If there was a gift to the idol it was bad because there was no idol in existence at the time of his death ; if there was a power to make such a gift the power was ineffective, because, on the authority of *Bai Motivahoo* v. *Bai Mamoobai* (1), we think that the power must be to convey to a person who was in existence either actually or in contemplation of law at the death of the testator, and the idol to which the dedication is said to have been made was not then in existence.

We are unable to agree with the learned Vakil for the appellant that the idol was in existence in contemplation of law. The deity, no doubt, is

(1) 21 B. 709 = 24 I. A. 93.

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always in existence, but there could be no gift to the deity as such, and there was no personification of the deity, to whom the gift could have been made or who was capable of taking it. We must hold, therefore, that there was no valid gift or dedication to this idol either by Behari Lal directly or by his widow under the powers conferred upon her by the will.

It is argued that, assuming there was an intestacy, and that Atarmoni succeeded as her husband's heiress, the gift of the whole of the property to the idol would still be good because it was made in accordance with the well-expressed wish and intention of her husband. But Atarmoni adopted a son under her husband's authority and the adoption related back to the time of her husband's death. On the adoption the widow was divested and the adopted son took. Even assuming that she kept the life-estate she had no power to make a gift which would enure after her death. We may observe also that the *anumatipatro* in effect revoked the power of appointing a *shebait* conferred on her by the will. An adoption being made, the succession to the *shebaitship* was regulated. In our opinion the appellant cannot in any view of the case succeed, and the appeal must be dismissed with costs.

B. D. B. *Appeal dismissed.*

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25 C. 409.

[409] APPELLATE CIVIL.

Before Mr. Justice Trevelyan and Mr. Justice Stevens.

HARAK CHAND (*Defendant*) v. DEONATH SAHAY AND OTHERS (*Plaintiffs*).

BHAGBUT PROSAD SINGH (*Defendant*) v. DEONATH SAHAY AND OTHERS (*Plaintiffs.*)* [30th August, 1897.]

Limitation Act (XV of 1877), *s.* 22—*Assignment* pendente lite—*Substitution of assignees as plaintiffs.*

In a suit instituted within the period prescribed by the law of limitation, the plaintiff assigned over his interest, and the assignees were substituted on the record in the place of the original plaintiff after the said period had expired.

Held, that under s. 22 of the Limitation Act (XV of 1877) the suit was barred by limitation. *Suput Singh* v. *Imrit Tewari* (1) distinguished.

[**F.**, 26 B. 730 (733); **Appr.**, 34 C. 612 = 5 C.L.J. 486 = 11 C.W.N. 521 = 2 M.L.T. 312 (**F.B**); **Cited**, 25 P.R. 1903 = 74 P.L.R. 1903; 69 P.R. 1902; **R.**, 34 C. 941 = 6 C.L.J. 237 = 11 C.W.N. 959; 9 C.W.N. 883; **D.**, 7 C.W.N. 817 (821); 3 P.R. 1907 = 3 P.L.R. 1908.]

THE facts of this case appear sufficiently from the judgment of the High Court.

Harak Chand, defendant No. 13 (in appeal No. 388), and Bhagbut Prosad Singh, defendant No. 18 (in appeal No. 366), appealed separately to the High Court.

Dr. *Rash Behary Ghose*, Moulvie *Mahomed Yusuf*, Babu *Karuna Sindhu Mukerjee*, and Babu *Debendra Chandra Mallik*, for the appellant in No. 366.

Mr. *C. Gregory*, Dr. *Asutosh Mukerjee*, Moulvie *Mahomed Isfak*, and Mr. *J. R. Percival*, for the respondents in No. 366.

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* Appeals from Original Decrees Nos. 366 and 388 of 1895, against the decree of Babu Boroda Prosanna Shome, Subordinate Judge of Patna, dated the 26th of August, 1895.

(1) 5 C. 720.

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Babu *Iswar Chandra Chakrabarti*, and Babu *Jagat Chandra Banerjee*, for the appellant in No. 388.

Mr. *C. Gregory*, Moulvie *Mahomed Isfak*, and Mr. *J. R. Percival*, for the respondents in No. 388.

The judgment of the High Court (TREVELYAN and STEVENS, JJ.) was as follows :—

JUDGMENT.

This suit was brought on the 4th September 1894 by Deonath Sahay for the purpose of enforcing a mortgage which had [410] been executed in the name of one Ganesh Dutt Singh whose servant he was. Pending the suit Deonath Sahay transferred his interest to Amrit Singh and Sri Krishen Singh, who by an order, dated the 17th April 1895, to which we shall hereafter refer, were substituted in his place as plaintiffs.

The main defence in the Court below was that the mortgage was not a genuine transaction, and therefore could not be sued upon.

We have heard the evidence on which the learned Judge decided the case, and we have no reason whatever to differ from his conclusion. He found that the mortgage was a genuine one, and that Deonath Sahay was the beneficial owner thereof. A certain number of observations are capable of being made with regard to the evidence, but we think they have been fairly met.

The learned Judge had the opportunity of seeing the witnesses, and it is impossible for us to say that there is any error in his decision. We are not even prepared to say that if we were trying this case as a Court of first instance we would come to a different conclusion.

Another question, which is a more serious one, has been argued before us. It is contended that the suit is barred by limitation. This defence was not taken in the Court below. But that circumstance does not in any way permit us to exclude it from our consideration. Section 4 of the Limitation Act provides that every suit which is instituted after the period of limitation prescribed therefor shall be dismissed, although limitation has not been set up as a defence. If a suit is barred by limitation it is the duty of the Court to dismiss it. Therefore, as the question is raised in the memorandum of appeal before us, we must determine whether the lower Court was right in not dismissing this suit.

There is no doubt that as originally instituted the suit was not barred by limitation. The question is whether, as now constituted, the defence of limitation is not fatal to it. The suit was brought just within twelve years of the due date. Having regard to the decision of a Full Bench of this Court [411] in the case of *Girwar Singh* v. *Thakur Narain Singh* (1) it is admitted that this case is governed by art. 132 of the second schedule of the Limitation Act. Therefore twelve years is the period applicable. As we have said Amrit Singh and Sri Kishen Singh were made plaintiffs on the 17th April 1895, it is necessary for us to see what the order then made was. The whole question depends, in our opinion, on the terms of that order.

On the 1st April 1895, Amrit Singh and Sri Kishen Singh filed a petition saying that the plaintiff had sold his entire right and interest in the amount in suit for 8,000 rupees to them; that he has no connection with the suit and no right to take measures under it, and they asked that by striking off the name of the original plaintiff Deonath Sahay their names may be brought in the category of the

(1) 14 C. 730.

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plaintiffs, and that all the proceedings in the suit may be held in their presence from the date of the petition. On the same day Deonath Sahay filed a petition consenting to the order asked for. On the 17th April 1895 the order was made and is recorded in the order sheet as follows: "No objection being made to-day, let the purchasers' names be substituted *vice* the original plaintiff, and that the case do proceed. In register of suits note is to be made accordingly." The alteration made in the heading of the plaint is as follows: "Under an order dated the 17th April 1895 Sri Kishen Singh, *alias* Hazoori Singh, son of Rup Narain Singh, deceased, inhabitant of *mohallah* Andarkila, one of the *mohallahs* of Behar, and Amrit Singh, son of Meherban Singh, deceased, inhabitant of *mouzah* Onawan, pergunnah Behar, purchasers of the claim of the plaintiff were brought under the category of the plaintiffs." The subsequent proceedings in the suit were headed in the same way, and it does not appear that Deonath Sahay had anything more to do with the suit. He is made a party to this appeal but this does not affect the question. The judgment of the lower Court is headed: "Sri Krishen Singh and another." That seems to show that the Subordinate Judge, who made the order of 17th April 1895, himself understood the name of the original plaintiff was struck out; and that is the order in terms which has been made. If the new plaintiff had been [412] added to the list of plaintiffs no difficulty would have arisen. But it is contended under s. 22 of the Limitation Act that, as the original plaintiff is no longer a party to the suit, the suit must fail. The first part of that section is as follows: "When after the institution of a suit a new plaintiff or defendant is substituted or added, the suit shall, as regards him, be deemed to have been instituted when he was so made a party." There is no doubt that, taking the words of that section to bear their legitimate meaning, the suit must be barred so far as the substituted plaintiffs are concerned. It may, perhaps, appear extraordinary that an assignment pending suit should have this effect, and that although the right of the original plaintiff is not barred, the right of his assignee should be barred as soon as it is acquired. It might perhaps have been possible for us to put on that section a construction which does not apply to assignments *pendente lite*, but the proviso seems to show that it does so apply. It shows that the section was not intended to allow any benefit to those whose rights are acquired during suit, as it expresses in one of such cases an exemption from the operation of the section. Our attention has been called to a decision of Sir Richard Garth and Mitter, J., in *Suput Singh* v. *Imrit Tewari* (1). In some respects that case is similar to the present case. There, however, the substituted plaintiffs obtained leave to carry on the suit. No such leave has been obtained here. It is very unfortunate, but we feel ourselves unable to avoid acting upon the plain words of the section. This is not the only case where an assignee may be in a worse position so far as limitation is concerned than his assignor. An assignee from a person who has the exemption given to minors does not obtain the same exemption, and a case similar to the present one might occur with regard to an assignee from a person who was a minor at the time the transaction, which he seeks to set aside, took place. We cannot but feel that we may be doing a certain amount of injustice in this case; but we think that the Legislature has prevented us from coming to any other conclusion. We accordingly dismiss the suit.

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(1) 5 C. 720.

1897 AUG. 30. — APPELLATE CIVIL. — 25 C. 409.

The appellants are entitled to their costs in the Court below, [413] but, as the defence of limitation was not raised in that Court, and as the expense of this appeal has been brought about by such omission, we think that the appellants ought to pay the respondents' costs of the appeals in this Court.

S. C. C. *Appeal allowed.*

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25 C. 413=2 C.W.N. 257.

APPELLATE CRIMINAL.

Before Mr. Justice Banerjee and Mr. Justice Wilkins.

THE LEGAL REMEMBRANCER (*Appellant*) v. CHEMA NASHYA (*Respondent*).* [21st October, 1897.]

Evidence Act, (I of 1872), s. 27—*Information received from the accused—Statement leading to the discovery of a fact—Admissibility of such statement.*

If the statement of an accused person in the custody of the police is a necessary preliminary to the fact thereby discovered, it is admissible under s. 27 of the Evidence Act; it is immaterial whether the statement is sufficient to enable the police to make the discovery by themselves, or is only of such a nature as to require further assistance of the accused to enable them to discover the fact.

Empress of India v. *Pancham* (1) dissented from; *Queen-Empress* v. *Nana* (2) followed; *Adu Shikdar* v. *Queen-Empress* (3) referred to.

[R., U.B.R. (1906) 3rd. Qr. Evid. p. 3.; 2 S.L.R. 27 Cr.=10 Cr. L.J. 239.]

THIS appeal was presented by the Local Government under s. 417 of the Criminal Procedure Code (Act X of 1882) against an order of acquittal in appeal by the Sessions Judge of Rungpore, setting aside the order of the Deputy Magistrate convicting the accused.

The facts of the case appear from the judgment.

No one appeared on behalf of the accused.

The following judgments were delivered by the High Court (BANERJEE and WILKINS, JJ.):—

JUDGMENTS.

[414] WILKINS, J.—In this case the accused was convicted by the Deputy Magistrate of Nilphamari, on the 9th March last, with having dishonestly retained certain stolen property, *viz.*, Rs. 940-0 in cash and a *baguna*, and was sentenced under s. 411 of the Indian Penal Code to nine months' rigorous imprisonment. On appeal the Sessions Judge of Rungpore set aside the conviction and sentenced and acquitted the accused, and against this order the appeal which is now before us has been filed by the Local Government under s. 417 of the Criminal Procedure Code.

The circumstances of the case as disclosed by the evidence were these: On the night of the 11th February 1897, the house of one Keramutulla Sarkar was burglariously entered and a brass *baguna* with its contents, *viz.*, Rs. 1,000-0 in cash, and two silver ornaments were stolen from it. Information was given to the Police who took up the enquiry, and in the course of their investigation unsuccessfully searched (amongst others) the house of the accused. On the 14th February the accused was questioned by the Sub-Inspector and made certain statements to him, offering to

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*Criminal Appeal No. 2 of 1897, against the order passed by A. Ahmad, Esq., Officiating Sessions Judge of Rungpur, dated the 15th of April 1897.

(1) 4 A. 198. (2) 14 B. 268. (3) 11 C. 635.

produce the stolen property. In consequence of those statements, a number of witnesses were taken by accused to a field close to his house, and there at a spot pointed out by the accused the stolen *baguna* was dug out of the ground; then accused took the party to the outer-courtyard of his house, and pointed out a spot in a drain close by: further digging in the slope of the ditch at a place covered with rubbish brought to light an earthen pot containing Rs. 940-0 declared by accused to be part of the stolen Rs. 1,000-0. Upon these facts the Deputy Magistrate convicted the accused.

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The defence of the latter was to the effect that complainant had falsely brought the charge against him because he wished to marry a widowed sister of the accused, and the latter would not allow him to do so. But no evidence was adduced in support of this plea. The prosecution witnesses were none of them cross-examined on the point, and the accused merely called witnesses who attempted to show (but failed) that the first search of the accused's premises, including the actual places where the property was dug up, had failed to discover the stolen property, which accordingly [415] must have been deposited by or on behalf of the complainant where it was subsequently found.

The Sessions Judge, in acquitting the accused, has entered into certain arguments which are not very easy to understand. It is of course correct to say that, as a general rule, a confession made to a police officer is not admissible in evidence. But s. 27 of the Evidence Act provides that when any fact is deposed to as discovered in consequence of information received from an accused person, in the custody of a police officer, so much of such information (whether it amounts to a confession or not) as relates distinctly to a fact thereby discovered, may be proved. Consequently, the Magistrate was not in error in recording so much of the accused's statement to the Police as led to the discovery of the stolen property in this case. It is perfectly well proved that the accused did make such a statement, that he did take the search-party to two secret places, that he did indicate that there the stolen property was buried, and that when these places were dug up, the stolen property was then found. The conclusion is irresistible, the guilty knowledge of the accused in clearly established, and no further proof of his dishonesty was necessary. If the Magistrate recorded a little more of the accused's statements to the Sub-Inspector than the law would strictly justify, the accused has not been prejudiced thereby; there is ample evidence, apart from that, against him.

I should, therefore, set aside the order of acquittal passed by the Sessions Judge, and restore the order of the Deputy Magistrate convicting and sentencing the accused under s. 411 of the Indian Penal Code, and I would direct the Magistrate to issue his warrant accordingly, in order that the accused may serve out that portion of the original sentence which is still unexpired.

BANERJEE, J.—I concur. I only wish to add a few words with reference to the applicability of s. 27 of the Evidence Act to this case.

The learned Deputy Magistrate is wrong in saying that "s. 27 of the Evidence Act does not apply because, to use the words of Straight, J., in *Empress of India* v. *Pancham* (1), [416] it was by the accused's own *act* and not from any *information* given by him that the discovery took place." In the first place, the facts here were different from those of the case cited,

(1) 4 A. 198.

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the property in this case having been actually found out, not by the accused, but by one of the witnesses who dug up the property at the direction of the Sub-Inspector, upon the place being pointed out by the accused. And in the second place, the view taken by Straight, J., in the case referred to, has been dissented from by a Full Bench of the Bombay High Court in a later case, *Queen-Empress* v. *Nana* (1) which in my opinion lays down the correct rule, that where the statement of the accused is a necessary preliminary to the fact discovered, it is admissible under s. 27 of the Evidence Act, the question whether the statement is sufficient to enable the Police to make the discovery by themselves, or is only of such a nature as to require further assistance of the accused to enable them to discover the fact being immaterial. In this view, the statement of the accused that the property in question had been kept concealed by him in the place pointed out, though that statement was made while the accused was in police custody, and not in the immediate presence of a Magistrate, would be admissible evidence against him. The view I take is in no way inconsistent with that taken by this Court in *Adu Shikdar* v. *Queen-Empress* (2) as the part of the information or statement that is here used as evidence against the accused under s. 27 relates distinctly to the fact thereby discovered and does not go beyond it.

S. C. B.

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25 C. 416 = 2 C.W.N. 347.

APPELLATE CRIMINAL.

Before Mr. Justice Banerjee and Mr. Justice Wilkins.

NABI BAKSH *alias* ALI BAKSH (*Appellant*) *v.* QUEEN-EMPRESS (*Respondent.*)* [15th September, 1897.]

Theft—Removing a thing with the object of causing trouble to the owner—Wrongful loss.

The accused, who was charged by his master with having committed theft of a box, stated that he had removed the box and left it concealed in the [417] cowshed to give a lesson to his master. The Sessions Judge in his charge to the jury said : " If the jury find that the accused removed the box to put the owner to trouble, that is causing wrongful loss to the owner, and the act is theft;" and the jury returned a verdict of guilty, finding " that the taking was with the intention of putting the owner to trouble."

Held, the above charge and verdict were based on an erroneous view of the law. It cannot be said that removing a thing to put the owner to trouble is necessarily and in every case causing " wrongful loss."

THE facts of the case appear from the judgment.

No one appeared on behalf of the accused.

The judgment of the High Court (BANERJEE and WILKINS, JJ.) was as follows :—

JUDGMENT.

The appellant Nabi Baksh *alias* Ali Baksh Sheikh was tried before the Sessions Court of Murshidabad for the offence of theft committed by him while he was a servant of the complainant, and committed after two previous convictions. He was found guilty by the jury and he admitted two previous convictions ; and he has been sentenced by the learned Sessions Judge to two years' rigorous imprisonment under ss. 381 and 75 of the Indian Penal Code.

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* Criminal Appeal No. 646 of 1897, made against the order of L. Palit, Esq., Officiating Sessions Judge of Berhampur, dated the 29th of July 1897.

(1) 14 B. 260. (2) 11 C. 635.

He has appealed against the conviction and sentence; and the trial having been by the jury, the appeal lies only on a matter of law, (see s. 418 of the Criminal Procedure Code); and this Court can alter or reverse the verdict, only if it is of opinion that the vedict is erroneous owing to a misdirection by the Judge or to a misunderstanding on the part of the jury of the law as laid down by him [see s. 423 cl. (*d*)].

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APPELLATE CRIMINAL.

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We are of opinion that the verdict of the jury in this case is erroneous owing to misdirection by the Judge. For the learned Sessions Judge in his charge to the jury said: "If the jury find that the accused removed the box to put the owner to trouble, that is causing wrongful loss to the owner and the act is theft. The jury will consider the accused's statement in this connection." The statement of the accused here referred to was this: "Bebi then told me to produce the things. I brought out this box. which I left concealed in the cowshed, to give a lesson to them." And the jury returned a verdict of **[418]** guilty, finding "that the taking was with the intention of putting the owner to trouble."

Now the above charge and verdict are, we think, based on a clearly erroneous view of the law. It is true that to constitute the offence of theft it is not necessary that the taking should be permanent or with an intention to appropriate the thing taken, or that there should be wrongful gain to some one in addition to wrongful loss to the real owner [see s. 378 of the Indian Penal Code, Illustration (*l*). *Queen-Empress* v. *Sricharan Chungo* (1)]. But to constitute theft there must be an intention to take the thing in question dishonestly, that is, with intent to cause wrongful gain or wrongful loss, and can it be said that removing a box "to put the owner to trouble" is necessarily and in every case causing "wrongful loss?" The answer must, we think, be in the negative. For, otherwise a person, keeping concealed for a time a valuable thing belonging to a friend, who is a careless man, in jest for the purpose of causing him a little anxiety, or in earnest for the purpose of teaching him the salutary lesson of being careful, would be guilty of theft, a result which the Legislature could never have intended. No doubt the language of s. 23 of the Indian Penal Code which defines wrongful loss, and says a "person is said to lose wrongfully when such person is wrongfully kept out of any property as well as when such person is wrongfully deprived of property," might at first sight seem to create a difficulty in the way of accepting the view we take. But the difficulty is only apparent and not real. Of course, when the owner is kept out of possession with the object of depriving him of the benefit arising from the possession even temporarily, the case will come within the definition. But where the owner is kept out of possession temporarily not with any such intention, but only with the object of causing him trouble in the sense of mere mental anxiety, and with the ultimate intention of restoring the thing to him without exacting or expecting any recompense, it is difficult to say that the detention amounts to causing wrongful loss in any sense.

[419] We, therefore, hold that the verdict in this case was erroneous owing to a misdirection by the Judge, and we reverse it accordingly and acquit the appellant.

Having regard to all the circumstances of the case, we have not thought it necessary to order a retrial.

S. C. B.

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(1) 22 C. 1017.

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Nov. 8.

CRIMINAL REFERENCE.

25 C. 419.

25 C. 419.

CRIMINAL REFERENCE.

Before Mr. Justice Banerjee and Mr. Justice Wilkins.

CHUNDRA KUMAR DEY, MUNICIPAL OVERSEER (*Complainant*) *v.* GONESH DAS AGARWALLA (*Accused*).* [8th November, 1897].

Bengal Municipal Act (Bengal Act III of 1884), *ss.* 237, 238 *and* 273—*Notice of intention to build—Commencing to build before sanction—Refusal of sanction within the period of six weeks—Liability to fine.*

If a person after giving notice in writing of his intention to erect a house under s. 237 of the Bengal Municipal Act (Bengal Act III of 1884) commences to build without waiting for the six weeks mentioned therein [as he is not bound to do under the Act there being no such provision in it] he does not necessarily contravene the law.

But if he so acts, the reasonable view must be that he does it at his risk, his act being liable to be treated as one in contravention of any legal order of the Commissioners issued within the statutory period of six weeks, if such order does not sanction the proposed building; the above appears to be the only reasonable view of s. 238 of the Act.

REFERENCE under s. 438 of the Criminal Procedure Code submitted by the Deputy Commissioner of Lakhimpur.

The facts of the case appear sufficiently from the letter of reference, the material portion of which was as follows:—

"In this case one Gonesh Das Agarwalla, a merchant of Debrugarh, applied to the Municipal Commissioners, on the 20th July 1897, for permission to erect a house on the Strand Road.

"The Vice-Chairman enquired into the case, and as the result of his enquiry a notice was issued on Gonesh Das, directing him not to erect the house and to demolish it, if already built. This notice was served on August **[420]** 5th, 1897, after the building had been completed. The Vice-Chairman reported the matter to the Chairman, who instituted a prosecution under s. 273 of the Municipal Act.

"The case was tried by the Senior Extra Assistant Commissioner who found that the notice under s. 238 was served after the building was completed. He was of opinion that the accused should not have proceeded with the building without permission, but should have waited six weeks to allow the Commissioners to pass orders on his application. He was of opinion that the provision of s. 238 (1) had been contravened, and that an offence had been committed under s 273 (1).

"The accused was fined Rs. 20.

"I consider the accuracy of the finding of the lower Court extremely doubtful. Section 273 (1) provides that whoever begins to build contrary to the provision of s. 238 is liable to punishment. As the accused admittedly made an application to the Commissioners asking for permission to build the house he has clearly not contravened the provision of s. 238 (1) and is, therefore, apparently not liable under s. 273 (1).

"The Commissioners have a separate remedy. They may direct the demolition of the building already erected without their consent. They have actually, it appears, directed the accused in the notice, dated the 3rd August 1897, to demolish the building, but he has not apparently taken any steps to carry out this order.

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* Criminal Reference No. 290 of 1897, made by L. J. Kershaw, Esq., Deputy Commissioner of Lakhimpore, dated the 21st of October 1897.

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"The lower Court (as appears from the explanation of the Magistrate) was of opinion that the accused was legally bound to wait six weeks before he commenced building.

"I venture to differ from this view. The framers of the Act apparently desired to place no restriction to the commencement of operations in pucca buildings. In the erection of huts, the builder is bound under s. 243 to give one month's notice before he commences building. There does not appear to be any such provision in the case of pucca buildings.

"I venture to submit on these grounds that the conviction is bad in law and should be set aside."

No one appeared in support of the reference.

The judgment of the High Court (BANERJEE and WILKINS, JJ.) is as follows:—

JUDGMENT.

In this case the accused Gonesh Das Agarwalla was convicted by the Extra Assistant Commissioner of Debrugarh under s. 273 (1) of the Bengal Municipal Act III of 1884 (as amended by Bengal Acts IV and VI of 1894) for having begun to build a house [421] contrary to the provisions of s. 238 of the Act and was fined Rs. 20. The Deputy Commissioner of Lakhimpore has referred the case to this Court under the provisions of s. 438 of the Criminal Procedure Code, as he is of opinion that the conviction of the accused is bad in law, inasmuch as the notice issued by the Municipal Commissioners forbidding the erection of the house, and which was served upon the accused after the house had been completed, was too late, and that the accused was not bound to wait for the permission of the Commisonerss before commencing to build the house.

It is an admitted fact that the accused did, before commencing to build the house, give a written notice to the Commissioners under s. 237 (1) of the Act. The question is whether the accused in commencing to build before getting the permission of the Commissioners, and without waiting for the "six weeks" mentioned in that section, contravened the provisions of s. 273 (1) of the Act.

Under s. 237 of the Act the Commissioners were allowed six weeks from the receipt of the notice given by the accused to deliberate upon the matter, and to grant or refuse sanction for the proposed building; as a matter of fact they refused to sanction it, within the statutory period, but in the meanwhile, the accused, without waiting for their decision, commenced and completed the erection of the building.

Section 273 (1) is as follows: "Whosoever............begins to build ....any house contrary to the provisions of s. 238............shall be liable............to a fine of Rs. 50............"

Section 238 (1) provides: "Should any person commence to erect ....such house............in contravention of any legal order of the Commissioners issued within six weeks of receipt of a valid notice under the last preceding section, the Commissioners may, by notice to be delivered within fifteen days, require the building to be altered or demolished............"

Thus, if the provisions of both these sections are fulfilled, the Commissioners have two remedies, *viz.*, (1) by prosecution and fine under s. 273, and (2) by altering or demolishing the objectionable building.

[422] The question in the present case is, whether the provisions of ss. 238 and 273 (1) of the Act were fulfilled, or, in other words, whether the accused can be said to have commenced to erect the house "in contravention of a legal order" which was not communicated to him until

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after the building had been completed. So far as we understand the Act, the accused was not bound to wait for six weeks before getting a reply to his notice; it is true that the Commissioners are allowed that period within which to come to their decision; but the Act is silent as to the counter-obligation alleged against the accused, whatever the intention of the framers of the Act may have been.

But, though that is so, and though, by commencing to build after giving the notice required by s. 237, without waiting for the six weeks mentioned in it, a person does not necessarily contravene the law, yet when he so acts, the reasonable view must be that he does it at his risk, his act being liable to be treated as one in contravention of any legal order of the Commissioners issued within the statutory period of six weeks, if such order does not sanction the proposed building. As he commences to build in anticipation of sanction, his act is valid if the sanction is obtained; but if sanction is refused within the statutory period, the act from its commencement must be held to have been in contravention of the order of the Commissioners, though issued subsequently within the statutory period.

This appears to us to be the only reasonable view of s. 238 of the Act. The language of the section is doubtless faulty; but its meaning is clear.

To hold that a building completed before receipt of the order of the Commissoners refusing sanction within the statutory period is unaffected by that order, would be to hold in such cases ss. 237 and 238 are a nullity.

For these reasons, we think that the order of the Extra Assistant Commissioner was right and should stand.

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25 C. 423.

[423] CRIMINAL REVISION.

Before Mr. Justice Hill and Mr. Justice Wilkins.

BROWN (1*st Party, Petitioner*) *v.* PRITHIRAJ MANDAL (2*nd Party, Opposite Party*).* [1st December, 1897.]

Possession, Order of Criminal Court as to—Criminal Procedure Code (Act X of 1882). *s.* 145—*Parties to proceedings—Manager in possession.*

A person who is in possession of land merely as manager for the actual proprietor should not be made a party to proceedings under s. 145 of the Criminal Procedure Code. *Behari Lall Trigunait* v. *Darby* (1), followed.

[D., 31 C. 48=7 C.W.N. 825 (826).]

THE facts of the case appear from the judgment.

Mr. *A. M. Dunne* appeared for the petitioner.

Babu *Kritanto Kumar Bose*, for the opposite party.

The Deputy Legal Remembrancer (Mr. *Gordon Leith*), for the Crown.

The judgment of the High Court (HILL and WILKINS, JJ.) is as follows:—

JUDGMENT.

These proceedings were instituted under s. 145 of the Code of Criminal Procedure by one Prithiraj Mandal against Mr. A. P. Brown in the Court of the Sub-Divisional Magistrate of Kurseong. They relate to four plots

* Criminal Revision No. 508 of 1897, made against the order passed.

(1) 21 C. 915.

of land which were claimed by the complainant on the ground that he was in possession of them as tenant. He asserted that he had been dispossessed by Mr. Brown. The proceedings were transferred on the 9th April 1897 to the Court of the Deputy Magistrate of Darjeeling. After the Deputy Magistrate had held a local investigation, he drew up a proceeding under s. 145, requiring the parties to put in written statements of the respective cases and to appear before him for the disposal of the matter in due course. In the result he arrived at the conclusion that the complainant Prithiraj Mandal was entitled to retain possession of the first and second of the plots; that in respect of [424] the third plot he was entitled to graze his cattle upon it; and with regard to that particular plot he made an order in favour of Prithiraj Mandal under s. 147. With reference to the fourth plot his finding was that Mr. Brown was the person in possession, and he accordingly ordered him to be retained in possession.

Exception has been taken to the proceedings and orders of the Magistrate upon various grounds. It appears to us, however, that it is necessary only to refer to the first, as we think it to be conclusive of the case. In the written statement put in on behalf of Mr. Brown, it has been stated, and it has been so found by the Magistrate that he, Mr. Brown, was not the actual proprietor of the land in dispute, but was there merely in the character of a manager for the actual proprietor one Mr. Ephgrave, who appears himself to be a resident of Darjeeling, and to have been present there at the time of these proceedings.

It has been contended before us upon the authority of the case of *Behary Lall Trigunait* v. *Darby* (1) that, having regard to the fact that Brown had no interest in the land, but was in possession merely as manager for the actual proprietor, he was not a proper party to these proceedings, and that they are therefore bad *ab initio*. We think that this contention is sound; and that we have no alternative but to give effect to it. In the case to which reference has been made the person against whom the claim was preferred and who was treated as the second party in the case was a Mr. Darby, who was the manager of a certain coal company, which claimed to be in possession of the land. What the Court there said was this: "We think that this rule must be made absolute, and that it is enough for us to say that it must be made absolute, because the persons interested are not before the Court. Mr. Darby in whose favour this order has been made, in his written statement, states that the property in question belongs to a coal company; and that his position is that of a manager of the company. He does not state that he has any interest except as manager, and does not state that he has any independent, or in fact any, possession, except as representing the company on whose behalf he is managing the mine. We do not think that that kind of [425] possession is a possession such as is contemplated by this section, or, as I said just now, that the parties interested are properly before us." We think the principles thus laid down are applicable to the present case, and we accordingly set aside the proceedings *ab initio*.

The case relied upon by the other side, *Protap Narain Singh* v. *Rajendro Narain Singh* (2) in our opinion has no application here. We further direct that the costs which were made payable by Mr. Brown by the orders of the Deputy Magistrate, dated the 30th June and 2nd July, if paid, be refunded.

S. C. B.

(1) 21 C. 915.

(2) 24 C. 55 (F.B.).

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25 C. 425 = 2 C.W.N. 113.

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Before Mr. Justice Hill and Mr. Justice Wilkins.

INDRA NATH BANERJEE (*Petitioner*) *v.* QUEEN-EMPRESS ON THE COMPLAINT OF MATILAL MOOKERJEE AND OTHERS (*Opposite Party*).*
[8th December, 1897.]

Nuisance—Cremation—Burning-ghat or cremation-ground—Criminal Procedure Code (Act X of 1882), ss. 133, 140, 437—Jurisdiction of District Magistrate to order further inquiry, in a proceeding under s. 133 of the Code—"Legalised nuisance"—Private cremation-ground, duties of owner of—"Public place"—"Trade or occupation"—Order of removal of burning-ghat—Form of notice.

A District Magistrate has, strictly speaking, no power under s. 437 of the Criminal Procedure Code (Act X of 1882) to order a 'further inquiry' into a proceeding under s. 133 of the Code, which has been practically dropped by a Subordinate Magistrate, the proper course being to refer the matter to the High Court.

Although a burning-ghat or cremation-ground may not in itself be a "nuisance" within the meaning of cl. 2, s. 133 of the Criminal Procedure Code (Act X of 1882), still a Magistrate will have jurisdiction to take action under that section if it is shown that such a ghat or ground is in such an offensive state, or that cremation is carried upon it in such an offensive manner, as to be a source of injury, danger, or annoyance to persons living in the vicinity.

Queen-Empress v. *Saminadha Pillai* (1) and *Bamford* v. *Turnley* (2), referred to and discussed. *Brindabun Chunder Roy* v. *Chairman of Municipal Commissioners of Serampore* (3) distinguished.

[426] A private proprietor may be guilty of acts done on his private property, which may give rise to a public nuisance; the owner of a cremation ground may be held to create a "nuisance" if he allows the cremation of bodies upon that ground to be so performed as to annoy or endanger the lives and properties of persons living in the neighbourhood.

The proprietor of a cremation-ground cannot be said to be carrying on any "trade or occupation" within the meaning of cl. 3, s. 133 of the Criminal Procedure Code.

A Magistrate has no power under s. 133 of the Criminal Procedure Code to order the removal of a burning-ghat from its position, but he can direct a proprietor to "remove the nuisance," *i.e.*, to take such steps as would result in the cremation of corpses ceasing to be a nuisance to the public.

[R., 17 C.P.L.R. 127 (128).]

THE facts of the case, and the arguments adduced, are fully set forth in the judgment of the High Court.

Mr. *Jackson*, Babu *Degamber Chatterjee*, Babu *Debendra Chunder Mullick*, and Babu *Dwarka Nath Mitter*, for the petitioner.

The Deputy Legal Remembrancer (Mr. *Gordon Leith*), and Babu *Samatul Chunder Dutt*, for the Crown.

The judgment of the Court (HILL and WILKINS, JJ.) was as follows :—

JUDGMENT.

This is a rule calling upon the District Magistrate of Burdwan to show cause why the order of the Sub-Divisional Officer of Katwa, dated the 21st July 1897 making absolute, under s. 137 of the Criminal Procedure Code; a conditional order issued by that officer on the 24th April 1897, under s. 133 of the Criminal Procedure Code, and calling upon the petitioner to

* Criminal Revision No. 566 of 1897.

(1) 19 M. 464 (467, 468).
(2) (1862) 31 L J. Q.B. (Ex. Ch.) 286.
(3) 19 W.R. C.R. 309.

remove a burning-ghat from its present position where it is a nuisance, or to show cause why such conditional order should not be made absolute, should not be set aside.

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The facts appear to be as follows :—

Previous to the 10th June 1893, the burning-ghat or cremation-ground in question was situated on the borders of villages Mohanpur and Naihati; on the application of some of the inhabitants of Mohanpur proceedings were instituted against the proprietor (the present petitioner) under s. 133 of the Criminal Procedure Code, and on the 10th June 1893, at the instance of the District Magistrate, the petitioner removed the burning-ghat [427] to its present position. In November 1896 some of the inhabitants of Naihati moved the Sub-Divisional Officer under s. 133 of the Criminal Procedure Code for the removal of the ghat from its new site, and, on the 4th March 1897, the Deputy Magistrate declined to interfere, not because the ghat as conducted was not a " nuisance " within the meaning of the section but because " as there must exist a burning-ghat for the cremation of the dead, and as he could not find a more suitable spot, it would be futile to take proceedings under s. 133 of the Criminal Procedure Code." The result was that the Deputy Magistrate ordered the application to be " filed."

The Naihati people then moved the District Magistrate in revision of this order, and asked that a proceeding under s. 133 of the Criminal Procedure Code might be drawn up against the petitioner to remove the said " nuisance from the Naihati village." Upon receipt of this petition, the District Magistrate ordered it to be forwarded to the Sub-Divisional Officer, who was directed to institute fresh proceedings under s. 133. The Sub-Divisional Officer accordingly drew up his proceedings of the 24th April, with the result that he made the order absolute which the petitioner now seeks to have set aside.

We have heard the Deputy Legal Remembrancer, who appears on behalf of the Crown, to show cause against the rule, and we have also heard Mr. Jackson for the petitioner in support of this rule. We now proceed to deal *seriatim* with the arguments used by Mr. Jackson in support of his contention that the rule should be made absolute.

The *first* ground of objection is that the proceedings are bad, inasmuch as the District Magistrate had no authority to order a further inquiry into the application of the inhabitants of Naihati, which had been practically rejected or refused by the Sub-Divisional Officer. We cannot accept the arguments set up in reply to this, *viz.*, that the proceedings instituted in April 1897 were not in continuation of the application of November 1896, but were fresh proceedings altogether. There is nothing in the petition to the District Magistrate to show that the inhabitants of Naihati complained to him upon a new state of affairs, or upon [428] any fresh nuisance which had occurred since the Sub-Divisional Officer had refused to interfere; and the conditional order which was ultimately made absolute was one issued upon the original complaint stated in the application of November 1896. But we may dispose of this objection by saying that, though strictly speaking the District Magistrate may have had no power under s. 437 of the Criminal Procedure Code to order a further inquiry into this matter, still we do not think it necessary to set aside the whole of the proceedings upon this ground, for, had the District Magistrate referred the petition to this Court as would appear to have been the proper course, we should certainly have directed the Sub-Divisional Officer to proceed and hold the formal inquiry which he has now held.

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The second contention of the learned counsel for the petitioner is that, as no burning-ghat can be a public nuisance, the Magistrate had no authority to take action under s. 133 of the Criminal Procedure Code in respect of this burning-ghat. Mr. Jackson supports this contention by referring to certain remarks contained in the judgment of a Divisional Bench of the Madras High Court in the case of *Queen-Empress* v. *Saminadha Pillai* (1). The accused in that case had been convicted under s. 290 of the Indian Penal Code for having cremated a corpse at a certain place, and the learned Judges remarked that "it is clear that the act of the accused falls under the limited class of cases sometimes designated as nuisance "legalized." In other words it seems to be one instance of those compromises belonging to social life [alluded to by Pollock, C. B., in *Bamford* v. *Turnley* (2)] upon which the peace and comfort of that life mainly depend, and in which some apparent natural right is invaded or some enjoyment abridged to provide for the more general convenience or necessities of the whole community." Now the expression "legalized nuisance" used in this connection might at first sight seem to render innocent in law the practice of cremation under any circumstances whatsoever. But that this is not the true meaning of the phrase, and that it was not so interpreted in the case above referred to, is clear from what immediately follows in the same [429] judgment. The learned Judges go on to say (at p. 467 of the report): "In support of the above view, it is hardly necessary to observe that not only the religious sentiments of all sections of the community, but also the requirements of general health and comfort, absolutely demand that corpses shall be disposed of as early as practicable, so as not to prove hurtful to the living. It is this imperative necessity that, as a general rule, casts upon persons having charge of corpses, not only as a matter of social but also of legal obligation, the duty of arranging for the disposal of those corpses in a reasonably speedy, *decent and inoffensive way*," and further on, at p. 468, "when persons like the accused entitled to use a particular spot dedicated for the communal purpose of cremation use it for that purpose *in a manner neither unusual nor calculated to aggravate the inconveniences necessarily incident to such an act as it is generally performed in this country*, it must be admitted that he does what is perfectly lawful." In fact the case cited does not go further than this; it is an authority upon the point that a cremation-ground properly kept and used cannot be considered a public nuisance, but it does not decide that a cremation-ground kept and used in such a manner as to be offensive or a source of injury, danger or annoyance to the people in general, who dwell in the vicinity, is not therefore a "public nuisance" within the meaning of s. 268 of the Indian Penal Code, or a "nuisance" within the meaning of the second paragraph of s. 133 of the Criminal Procedure Code.

In support of this branch of his argument, Mr. Jackson also relied upon the case of *Brindabun Chunder Roy* v. *Chairman of the Municipal Commissioners of Serampore* (3), but that case does not seem to us to be very much in point. Its decision turned upon the construction of s. 79 of the Municipal Act of 1864, and the conclusion arrived at was that Municipal Commissioners could not close a cremation-ground under that section, merely because they thought that the burning of dead bodies was offensive; it was necessary in order to give them jurisdiction that they should be satisfied upon the evidence of competent persons, that the ground

(1) 19 M. 464 (467, 468).
(2) (1862) 31 L. J. Q. B. (Ex. Ch.) 286.
(3) 19 W. R. C. R. 309.

was in such a state as to be dangerous to the [430] health of persons living in the neighbourhood (see pp. 312 and 314 of the report).

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We, therefore, hold that, although a burning-ghat or cremation-ground may not in itself be a nuisance within the meaning of cl. 2, s. 133 of the Criminal Procedure Code, still a Magistrate will have jurisdiction under that clause if it is shown that such a ghat or ground is in such an offensive state, or that cremation is carried on upon it in such an offensive manner, as to be a source of injury, danger, or annoyance to persons living in the vicinity. As a matter of fact this is what the Magistrate in the present case has clearly found upon the evidence given before him.

The third objection taken on behalf of the petitioner is that as this cremation-ground is private property, it is not a "public place" within the meaning of s. 133 of the Criminal Procedure Code, and that consequently the Magistrate had no jurisdiction to proceed under the second clause of that section. No doubt this burning-ghat is the property of the petitioner, and is not itself a public place. But the question before us is not so much whether the land itself is public or private, as whether the "nuisance" complained of is on or at a public place. The distinction is clear. It is not the place where the nuisance originates which we have to look to, it is the nuisance itself. And we have no hesitation in saying that in our opinion a private proprietor may be guilty of acts done on his private property, which may give rise to a public nuisance to those living in the neighbourhood. A private owner who fires off blank charges from a cannon in his compound may give rise to a public nuisance, so far as regards persons riding or driving on a public way just outside the compound. So also the owner of a cremation-ground may fairly be held to create a nuisance if he allows the cremation of bodies upon that ground to be so performed as to annoy or endanger the lives and properties of persons living in the vicinity.

This, we think, is the proper reply to the argument as set forth. It is not enough to say, as has been urged by the Deputy Legal Remembrancer, that cl. 3 of s. 133 of the Criminal [431] Procedure Code would apply to this case. In the first place the petitioner in the present case cannot be said to be carrying on any "trade or occupation," he merely puts his land at the disposal of any one who wishes to cremate a dead body, and makes his profit by charging a high rent to a tenant who sells wood to the relatives. In the second place the proceedings throughout have been conducted with reference to cl. 2, and not to cl. 3, of s. 133.

For these reasons we think that we should not be justified in setting aside the order of the Sub-Divisional Officer, who has found as a fact upon evidence, which he summarizes in his judgment, that the practice of cremating corpses as carried on upon the petitioner's land, amounts to a nuisance within the meaning of s. 133 of the Criminal Procedure Code. It is not sufficient for the petitioner to say that it is not he who commits the nuisance which is one which (if it exists at all) is created by the *murdafarashes* or professional corpse-burners paid by the persons who use the cremation-ground. If he permits his ground to be used for such a purpose, it is incumbent upon him to take care that it is used in a proper, decent, and inoffensive manner, whereas the findings are that the process of cremation is so conducted as to be opposed to public decency, and to be a source of annoyance to the neighbours. It is for the petitioner to see that the ground is properly enclosed, and that no offensive matter is allowed to lie about it or to travel beyond its boundaries so as to annoy the public.

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But we think that the form of the order absolute made by the Sub-Divisional Officer is open to objection. The Sub-Divisional Officer has directed the petitioner to "remove the burning-ghat from its present position." This, under the section, he had no power to do. What he had jurisdiction to direct was that the petitioner "should remove the nuisance;" in other words take such steps as would result in the cremation of corpses at this place ceasing to be a nuisance to the public. And we think that this is the form in which the notice, to be given to the petitioner under s. 140 of the Criminal Procedure Code, should be drawn up. If, as would appear from the Sub-Divisional Officer's order of [432] the 7th August last, a new and more convenient site has been selected for a burning-ghat, and if the petitioner has no objection to remove it to that site, so much the better. But if he desires to retain the ghat where it is, the Magistrate has no authority to force him to remove it, and to prevent its being used for cremation purposes, so long as he takes care that it is not a nuisance to the neighbourhood. To this extent, therefore, and only to this extent, will the rule be made absolute.

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25 C. 432.

CRIMINAL REFERENCE.

Before Mr. Justice Banerjee and Mr. Justice Wilkins.

QUEEN-EMPRESS *v.* MAKUND RAM AND OTHERS (*Accused*) *Petitioners.**
[19th October, 1897.]

Gambling Act (*Bengal Act II of* 1867), s. 6—*Common gaming house*—Cowries—*Instruments of gaming.*

Cowries may be treated as instruments of gaming where they are used as counters or as a means to carry on gaming.

The finding of *cowries* in a house upon search made under a warrant will under s. 6 of the Gambling Act (Bengal Act II of 1867), raise a rebuttable presumption that the house is used as a common gaming-house.

REFERENCE submitted under s. 438 of the Criminal Procedure Code by the Officiating Sessions Judge of Cuttack, against a conviction and sentence under s. 4 of the Gambling Act (Bengal Act II of 1867). The material portion of the letter of reference was as follows :—

"The facts appear to be that a certain house was raided by the police during the night, and the accused were found seated round a heap of pice and *cowries*. The first accused was sent up under s. 3 but was acquitted; he was however convicted with the others under s. 4. The Magistrate appears to have found that the house was occupied by all the accused except the Brahmins, who seem to be three or four among them.

"The prosecution must prove that the place comes under the definition of a common gaming house in s. 1 of the Act taken with s. 6. It is, I believe, settled that coins are not instruments of gaming—*Queen-Empress* v. *Vithal Bhaichand* (1). The case of *cowries* is somewhat more doubtful. They [433] are not instruments primarily devised or intended for gaming. In a very recent case, *Queen-Empress* v. *Bala Misra* (2), it was held that if

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* Criminal Reference No. 271 of 1897, made by W. B. Brown, Esq., Officiating Sessions Judge of Cuttack, dated the 20th of September 1897.

(1) 6 B. 19. (2) 19 A. 311.

cowries were used in any particular case as instruments of gaming, they should be considered as such for the purpose of the Act. I understand this to apply to the case in which *cowries* are used as counters representing a higher denomination of coins. When the *cowries* themselves are gambled for I think they are not instruments of gaming. The game in the present case was probably some variety of odds and evens, and it appears that *cowries* and pice were the things gambled for: 24 *cowries* exchange for a pice. It is impossible to say whether the *cowries* were gambled for as counters or for themselves. I have not been referred to any Calcutta case on the legal status of *cowries*, and I think it would be desirable to have a definite ruling on the subject.

"Another necessary part of the definition of a common gaming house is that it must be kept for the profit of the occupier. Section 6 under certain circumstances raises a rebuttable presumption that it is so occupied. In this case, however, the person who was tried as the occupier was actually acquitted on that charge. The Magistrate seems to believe that the house is occupied by all the accused except the Brahmins. Whether this means that they live there permanently, or that they keep it as a club, does not appear. It can hardly be believed that the occupiers made gain or profit out of the two or three Brahmins who were probably servants. On this ground, I think, the building was probably either accused's dwelling house or their club, and was not a common gaming house."

No one appeared in support of the reference.

The judgment of the High Court (BANERJEE and WILKINS, JJ.) was as follows:—

JUDGMENT.

The accused have been convicted under s. 4 of Bengal Act II of 1867 and sentenced to pay a fine of Rs. 10 each. The learned Sessions Judge recommends that the conviction and sentence be set aside on the ground that the house in which the accused were found is not shown to be a common gaming house within the meaning of s. 1 of the Act.

To sustain a conviction under s. 4 of the Act, no doubt two things have to be established, first, that the accused were found gambling, and, second, that the place where they were found was a common gaming house within the meaning of the Act. The first is clearly established as has been found in the judgment of the Magistrate. As to the second, the mere fact of gambling having taken place in the house on previous occasions was not, as the Magistrate **[434]** appears to think, sufficient to make it a common gaming house within the meaning of the Act, as the condition that it must be kept "for the profit or gain of the person owning, occupying, using, or keeping" it, though inferrible from it, would not be necessarily established by that fact. But if *cowries* are instruments of gaming within the meaning of the Act, the finding of *cowries* in the house upon search made under the warrant issued in this case will, under s. 6 of the Act, raise a rebuttable presumption that the house is used as a common gaming house. Now, though coins are not instruments of gaming, as has been held in *Queen-Empress* v. *Vithal Bhaichand* (1), *cowries* are different from coins, and may be treated as instruments of gaming, where they are used as counters, or as a means to carry on gaming. See *Queen Empress* v. *Bala Misra* (2). And in the present case, having regard to the fact that there were found both pice and *cowries*, and the latter were being used as

(1) 6 B. 19. (2) 19 A. 311.

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means of gaming, we think the presumption under s. 6 of the Act may well arise, a presumption which is further supported by the fact of the house having been used for gaming on previous occasions.

We therefore decline to interfere in this case.

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25 C. 434 = 2 C.W.N. 305.

CRIMINAL REFERENCE.

Before Mr. Justice Banerjee and Mr. Justice Wilkins.

RAM CHANDRA BORAL (*Complainant*) *v.* JITYANDRIA *alias* FARING BHUTTACHARJEE (*Accused.*)* [16th November, 1897.]

Criminal Procedure Code (Act X of 1882), *s.* 522—*Restoration of possession of immoveable property—Dispossession by use of criminal force.*

The words "an offence attended by criminal force" in s. 522 of the Criminal Procedure Code (Act X of 1882) mean an offence, of which criminal force forms an ingredient. Section 522 is not applicable to cases where there has been no conviction for criminal force, either separately or as an ingredient of the offence of which there is a conviction, and where there is no finding that any person has been dispossessed of any immoveable property by criminal force.

[435] *Luchmi Dass* v. *Pallat Lall* (1), and *Soshi Bhusan Dutt* v. *Pyari Kishore Biswas* (2), followed.

[**N.F.**, 15 P.R. 1914 Cr. = 112 P.L.R. 1914 = 14 P.W.R. 1914 = 15 Cr. L.J. 275 = 23 Ind. Cas. 483; **Diss.**, 26 M. 49 (50) = 12 M.L.J. 447 = 2 Weir 676; **F.**, 25 A. 341 (343) = 23 A.W.N. 59; 27 C. 174 (175) = 4 C.W.N. 307; 5 C.W.N. 250 (252); **R.**, 23 B. 494 (498); 4 C.W.N. 308 (309); 4 Cr. L.J. 293 = 12 P.R. 1906 (Cr.) = 54 P.L.R. 1907; 14 Cr.L J. 172 = 19 Ind. Cas. 172; **Com.**, 5 Cr.L.J. 278 = 11 C.W.N. 467.]

REFERENCE under s. 438 of the Criminal Procedure Code by the Sessions Judge of Moorshedabad. The facts of the case appear from the following portion of the letter of reference :—

"The trial was concluded on the 10th December 1896, and all the accused were convicted under s. 143 of the Penal Code. They appealed to the District Magistrate, who on the 17th December upheld the conviction.

"On the 26th July the complainant in the case under s. 143 of the Indian Penal Code made an application to the Honorary Magistrate who had tried the case, for an order under s. 522 of the Criminal Procedure Code. The Honorary Magistrate recorded the following order on the petition: 'Possession be given to the complainant under s. 522 of the Criminal Procedure Code.' The petitioner moved this Court to refer the matter to the High Court on the ground that it was illegal. The petitioner was the principal accused and was convicted under s.143 of the Indian Penal Code on the 10th December last. A rule was issued by this Court in the following terms: 'Let a rule issue on the District Magistrate and on the opposite party to show cause why a reference to the High Court should not be made with the recommendation that the order under s. 522 of the Criminal Procedure Code be set aside on the following grounds: (*a*) That the original conviction having been for an offence which did not contain the element of force, s. 522 is inapplicable. (*b*) That in the original case it was not found that there was any dispossession of the opposite party. (*c*) That the original case having been decided in December

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* Criminal Reference No. 275 of 1897, made by L. Palit, Esq., Officiating Sessions Judge of Murshedabad, dated the 25th of September 1897.

(1) 23 W.R.Cr. 54. (2) 1 C.W.N. cclvi.

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last the Honorary Magistrate was not competent to pass an order under s. 522 of the Criminal Procedure Code in July.'

"The Honorary Magistrate has not offered any explanation.

"The order appears to me to be clearly illegal and improper. The conviction was under s. 143 of the Indian Penal Code, of which offence the use of criminal force is not a constituent element. Section 522 of the Code of Criminal Procedure applies 'whenever a person is convicted of an offence attended by criminal force.' I interpret the phrase 'attended by criminal force, to mean 'of which the use of criminal force is an ingredient.' The learned pleader for the opposite party argued (1) that the phrase 'attended by criminal force' might mean attended by the use of criminal force or the show of criminal force, and (2) that 'attended by criminal force' might be interpreted to mean not that the use of criminal force must necessarily be an ingredient constituting the offence, but that the commission of the offence of which the accused [436] is convicted was accompanied by criminal force, though there may have been no conviction for the use of such criminal force. I think both the arguments are unsound. 'Criminal force' has been defined in s. 350 of the Indian Penal Code, and it is quite clear from that section that criminal force must necessarily mean the use of force and does not include the show of criminal force. Had criminal force included the show of criminal force the definition of assault would have been unnecessary. As to the second contention that the section is applicable if the commission of the offence of which a person is convicted was accompanied by criminal force, although there was no conviction for such criminal force, it amounts to this, that the Court passing the order is to go beyond the conviction, and consider whether there was criminal force used or not apart from the conviction. That certainly could never have been intended. If the section was intended to mean that then it would have run as follows: 'Whenever a person is convicted of an offence and it appears to the Court that any person has been dispossessed of immoveable property by criminal force, the Court may, &c.' instead of being as it is now 'whenever a person is convicted of an offence attended by criminal force.' I am therefore of opinion that s. 522 of the Code of Criminal Procedure is not applicable to cases where there has been no conviction for criminal force either separately or as an ingredient of the offence of which there is a conviction. Even if it be admitted that the section is applicable to such cases, it is to be noted that there is no finding in the Honorary Magistrate's judgment as to the use of criminal force. He no doubt says in giving the account of the prosecution that the men assembled were throwing brickbats, but he nowhere finds that as an established fact.

"The second ground on which the rule was issued was: 'That in the original case it was not found that there was any dispossession of the opposite party.' The Honorary Magistrate's judgment on this point is as follows: 'The accused's main contention is that the said piece of land belongs to the said Nebalia Estate, of which first accused is the executor and rest servants and defendants, on a purchase from one Lakhan Chandra, first witness for defence. Both the parties filed documentary evidence. It appears that Lakhan Chandra purchased it on a sale by the Official Assignee and that the land formerly belonged to one Gahi Babu. The boundary mentioned in the deed executed by the Official Assignee does not exactly tally with that executed in the sale deed of Lakhan Chandra. No party had advanced any evidence of taking actual possession of the land after purchase, but it is clear from the sale certificate, as well as from

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the deposition of the said Lakhan Chandra, that there lies a land on the south of Pulin Dhar's *hatia* measuring about 25 or 30 cubits by 5 or 6 cubits which is in possession of Pulin Dhar, and it is evident from the deposition of complainant's witnesses, as well as from the evidence of Durga Churn Dey, fifth witness for the defence, that Raj Krishta had a [437] hut, and that it stands on Pulin Dhar's land. As to the other portion of the land which is lying waste it appears that no party was in undisturbed possession, and the parties had a dispute about it. Sub-Inspector Gagun Chunder Neogi said that a proceeding under s. 145 of the Criminal Procedure Code was pending in the Berhampore Court between the parties, and both the parties were ordered not to interfere, so this statement clearly supports my aforesaid finding.'

"The case for the prosecution was that the complainant's master Pulin Chandra Dhar had purchased forty years ago a plot of *lakhiraj* land, and that this Rajkrishta, whose name appears in the above extract from the judgment of the Honorary Magistrate, was a tenant of Pulin Dhar's and had a hut on a portion of the land.

"From the above extract from the Honorary Magistrate's judgment it appears that he found that, as regards a portion of the disputed land, it was in no one's undisturbed possession, and that there were proceedings under s 145 of the Criminal Procedure Code pending. As regards the hut he found it to be in the possession of Pulin's tenant Rajkrishta.

"Now the petition praying for an order under s. 522 evidently relates to a good deal more than the hut which was in Rajkrishta's possession. The Honorary Magistrate, without specifying what portion of the land the complainant was to be put in possession of, ordered: 'Possession be given to the complainant under s. 522 of the Criminal Procedure Code.' It is to be noted that the complainant was merely the servant of Pulin Dhar, and never had anything to do with the possession of the land or hut, of which latter Rajkrishta was in possession. On this ground too the order is clearly an illegal and improper one.

"The third ground on which the rule was issued raises an important question of law, *viz.*, whether an order under s. 522 of the Criminal Procedure Code can be passed subsequently to, and independently of, the decision in the original case. I think not. To allow such an order to be passed subsequently would be productive of the greatest confusion and mischief. Within what limit of time must the order be passed? There is no limit fixed in the section, and if it be held that such orders can be passed subsequently, then the order may, as in this case, be seven months after the decision of the original case: and if seven months afterwards, then why not a year or two years and so on? This clearly could never have been intended by the Legislature. There are good grounds for holding that the order under s. 522 of the Criminal Procedure Code should be a part of the original judgment by which there is a conviction of an offence attended by criminal force. One very important reason in favour of taking this view is that, whereas orders under ss. 517, 518 or 519 of the Code are subject to appeal, revision and reference, there is no such special provision with regard to an order under s. 522. And that I [438] think is due to the Legislature intending that an order under s. 522 of the Criminal Procedure Code should form a part of the substantive order of conviction, and should be subject to appeal or revision with the substantive order; otherwise it may happen that an order under s. 522 may be passed by the original Court while the substantive order convicting the accused has been appealed against. The conviction may be set aside on

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appeal, but there being no provision for an appeal against an order under s. 522 of the Criminal Procedure Code, it cannot be interfered with. An appeal against an order under s. 522 will certainly not lie under the provisions of Chap. XXXI. If, however, s. 522 be so construed that an order under this section is to be considered a part of the order of conviction, then, if the conviction be set aside on appeal, the order under s. 522 will be necessarily set aside as part of the conviction itself.

"This case exemplifies the danger of allowing an order under this section to be made except as a part of the original order of conviction.

"On the above grounds I would refer this case to the High Court with the recommendation that the order under s. 522 be set aside."

Babu *Jogendro Nath Bose* appeared on behalf of the petitioner.

Babu *Joy Gopal Ghose* on behalf of the opposite party.

The judgment of the High Court (BANERJEE and WILKINS, JJ.) was as follows:—

JUDGMENT.

This is a reference from the Sessions Judge of Murshedabad recommending that an order of the Honorary Magistrate of Lalbag, giving possession of certain property to the opposite party under s. 522 of the Code of Criminal Procedure, should be set aside on three grounds,—*first*, because the offence of which the petitioner has been convicted is not one attended by criminal force, the conviction being for an offence punishable under s. 143 of the Indian Penal Code; *secondly*, because it has not been found that the opposite party has been dispossessed of any immoveable property by the use of criminal force; and, *thirdly*, because the order under s. 522 does not form part of the judgment in the criminal case as it ought to have done, but was passed several months after the conviction in that case.

We are of opinion that the view taken by the learned Sessions Judge with reference to the first two grounds is correct. Section [439] 522 of the Code of Criminal Procedure says: "Whenever a person is convicted of an offence attended by criminal force, and it appears to the Court that by such force, any person has been dispossessed of any immoveable property, the Court may, if it thinks fit, order such person to be restored to the possession of the same." "An offence attended by criminal force" means, in our opinion, an offence of which criminal force forms an ingredient. The offence in this case being that of being members of an unlawful assembly, is one into the composition of which the use of criminal force does not enter, though the show of criminal force may in certain cases; and the view we take is supported by the cases of *Lachmi Dass* v. *Pallat Lall* (1) and *Sashhi Bhusan Dutt* v. *Pyari Kishore Biswas* (2). But granting that the expression "attended by criminal force," is ambiguous and might include a case in which the offence involves not only the actual use of criminal force, but the show of such force as an ingredient, it cannot be said that the expression "by such force" in the sentence "and it appears to the Court that by such force any person has been dispossessed" means the show of criminal force and not the actual use of it.

The learned vakil for the opposite party referred to a passage in the judgment of the Court below as showing that the dispossession was by the use of force; but that would not be sufficient. It must be found

(1) 23 W. R. Cr. 54. (2) 1 C. W. N. CCLVI.

1897 Nov. 16. — CRIMINAL REFERENCE. — 25 C. 434 = 2 C.W.N. 303.

that the dispossession was by the use of "criminal force" as defined in s. 350 of the Indian Penal Code, the last clause of s. 4 of the Code of Criminal Procedure clearly showing that the expression "criminal force" used in s. 522 of the Code of Criminal Procedure must be understood in the sense in which it is defined in the Penal Code.

In this view of the matter it becomes unnecessary to consider the other questions raised before us.

The order under s. 522 of the Code of Criminal Procedure must therefore be set aside.

S. C. B.

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25 C. 440.

[440] CRIMINAL REFERENCE.

Before Mr. Justice Banerjee and Mr. Justice Wilkins.

QUEEN-EMPRESS *v.* HAR CHANDRA CHOWDHURY AND ANOTHER (*Defendants*).* [23rd October, 1897.]

Recognizance to keep peace—Surety bond—Liability to forfeiture—Evidence necessary—Criminal Procedure Code (Act X of 1882), s. 514.

The mere fact of the person for whom another stands surety being convicted of a breach of the peace ought not to be sufficient to make the surety bond executed by the latter liable to forfeiture without any evidence taken in the presence of the surety to show that the forfeiture has been incurred.

The language of s. 514 of the Criminal Procedure Code (Act X of 1882) does not indicate that the final order making a person bound by a bond can be made without taking any evidence in his presence or giving him any opportunity of cross-examining the witnesses on whose evidence the forfeiture is held to be established.

The mere production of the original record or of a certified copy of the original record of the trial in which the principal had been convicted of breaking the peace within the period covered by a bond would not be conclusive, if indeed it would be any evidence, against the surety in a proceeding under s. 514 of the Criminal Procedure Code.

[Diss., 32 P.R. 1903 Cr.; N.F., 12 Cr. L.J. 404 = 11 Ind. Cas. 588 = 226 P.L.R. 1911 = 35 P.W.R. 1911.]

REFERENCE under s. 438 of the Criminal Procedure Code (Act X of 1882) by the Sessions Judge of Mymensingh.

The facts of the case appear sufficiently from the letter of reference, the material portion of which was as follows:—

"In this case the Deputy Magistrate, Babu Uma Prosanna Guha, by a proceeding, dated 7th April 1897, called on the petitioners to show cause why bonds for Rs. 100 each which they were said to have executed as sureties for Ram Kanta Chango and Hara Charan Chango keeping the peace for a period of one year from the 20th September 1895, should not be forfeited on the ground that Hara Charan Chango and Ram Kanta Chango were convicted on the 30th October 1896 and 20th January 1897, respectively, of an offence punishable by s. 324 of the Indian Penal Code committed on the 28th July 1896.

"The petitioner showed cause on the 23rd April. It will be observed that they did not distinctly admit having executed the bonds.

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* Criminal Reference No. 268 of 1897 made by R. H. Anderson, Esq., Sessions Judge of Mymensingh, dated the 20th and 21st September 1897, against the order of E. B. Harris, Esq., District Magistrate, and Babu Uma Prosunna Guha, Deputy Magistrate of that District, dated the 27th June 1897 and the 7th May 1897, respectively.

"**[441]** The Deputy Magistrate without recording any evidence forfeited the bonds by an order, dated 7th May 1897. An appeal was preferred to the District Magistrate, and dismissed on the 27th June, though the amount forfeited was in each case reduced to Rs. 50.

"In my opinion the Deputy Magistrate's order is illegal. These bonds could only be forfeited on proof taken in the presence of the petitioners that the bonds were liable to be forfeited. *In the matter of Mohesh Chunder Roy* (1), *Empress* v. *Nobin Chunder Dutt* (2), and *In re Chandra Sekhar Rai* (3).

"Further, as it seems to me, there should have been proof that these petitioners executed these bonds, since they did not admit they had executed them.

"Finally I have considerable doubt whether this penalty could be exacted from the sureties, when it was not exacted from the principals (see the Deputy Magistrate's order).

"With regard to the District Magistrate's remarks I would say (*a*) that the case of *Empress* v. *Nobin Chunder Dutt* (2) appears to me to have much more bearing on the question before us than the District Magistrate thinks. The question referred to the Full Bench was whether a Magistrate is bound by law to record the proof on which he proposes to forfeit a recognizance to keep the peace in the *presence of the person bound by such recognizance.* But the answer was this: 'A Magistrate is not justified in forfeiting a recognizance unless the *party charged with a breach of the peace* has had an opportunity of cross-examining the witnesses, upon whose evidence the rule to show cause has been issued.' Now, when the surety is called on to show cause why his bond should not be forfeited, it seems to me he is then legally in the position of the 'party charged with a breach of the peace.' He did not personally break it, but, in the eye of the law when the principal broke it, the surety broke it. That is what he is penalized for. As I understand the criminal law no punishment of any kind is imposed on a man unless the evidence on which the order of punishment is based is taken in his presence (or at least he has had an opportunity of being present) and he has had an opportunity of showing that on that evidence he ought not to be punished.

"(*b*) The second point in my reference is purely technical I admit. As, however, the petitioner's pleader urges it, and in fact it is a valid though technical objection, I think I am bound to mention it.

"(*c*) The third point is doubtful. I cannot say I am sure the Magistrate is wrong; still the matter is not free from doubt in a case like this where the **[442]** principals have been prosecuted and convicted and their bonds have not been forfeited."

No one appeared in support of the Reference.

The following judgments were delivered by the High Court (BANERJEE and WILKINS, JJ.):—

JUDGMENTS.

BANERJEE, J.—The petitioners were called upon by the Deputy Magistrate of Mymensingh under s. 514 of the Code of Criminal Procedure to show cause why the bond executed by them as sureties for Ram Kant Chango and Hara Charan Chango keeping the peace for one year should not be forfeited, and why they should not each pay the amount

(1) 10 C. L. R. 571. (2) 4 C. 865. (3) 11 C. 77.

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of the bond (Rs. 100), when the said Rama Kanta Chango and Hara Charan Chango had been convicted of an offence under s. 324 of the Indian Penal Code. The petitioners showed cause, but their objections were overruled, and the Deputy Magistrate without recording any evidence declared on the 7th May 1897 that the bonds were forfeited; and that order was affirmed on appeal by the Magistrate of the district on the 27th of June 1897, with this modification, that the amount forfeited in each case was reduced to Rs. 50.

The learned Sessions Judge of the District recommends that the orders of the District Magistrate and the Deputy Magistrate be reversed for three reasons: *first*, because they were made without taking any evidence in the presence of the petitioners; *secondly*, because the execution of the bond by the petitioners was neither admitted nor proved: *thirdly*, because the principal parties not having been proceeded against, the sureties could not be made liable.

In support of the first reason the cases of *Empress* v. *Nobin Chunder Dutt* (1) and *In the matter of Mohesh Chunder Roy* (2) are relied upon by the Sessions Judge. Though the facts of the two cases referred to are different from those of the present, the principle upon which they are based is, I think, applicable to this case, and no order declaring the forfeiture of a bond can be **[443]** made against any party unless the ground of forfeiture is established by evidence, which is taken in the presence of such party, or is otherwise admissible against him. The mere fact of the persons for whom another stands surety being convicted of a breach of the peace ought not to be sufficient to make the surety bond executed by the latter liable to forfeiture, without any evidence taken in the presence of the surety to show that the forfeiture has been incurred.

It is true that s. 514 of the Code of Criminal Procedure by enacting that "whenever it is proved to the satisfaction of any Court by which a bond under the Code is taken that such bond has been forfeited, it shall record the grounds of such proof, and it may call upon any person bound by such bond to pay the amount or to shew cause," indicates that the evidence upon which the Court is satisfied that a forfeiture has been incurred and that the person bound by the bond should be called upon to pay or to shew cause, may be taken in the absence of such person, but that does not show that the final order making him liable can be made without taking any evidence in his presence or giving him any opportunity of cross-examining the witnesses on whose evidence the forfeiture is held to be established. Where the bond is given by the person bound down to keep the peace, the judgment convicting him of a breach of the peace is admissible in evidence against him, and may form a sufficient basis for an order under s. 514, he having had an opportunity of cross-examining the witnesses on whose evidence the forfeiture is held established. So also in a case in which a surety bond is given on condition that it shall be forfeited if the person for whom it is given is convicted of a breach of the peace, the judgment in the case in which such person is convicted would be admissible in evidence against the surety under s. 43 of the Evidence Act as evidence of the fact of conviction, which is a relevant fact in the case.

But where, as in this case, the bond is given by a surety, and the condition in the bond is that it shall be forfeited, not if the principal party is convicted of a breach of the peace, but if he commits a breach of the peace, the judgment convicting the **[444]** principal of a breach of the

(1) 4 C. 865. (2) 10 C.L.R. 571.

peace is no evidence under the Evidence Act (see s. 43) against the surety who was no party to it, to prove that the party bound down to keep the peace has really committed a breach of the peace. Such fact must be proved by evidence taken in the presence of the surety, unless it is admitted by him. There has been no such evidence taken in this case, nor is the fact of a forfeiture having been incurred admitted. That being so, the order complained of must in my opinion be set aside, and the amount, if realized, refunded.

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In this view of the case it becomes unnecessary to determine the other two points raised in the reference. I may add, however, that the second ground is not tenable, the execution of the bond having been admitted in the argument as pointed out in the explanation of the Deputy Magistrate. Nor is there any force in the third reason. The mere fact of the principal party not being proceeded against is no ground for holding that the surety is discharged.

WILKINS, J.—I am of the same opinion. Before it can be declared that a bond executed by a surety is forfeited under s. 514 of the Criminal Procedure Code, there must be a formal finding arrived at after taking evidence in the presence of such surety, which evidence must prove that the principal person has so acted as to necessitate or render it advisable that the surety should by reason of the act of the principal forfeit his bond. The mere production of the original record or of a certified copy of the original record of the trial in which the principal had been convicted of breaking the peace within the period covered by the bond, would not be conclusive, if indeed it would be any evidence, against the surety in a proceeding under s. 514 of the Criminal Procedure Code. The proceedings are judicial proceedings, and an order of forfeiture under s. 514 can be made only after a proper judicial enquiry and upon legal evidence recorded in presence of the surety.

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[445] APPELLATE CIVIL.

Before Mr. Justice Banerjee and Mr. Justice Wilkins.

MADHUB RAM (*Defendant*) v. DOYAL CHAND GHOSE (*Plaintiff*).*
[19th November, 1897].

Landlord and tenant—Suit for rent—Bengal Tenancy Act (VIII of 1885), *ss.* 72 *and* 73—*Rule* 3, *chap* I *of the Rules made by the Local Government under cl.* (2) *of s.* 189 *of the Bengal Tenancy Act—Liability for rent on change of landlord—Notice of transfer—Transfer of putni right over a specific area, whether valid—Regulation VIII of* 1819, *ss.* 3 *and* 6—*Transfer of Property Act* (*IV of* 1882), *s.* 6.

Putni right over a specific area lying within a *putni* taluk is transferable. Sub-s. 1 of s. 72 of the Bengal Tenancy Act does not require that the notice therein contemplated should be given in any particular manner.

THE facts of the case, so far as they are necessary for the purposes of this report, and the arguments, appear sufficiently from the judgment of the High Court.

Babu *Mohendra Nath Roy*, for the appellant.

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* Appeal from Appellate Decree No. 235 of 1896, against the decree of Babu Abinash Chunder Mitter, Subordinate Judge of Hooghly, dated the 13th of November 1895, reversing the decree of Babu Devendra Bojoy Bose, Munsif of Howrah, dated the 26th July 1894.

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Dr. *Rash Behary Ghosh*, and Babu *Hara Kumar Mitter*, for the respondent.

The judgment of the High Court (BANERJEE and WILKINS, JJ.) was as follows :—

JUDGMENT.

BANERJEE, J.—This appeal arises out of a suit for arrears of rent brought by the plaintiff-respondent on the allegation that in execution of a decree held by him against Bibi Jarao Kumari, he purchased at a sale held by public auction the interest of the said Bibi Jarao Kumari in a certain quantity of land; that the defendant holds the said land at a certain rent; and that the rent payable in respect of the period in suit is due to him from the defendant.

The defence, so far as it is necessary to be referred to for the purposes of this appeal, was to the effect that the land in suit **[446]** being *basti* land situated in Sulkea within the jurisdiction of the Howrah Municipality, the suit was not maintainable in the form in which it was brought and in the Court in which it was instituted; that there was no relation of landlord and tenant between the plaintiff and the defendant; and that the defendant was not liable for the rent claimed, and it had been paid to Bibi Jarao Kumari, and the plaintiff had given the defendant no notice of his purchase before such payment.

The first Court dismissed the suit on two grounds: *first*, because the plaintiff's purchase which was that of a portion of the interest of Bibi Jarao Kumari, which was a *putni*, was invalid in law; and, *secondly*, because the defendant was not exempted from liability to pay the rent in suit to Bibi Jarao Kumari. On appeal by the plaintiff, the lower appellate Court has reversed the first Court's decision, holding that the plaintiff has acquired a valid right by his auction purchase, to claim rent from the defendant, and that the defendant must be taken to have had sufficient notice of the plaintiff's purchase after the date when the plaintiff took possession of the property purchased by him, and any payment made by the defendant subsequent to that date must be taken to have been made by him at his own risk.

In second appeal it is contended for the defendant-appellant that the decision of the lower appellate Court is wrong, *first*, because the purchase by the plaintiff of the interest of Bibi Jarao Kumari in a portion of the lands of her *putni taluk* was not valid in law; and, *secondly*, because the defendant was not liable to pay rent to the plaintiff when he did not give any notice to him in due form as required by s. 72 of the Bengal Tenancy Act.

In support of the first contention the learned vakil for the appellant referred to s. 3 of Reg. VIII of 1819, and argued that as property in a *putni taluk* was a creation of Reg. VIII of 1819, such property could arise only so far as it was recognized by that enactment; and as the Regulation did not recognize the existence of separate property in any portion of the land of a *putni taluk*, what was sold here was not property, *i. e.*, was not saleable property within the meaning of **[447]** the law, and the plaintiff, therefore, could not have acquired any interest by his auction-purchase.

We are unable to accept this contention as sound. Though, no doubt, cl. 1 of s. 3 of the *putni* Regulation speaks of the entire *putni*, s. 6 affords indication of the validity, under certain conditions, of a transfer by the *putnidar*, extending, not only to fractional or aliquot parts of a *putni taluk*,

but also to any alienation other than that of the entire interest, that is, to any alienation of the interest in any portion of the *putni taluk*, such portion not being an aliquot part or share, but being a portion of the land composing the *putni*. We may also refer to s. 6 of the Transfer of Property Act as showing that property of the kind that has been purchased by the plaintiff in this case is transferable, and could therefore be validly attached and sold under the Code of Civil Procedure. The first contention urged on behalf of the appellant therefore fails.

In support of the second contention, reference has been made to s. 72 of the Bengal Tenancy Act and to Rule 3, Chap. I of the Rules made by the Local Government under cl. (2) of s. 189 of the Tenancy Act; and it is argued that as the notice has not been served in the manner prescribed by the said Rule, which is of general application, and should, therefore, be held to apply to this case, the mere fact of notice being presumable from the plaintiff having taken possession, according to the provisions of the Code of Civil Procedure, cannot be considered a sufficient compliance with s. 72 of the Bengal Tenancy Act, which makes the giving of notice of the transfer a condition precedent to the liability to pay rent to the transferee arising.

In answer to this contention, the learned vakil for the respondent urges, in the first place, that the point now raised is different from that which was raised in the written statement of the defendant, in the 9th paragraph of which he said: "If the plaintiff had given any information to or served any notice on the defendant the latter could find out the proper party and pay rents considerately"; in the second place that the provisions of the Bengal Tenancy Act were inapplicable to this [448] case, which was a suit for rent on account of *basti* land situated with the limits of a Municipality; in the third place, that even if the Bengal Tenancy Act applied to this case, sub-s. 1 of s. 72, which is the provision relied upon, does not require the giving of the notice in any particular manner, and that the requirements of the law were fully satisfied when it was found that the defendant had notice of the purchase; and, lastly, that Rule 3 relied upon by the appellant was in its nature directory and not mandatory, and that all that was required was that the defendant should have notice of the transfer, the provisions relating to the mode in which notice ought to be served being intended only to secure a proper notice.

In answer to the first of these grounds upon which the appellant's contention has been sought to be met, the learned vakil for the appellant points out that the defendant not only said what is stated in paragraph 9 of his written statement, but in an earlier part of that statement he urged that there had been no notice duly served. In answer to the second reason relied upon by the learned vakil for the respondent it was urged that as the plaintiff brought his suit under the Bengal Tenancy Act, as he must have done when he claimed damages, and not interest on the arrears of rent, and the Court gave him a decree in accordance with such prayer, it was not open to the plaintiff to urge now that the case was not governed by the Bengal Tenancy Act. And as to the third and fourth grounds it was urged, in reply, that there was no distinction observed in the Bengal Tenancy Act between the giving of notice and the serving of notice, and that Rule 3 relied upon being of general application and mandatory in its character, should be held to govern this case.

We are of opinion that the first ground upon which the learned vakil for the respondent seeks to meet the appellant's objection is not tenable,

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as the defendant in his defence not only said what has been pointed out in paragraph 9, but also raised the objection that no notice had been served upon him.

The question raised upon the second ground relied upon by the respondent is not altogether free from difficulty, having [449] regard to the fact that the suit was evidently brought under the Bengal Tenancy Act, and there is nothing found as to the nature and incidents of the holding at its inception; but in the view we take of the remaining two grounds urged for the respondent, it becomes unnecessary to say more with reference to this second ground. We are opinion that sub-s. 1 of s. 72 does not require that the notice therein contemplated should be given in any particular manner. In the first place a comparison of sub-s. 1 with sub-s. 2 of that section would show that, whereas in sub-s. 1 all that is said is that the tenant's liability to pay rent to the transferee would not accrue unless the transferee has, before payment to the original landlord, given notice of the transfer to the tenant, sub-s. 2 enacts that where there is more than one tenant paying rent to the landlord, a general notice from the transferee to the tenants of the transfer in the prescribed manner shall be a sufficient notice for the purpose of this section. The prescribed manner, which by cl. 15 of s. 3 means the manner prescribed from time to time by the Local Government by notification in the official Gazette, is therefore expressly limited to the case where there are more tenants than one paying rent to the landlord. That, however, admittedly, is not the case here.

A comparison of s. 72 with s. 73 also bears out the same view, for the notice contemplated in s. 73 is required to be given to the landlord in the prescribed manner. Then, again in other places, such as cl. (*b*) of s. 49, where a notice is contemplated, the Act speaks of the notice being served and not simply given; and Rule No. 3 of chap. I of the Rules made by the Local Government under the Act, runs in these words: "Where no other mode of service of the notice is prescribed by the Tenancy Act, or by these Rules, service shall be effected in the manner prescribed for service of summons on the defendant." This evidently shows that Rule 3 is intended to apply only to those cases where the Act speaks of the service of a notice and not merely of the giving of a notice. Rule 3 may apply to cases where the Act speaks of the giving of notice if such notice is required to be given in the prescribed manner. But we do not think it would be reasonable to hold that, although the Act may speak only of the giving of a notice without the qualifying [450] words "in the prescribed manner," nevertheless a notice given in any way other than the prescribed manner should be treated as not being a sufficient compliance with the Act. Seeing that when the Legislature intended that the notice was either to be served or to be given in the prescribed manner, it has expressly said so, and seeing that in the provisions of the law, sub-s. 1 of s. 72, now under consideration, it has not taken care to say so, we do not think that it would be right to hold that it was nevertheless intended that notice under sub-s. 1 of s. 72 should be served in the prescribed manner.

What we have said above is sufficient for the disposal of the case. Were it necessary to determine the fourth point raised by the learned vakil for the respondent, we should have been inclined to hold that Rule 3 of the Rules made under s. 189, in a case like this, was intended to be only directory and not mandatory. The two grounds urged before us on

behalf of the appellant, therefore, both fail; and the appeal must consequently be dismissed with costs. 1897 Nov. 19.

We should add that we are indebted to the learned vakils on both sides for the able arguments that have been addressed to us in this case. APPELLATE CIVIL.

S. C. G. *Appeal dismissed.*

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25 C. 450.

APPELLATE CIVIL.

Before Mr. Justice Trevelyan and Mr. Justice Stevens.

RAM JEWAN MISSER AND OTHERS (*Plaintiffs*) v. JAGARNATH PERSHAD SINGH AND OTHERS (*Defendants*).* [1st September, 1897.]

Limitation Act (XV of 1877), sch. II, art. 132—Mortgage—Usufructuary mortgage—Further mortgage of the same property—Destruction of mortgaged property by alluvion—Transfer of Property Act (IV of 1882), s. 68, Right to sue under—Limitation.

Plaintiffs advanced money on an usufructuary mortgage of certain land in Magh 1280 (January 1873), and subsequently advanced another sum of money in Sraban 1280 (July 1873) on the security of the same land. The [451] land was washed away in 1892. In an action brought in 1894 under s. 68 of the Transfer of Property Act (IV of 1882) for the money of both the mortgages on the ground that the defendants declined to give fresh security the defendants objected that the claim as regards the mortgage of Sraban 1280 was barred before the inundation, under cl. 132 sch. II of the Limitation Act (1877), the money being due on the date of the bond. *Held*, overruling the objection of limitation :—

1. With reference to the terms of the mortgage of Sraban 1280, that it was intended to add the money to the amount of the previous mortgage, and to place it on the same conditions, and that the plaintiffs were, therefore, equally entitled to sue for the money upon this mortgage as upon the other.

2. That assuming that there was a right to sue for the money, it did not follow that the plaintiffs were not entitled to have substituted for the security the money which took the place of the security.

3. That on the happening of the event provided for in s. 68, the plaintiffs who were admittedly entitled to remain in possession of the property, until the moneys had been repaid, were clearly entitled to have the money substituted for the property.

[R., 26 B. 241 (245); 3 Bom.L.R. 876 (877); 6 C.L.J. 143 (145) = 11 C.W.N. 240-N.]

THIS was a suit by the mortgagees under s. 68 of the Transfer of Property Act requiring the defendants, mortgagors, to give them sufficient security for their debt, on the ground that the mortgaged property had been destroyed by inundation, and should the defendants fail to do so the suit was in the alternative for the mortgage-money. There were two mortgages in respect of the property, one a registered usufructuary mortgage, dated the 1st Magh 1280 (14th January 1873) and the other an unregistered mortgage, dated the 21st Sraban 1280 (31st July 1873). The lower Courts found that the inundations took place in Asar and Sraban 1299 (July 1892) and the present suit was brought on the 26th August 1894. One of the objections raised in defence was that the money due on the mortgage of 21st Sraban 1280 was barred by limitation. The terms of

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* Appeal from Appellate Decree, No. 1073 of 1866, against the decree of Babu Mohendra Nath Mitter, Subordinate Judge of Shahabad, dated the 1st of May 1896, modifying the decree of Babu Lalit Kumar Bose, Munsif of Buxar, dated the 8th of July 1895.

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the mortgages are sufficiently set forth in the judgment of the High Court. The material portion of the Munsif's judgment was as follows :—

"The parties contracted that the money due on this mortgage bond shall not be payable immediately on the day the bond is written, but at some distant date when the *rehennama* is satisfied. The plaintiffs could not, therefore, have sued at any time they liked for money due on this mortgage bond. I, therefore, am of [452] opinion that the present cause of action arose when the property was washed away. According to the statement of both the parties the plaintiffs sue within three years of that time, consequently the suit, even though it is for a personal remedy, is not barred by limitation."

The Munsif decreed the entire claim. On appeal, the Subordinate Judge held that the bond of Sraban 1280 was barred by limitation. He observed :—

If the plaintiff's right to recover the money due under the bond is barred, he cannot recover the money under s. 68 of the Transfer of Property Act on the ground of the mortgage land being lost by diluvion, for his right to recover the money being barred, the security is at an end. There being no time fixed for payment of money in the bond, limitation under art. 132, sch. II of the Limitation Act, runs from the date of the bond. *Nilcomal Pramanick* v. *Kamini Kumar Basu* (1).

The appeal was allowed in part and the decree of the original Court was modified by disallowing the claim in respect of the bond of Sraban 1280.

The plaintiffs appealed to the High Court.

Mr. *C. Gregory*, for the appellants.

Moulvie *Mahomed Yusuf*, for the respondents.

The judgment of the High Court (TREVELYAN and STEVENS, JJ.) was as follows :—

JUDGMENT.

In this case we are of opinion that the learned Subordinate Judge has erred in the conclusion at which he has arrived. The suit was brought under the provisions of s. 68 of the Transfer of Property Act to obtain payment of certain mortgage money on the ground that the mortgaged property had been wholly destroyed by having been flooded with water. There were two mortgages, one dated Magh 1280, and the other Sraban 1280. The learned Munsif gave a decree in respect of both the mortgages. But the Subordinate Judge, while upholding the decree in respect of the mortgage of Magh, has upset it with regard to the mortgage of Sraban.

[453] The mortgage of Magh was unquestionably an usufructuary mortgage. The mortgagee was put into possession and was allowed to take the profits of the property as the interest of the money advanced by him, and the mortgagor was to pay the principal of the money on the full-moon day of any Jeyt succeeding the date of the mortgage. The second mortgage is, as we read it, clearly nothing more than a further charge of a further sum of money on exactly the same conditions as the first mortgage. It is very short, and has been translated both by the appellants' and the respondents' advisers, and there seems to be no real distinction between the two translations. Taking the translation put in by the respondents it reads in these terms: "Whereas I borrowed in cash Company's rupees 99-15 annas current coin from Madho Misser and Ram Jewan Misser, of *mouzah* Adrakpore, pergunnah aforesaid, I

(1) 20 C. 269.

shall pay the interest thereon at the rate of one rupee per cent. I have borrowed the money along with the registered deed" (that is the deed of Magh) "in which the field of my share is 3½ bighas, and I mortgage this field for this money. I shall first pay this amount together with interest, and after that the money covered by the registered mortgage bond. Therefore I execute this document so that it may be of use when required." The document proceeds to this effect: "I have executed this document as a part of the said mortgage bond;" and in the third place we find this document incorporates the second loan with the first. Meghborn Singh, who is one of the mortgagors, when signing his name says: "I execute this bond for 100 rupees payable along with the mortgage bond." There could be nothing clearer to show that it was intended to add this money to the amount of the previous mortgage and to place it on the same conditions. It follows, therefore, we think that the plaintiff is equally entitled to sue for the money upon this mortgage as upon the other.

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It has been argued that the claim in respect of this money is barred by limitation, and it is said that as the right to sue upon this mortgage was barred before the inundation, the right to sue under s. 68 of the Transfer of Property Act is also barred.

In the first place it is exceedingly doubtful to say the least of [454] it, whether there was any right at all to sue for the money. But assuming that there was such a right it does not by any means follow that the plaintiff is not entitled to have substituted for the security the money which takes the place of the security. It is admitted that the plaintiff is entitled to remain in possession of the property until the mortgage moneys have been repaid. Therefore in the event happening which is provided for in s. 68 of the Transfer of Property Act, it is clear that the plaintiff is entitled to have the money substituted for the property.

In the result, we think that the decision of the Subordinate Judge must be set aside, and that of the Munsif restored with costs in this and the lower appellate Court. As far as the cross-objections are concerned there is nothing in them, and they must be disallowed.

S. C. C. *Appeal allowed.*

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25 C. 454.

CRIMINAL REVISION.

Before Mr. Justice Hill and Mr. Justice Stevens.

CHAIRMAN OF THE SERAMPORE MUNICIPALITY (*Petitioner*) *v.* INSPECTOR OF FACTORIES, HOOGHLY (*Opposite Party*).*
[17th January, 1898.]

Factories Act (XV of 1881 *as amended by Act XI of* 1891), *ss.* 15 *(g) and proviso* (*i*), 17—*Bengal Municipal Act* (*Bengal Act III of* 1884), ss. 320, 321—*Liability for neglecting to keep a factory in a cleanly state—Criminal Procedure Code* (*Act X of* 1882), s. 537—*Nuisance—Sanction.*

The Inspector of Factories having found the latrines of the Hastings Mill, within the Serampore Municipality, in a filthy state instituted a prosecution against the manager of the mill, but the prosecution failed. He then prosecuted as representing the Municipal Commissioners of Serampore, the Chairman of the Municipality, who, on conviction, was fined Rs. 200 for "neglecting to keep

* Criminal Revision, No. 795 of 1897, against the order passed by H.F. Samman, Esq., Sub-Divisional Magistrate of Serampore, dated the 28th of October 1897.

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the factory free from effluvia arising from a privy," under the provisions of the Factories Act and of the Bengal Municipal Act, s. 320.

Held, that the conviction of the Chairman was unsustainable on the [455] finding that the Municipality and the occupier of the factory were jointly responsible.

Held, further, that it lay upon the occupier of the factory as being primarily liable for breach of any of the provisions of the Factories Act, to give the strictest proof of circumstances exonerating himself from the liability in order to fix it on any other person.

[R., 29 B. 423=7 Bom.L.R. 454 (456).]

THE Civil Medical Officer of Serampore, being the Joint Inspector of Factories, inspected the Hastings Mill, within the limits of the Serampore Municipality, and made a report to the effect that the drains and cesspits of the factory were full of filth and swarming with maggots, and that the latrines were in a neglected condition. Thereupon the Manager as the occupier of the mill was prosecuted under s. 15 (*g*) of the Factories Act, but the prosecution failed. Upon that, the present proceedings were instituted against the petitioner as representing the Municipal Commissioners of Serampore, under orders of the District Magistrate of Hooghly, (he being the Inspector of Factories of that District) for neglecting to keep the latrines of the Hastings Mill clean, under s. 15 (*g*) of the Factories Act and s. 320 of the Bengal Municipal Act, 1884, the Municipality having undertaken to maintain an establishment for the cleansing of public and private latrines within its limits.

The case was heard by the Sub-Divisional Magistrate of Serampore, who in a summary trial convicted the petitioner under both the Acts aforesaid, and sentenced him to pay a fine of Rs. 200.

Against this conviction the petitioner moved the High Court on the ground, amongst others, that he was not liable under either the Factories Act or the Bengal Municipal Act for the nuisance complained of.

Mr. *Caspersz* (with Babu *Shib Chunder Palit*) for the petitioner referred to *Chisholm* v. *Doulton* (1) in support of the rule. The rest of the arguments appear from the judgment of the Court

The judgment of the High Court (HILL and STEVENS, JJ.) was as follows :—

JUDGMENT.

This was a prosecution under cl. (*g*), sub-s. (1) of s. 15 of the Factories Act (XV of 1881), as amended by s. 14, Act XI of 1891.

[456] It appears that on the 20th of July last the Civil Medical Officer of Serampore, who is a Joint Inspector of Factories, inspected the Hastings Mill between the hours of 9 and 11 A.M. and found the latrines used by the operatives in a filthy state, the cause of that condition of things being that the pipe between the inner and the main outer cesspools had become blocked with solid nightsoil, jute and other things.

In the first place a prosecution was instituted against the manager of the mill, but the prosecution failed.

The present case was then instituted.

The sanction required by proviso (1) to s. 15, Act XV of 1881, as amended by s. 14, Act XI of 1891, was accorded to the prosecution of the Municipal Commissioners of Serampore. Process was at first issued against the Chairman of the Municipality. An order was afterwards passed for the issue of summons to all the Municipal Commissioners, but it was

(1) (1889) L. R. 22 Q. B. D. 736 (741).

eventually revoked, and the case proceeded against the Chairman, who is described in the summary-trial record made by the Sub-Divisional Magistrate by whom the case was tried as "representing the Municipal Commissioners of Serampore." In that capacity the Chairman was convicted of "neglecting to keep a factory free from effluvia arising from a privy" and under the provisions of cl. (*g*), sub-s. (1) of Act XV of 1881 read with s. 17 of the same Act and s. 320 of Bengal Act III of 1884 he was sentenced to pay a fine of Rs. 200, which the Magistrate directed to be paid out of the Municipal fund.

The ground on which the Municipality has been found to be liable is that under s. 320 of Bengal Act III of 1884, it has undertaken to maintain an establishment for the cleansing of public and private latrines within its limits, that it levies a fee from the Hastings Mill accordingly under the provisions of s. 321, and that it is therefore bound under s. 320 to "make suitable provision" for the cleansing of the latrines of the mill. The criminal liability under s. 15 of Act XV of 1881 is held by the Magistrate to attach to the Municipality by the operation of the latter part of s. 17 of the Act as amended by Act XI of 1891. That section runs as follows:—

[457] "Every occupier of a factory shall be deemed primarily liable for any breach therein of this Act or of any order or rule made thereunder; but he may discharge himself from such liability by proof that such breach was committed by some other person without his knowledge or consent, and in that case the person committing such breach shall be liable therefor."

We are now asked to set aside the conviction on several grounds, of which the principal are that the proceedings are informal, because the person prosecuted was the Chairman of the Municipality, whereas the sanction accorded was for the prosecution of the Municipal Commissioners; that ss. 15 and 17 of the Factories Act refer only to persons immediately connected with a factory; that there is nothing to show that the Municipal Act is to be read with the Factories Act; that there is no provision of law authorizing the prosecution of Municipal authorities, and that in any case neither the Municipality nor the Chairman can be held liable under the provisions of s. 17 of the Factories Act on the Magistrate's own finding, that the manager of the factory and the Municipality were jointly responsible for the obstruction which was the primary cause of the nuisance.

We may remark in passing that we are not prepared to say that the sanction did not sufficiently comply with the provisions of s. 15 of the Factories Act, and even assuming it to be otherwise, the defect would, we think, be cured by the provisions of s. 537 of the Code of Criminal Procedure. It does not seem to us necessary to enter at length into a consideration of all the questions which have been raised before us, because we are clearly of opinion that assuming that the Municipal Committee or their Chairman could at all be made criminally liable under the provisions of s. 17 of the Factories Act, the conviction is unsustainable on the findings of the Magistrate.

It has been found that a special establishment of sweepers is maintained by the Municipality for the cleansing of the latrines of the mill, but that they receive an extra allowance from the mill for night work, and are required to report themselves during the night to the mill officers. The Magistrate has held accordingly that the Municipality has undertaken the responsibility of **[458]** keeping the latrine clean by day,

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and the mill that of keeping it clean by night. It has not been found that the establishment of sweepers provided by the Municipality is insufficient; but it has been found that neglect on the part of the sweepers brought about the direct cause of the nuisance, namely, the obstruction of the pipe between the cesspools, and that for that obstruction the mill and the Municipality are jointly responsible. The Magistrate has, however, here drawn a subtle distinction in which we are unable to follow him. He says that, although the mill and the Municipality are jointly responsible for that which caused the effluvia to arise, the Municipality must be held responsible for the arising of the effluvia, because the discovery of the effluvia by the inspecting officer took place in the day time, when it was the turn of the Municipality to keep the latrine clean. He goes on to deal with the question whether the occupier of the mill had knowledge of the existence of the nuisance, and he concludes with the proposition that though it is possible that the occupier was aware of it, the burden of proving this lay upon the Municipality,—a proposition which seems to us clearly erroneous.

The provision of s. 17 of the Factories Act, by virtue of which this conviction has been had against the Chairman of the Municipality, is of a highly penal character and must be construed strictly in favour of the accused. We think that in order to fix liability on any person other than the occupier of a factory it is incumbent upon the latter to give the strictest proof of circumstances exonerating himself, and it is plain on the face of the section that the burden of proving absence of knowledge or consent on his part lies entirely upon him.

In the present case on the Magistrate's finding of joint responsibility the occupier is not discharged from his liability under s. 15 of the Factories Act and therefore the liability cannot be fixed on any other person. The conviction is for this reason unsustainable.

We accordingly set it aside, and direct that the fine, if realised, or so much thereof as may have been realised, be refunded.

B. D. B. *Conviction set aside.*

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[459] PRIVY COUNCIL.

PRESENT:

Lords Hobhouse, Macnaghten and Morris, and Sir R. Couch.

[*On appeal from the High Court at Fort William in Bengal.*]

DOWLAT KOER (*Proponent*) *v.* RAMPHUL DAS AND OTHERS (*Impugnants*). [2nd, 6th and 8th July and 10th December, 1897.]

Will—Evidence as to execution.

The question whether an alleged Hindu will was genuine or not was raised by the relations of the deceased, on an application, under the Probate and Administration Act V of 1881, for administration with the will annexed, filed by the proponent.

It was *held* upon evidence, which was very conflicting, in some respects obscure and unsatisfactory, and in reference to which the Court below had differed, that the will was genuine, and that the High Court was not justified in reversing a decree to that effect.

It was also *held* that it is the duty of a Judge in such cases patiently to investigate the actual facts, placing himself as it were in the position of the alleged

testator with all his actual surroundings; not to approach the subject from the point of view of what a testator ought or would be likely to have done on some preconceived idea of Hindu usages and habits of thought.

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[R., 39 C. 245=16 C.W.N. 265=13 Ind. Cas. 577.]

APPEAL from a decree (10th July 1894) of a Divisional Bench of the High Court, reversing a decree (11th November 1893) of the District Judge of Gaya.

This appeal arose out of a petition filed on the 9th June 1893 by the appellant for administration, with the will annexed, of Narain Das, which purported to be for her benefit. It was dated the 18th May 1893, and the testator died on the 3rd June following. The proponent stated that she was one of the widows of the testator, who died at his residence at Tikari in the Gaya District, leaving, beside herself, another widow named Rajkali, a mother named Uttim, and a brother named Babban Das, who were the present respondents. The latter filed objections to the will impugning it as not the genuine will of Narain Das.

The disputed will, after reciting that the testator had married three wives, of whom Rajkali and Dowlut Koer were alive, proceeded thus, as translated :—

[460] "Whereas shortly after my marriage with Massumat Rajkali Koer, and the performance of her ruckhsarti ceremony, I cut off all communication with her on account of her bad temper, disobedience, and also for several other reasons, and have kept my connection only with Massumat Dowlat Koer, my third wife, because she is the only wife who has been obeying and serving me, and has all along kept me pleased and happy by her amiable conduct and obedience. Therefore, I, the declarant, have always been living with her alone. And whereas my second wife Rajkali Koer has been residing against my wishes with Ramphul Das, *alias* Babban Das, my brother who is a drunkard, and a bad character, and who has always lived separate from me, and with whom I, the declarant, have ceased to have any connection."

He then left his whole property, as the alleged will declared, absolutely to the proponent subject to monthly charges of Rs. 25 each in favour of Rajkali Koer and Uttim Koer. The document bore the signatures of the testator and twelve witnesses, including that of the writer.

The facts of the case are stated in their Lordships' judgment, where the judgment of the District Judge, Mr. Alfred C. Brett, is referred to, and the terms of his order appear. Both the Judges in the appellate Court alluded to the alleged will having made no provision, except a subsistence allowance, for the other wife or for the mother of the testator, or for his own *shrad*, and examined the evidence at length. The evidence as to the execution of the will was, in the opinion of the appellate Court, such that the Judge should have declined to act on it. That evidence they considered to have become less valuable upon an endeavour to test it by the probabilities derived from the face of the will itself, and other sources. The Judges in their judgment, should have held the will unproved.

On this appeal—

Sir *E. Clarke*, Q.C., Mr. *J. D. Mayne*, and Mr. *J. T. Woodroffe* appeared for the appellant.

Mr. *H. H. Asquith*, Q.C., and Mr. *C. W. Arathoon*, for the respondents.

JUDGMENT.

Their Lordships' judgment was delivered by

LORD MACNAGHTEN.—The only question in this case is whether a certain paper writing, purporting to be dated the 18th of May 1893, and

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to bear the signature of Narain Das, who died on the following 3rd of June, is his will or a forgery.

[461] The instrument in dispute was propounded on the 9th of June 1893 by the appellant Dowlat Koer, who was living with Narain Das as his wife at the time of his death, and had lived with him for about twenty years on that footing, whether she was lawfully married to him or not. It was challenged at once by the three respondents Babban Das, a younger brother of Narain Das, Uttim Koer his mother, and Rajkali Koer his wife, and his only living wife, if Dowlat was not married to him.

After a trial which lasted fourteen days Mr. Brett, the District Judge of Gya, found for the will and decided in favour of the appellant, but refused her the costs of the suit on the ground that the will was not registered. On appeal to the High Court Mr. Brett's decision was reversed by TREVELYAN and AMEER ALI, JJ. They dismissed the appellant's petition with costs in both Courts.

In any view of the case there is much that is obscure and much that is unsatisfactory. But after carefully considering all the circumstances, and giving due weight, to the objections of the learned Judges of the High Court, their Lordships have no hesitation in accepting the conclusion at which the District Judge arrived and pronouncing in favour of the will.

Narain Das seems to have been a little over fifty years of age when he died. He was a man of low caste—a Bari. At one time he was a table attendant of the Rani Asmed Koer. For some services to the Raja Run Bahadur, who became her heir, he was rewarded by valuable *mokurruri* grants and thus acquired a good deal of property. When in the service of the Rani he formed a connection with Dowlat Koer, a maid servant in attendance on his mistress and then a young widow. Dowlat Koer says that Narain Das married her in privacy according to the simple rites of the "Sagai" ceremony. The respondents represent her as merely a concubine discarded in favour of the lawful wife. The District Judge thought the weight of evidence was in support of Dowlat's contention. Their Lordships agree with him in this. It seems more probable that there was a marriage between Narain and Dowlat than that there was not. The point, however, is not very material. Nor is it material to enquire whether Narain's connection with Dowlat when it first [462] began preceded or followed his marriage with Rajkali. There again if it were necessary to come to a conclusion their Lordships would be disposed to agree with the District Judge, who does not seem to have fallen into the error attributed to him by the High Court of mistaking dates by confusing the younger Rani with the elder. Be that as it may, it is quite plain that Dowlat was not abandoned for Rajkali. For many years and down to Narain's death Dowlat was the favourite, and her influence with him seems to have been paramount. He had no issue. Rajkali and Dowlat were both childless and so was his first wife who died before he married Rajkali.

Narain had two houses within the enclosure known as the fort of Tikari. They stood about 400 yards apart. One is spoken of as the north house, the other as the south house. The south house, according to the District Judge who inspected both, is in every way the larger, the more convenient, and the better built of the two. It was bought in Dowlat's name and rebuilt by Narain for her accommodation. "After he had made a fine place of it," says one of the witnesses for the respondents, "he put Dowlat into it." In this house Narain lived with Dowlat, and her nephew Tunu, who was Narain's treasurer or cashier, and her brother Chhedi, who used

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to be addressed by Narain as "Chhedi Bai" or "brother Chhedi." Narain's office was there. There he kept all his valuables, his deeds, his money, and his jewels, and there the customary nuzzars or complimentary offerings were presented in his honour. The north house was a humbler edifice and maintained on a poorer scale. It was occupied by Uttim and Rajkali and Babban and Babban's two wives. "In the north house," said Babban in cross-examination, "we got no fixed monthly allowance from Narain; but I should say he sent us at the average Rs. 50 a month. His net income was say Rs. 20,000 a year."

It is common ground that Narain's illness lasted five or six months. Though he seems to have been confined to the house during the greater part of that period, and though he was gradually getting worse, it is not disputed that he was perfectly competent to dispose of his property at the time when he is said to have made his will. In fact he did not become insensible until [463] the last few days, or, as Babban says, the last few hours before he died.

In these circumstances, if it could be shown that Narain was minded to settle his affairs before his death, or willing to face the question at all, one would certainly expect to find provision made for Dowlat Koer and her relations. They seem to have held the first place in his affections. At any rate they were about him during his long illness. They must have foreseen the end. They were hardly likely to be indifferent to their own interests, or to shrink from pressing their own claims and disparaging the merits or exaggerating the faults of absent rivals. On the other hand, the inmates of the north house for all practical purposes were out of sight. What amount of intercourse there was between the north house and the dying man it is impossible to say. It is admitted that Uttim often came to see Narain during his last illness. Rajkali came but once, if Dowlat and Tunu are to be believed. Dowlat speaks of one visit by Babban and Rajkali. She puts the date of that visit, "soon after the deed to Tunu," which will be mentioned presently and which was dated the 28th of April 1893. "They remonstrated with Narain," says Dowlat, "for alienating his property to my relations. They spoke contemptuously of me. This led to the interchange of abuse and they left in anger." Tunu also says that Rajkali came once to complain and that Narain's reply was this: "All the property is mine to deal with as I like." On this part of the case unfortunately no help is to be got from the other side. They pretended that Narain never ceased to live with the inmates of the north house. Uttim and Rajkali and Babban too in his examination in chief say that Narain lived continuously at the north house, that he fell ill there, that about two months before he died they took him to the south house for change of air, and migrated with him in a body. "We all stayed there," says Rajkali, "till the death of Narain, and then we said 'let us go and worship at the house where our family gods are'"—and so they all migrated back to the north house on the following morning. The District Judge, who examined the ladies himself, had no difficulty in rejecting this story as an impudent attempt to impose upon the Court. It is shown to be untrue by the ignorance which Uttim [464] and Rajkali both displayed about the south house. I do not believe, says Mr. Brett, they were there at all. It is disproved by entries in the accounts and by Babban's own admissions on cross-examination. It is directly contradicted by a petition signed and presented by Babban himself on the 28th of May asking for the intervention of the police to prevent Dowlat and her relatives despoiling the south house on Narain's approaching

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death. Narain Das, it is stated in the petition, "has been ill in his residential house for the last five or six months. Now he is becoming worse, and there is no hope of his life, he may die to-day or to-morrow. Babu Narain Das has a kept woman who lives along with her brother and sister's son with the said Babu Saheb."

About six weeks before his death Narain made a partial disposition of his property. The evidence does not explain what led him to do so. But the fact is undisputed and not unimportant.

On the 21st of April 1893 he executed in favour of Chhedi a permanent and heritable *mokurruri* lease of a *mouzah* producing, according to Babban, a net annual profit of Rs. 600, a sum just equal to the annual allowance he was making for the north house. The lease was duly registered on the 23rd by the sub-registrar who attended at the south house for the purpose.

On the 28th of April Narain executed in favour of Tunu a permanent and heritable *mokurruri* lease of a *mousah* called Khurey producing, according to Babban, a net annual profit of Rs. 3,000. It was duly registered on the 30th. This lease, as orginally drawn and executed, was in favour of Dowlat. It was intended to have the document in that form registered at the same time as the lease to Chhedi. A petition stating its execution and asking the sub-registrar to attend for the purpose of registering it was presented on the 22nd, together with a similar petition relating to Chhedi's lease. But when the sub-registrar came he was asked to postpone the registration of the lease of Khurey on the ground that some alteration was required, and the writer of the deed was not present. A petition was then put in stating that only one deed [465] was ready, and so only the lease to Chhedi was registered on that occasion. So far there is no dispute. There is a conflict of evidence as to the reason for not completing the registration of the lease of Khurey as originally drawn. Babban says he was told "one afternoon" when he was in the north house "about six weeks before Narain's death" that one "Gur Sahai had come from Gya with a lease." "I went over," he adds, "to see what was up. I saw my brother and Gur Sahai and Tunu and others. I asked Narain what he was doing. He said 'I am giving a life lease of Khurey to Dowlat.' She was on one side. He commenced to sign his name. He had got half through the signature when Gur Sahai said the deed was hereditary. Then Narain refused to sign and flung the paper down." Dowlat's account of the transaction is this: "Narain was ill," she says, "five or seven months. After he got ill he gave a lease to my brother Chhedi and to Tunu, my sister's son. Tunu he gave the lease of Khurey. He had intended to give me the lease, perpetual lease. This was written out, but I refused. I said 'You give one village to Chhedi and want to give one to me; what is to become of the rest?' He said 'I will give the rest to Tunu.' I said 'No, give Khurey to Tunu and give me the rest.' He consented. The lease to me was destroyed and Khurey was leased, perpetual lease, to Tunu eight days afterwards." Babban's story cannot be true. It is extremely improbable; the lease to Chhedi and the lease to Dowlat were both prepared on Narain's written instructions; the lease given to Chhedi was hereditary; the lease given afterwards to Tunu was hereditary too. But apart from the improbability of the story it will be observed that there is no room for the incident described by Babban. It could not have happened on the 21st, for the petition of the 22nd asking the sub-registrar to come over states that the lease was executed. It could not have

happened on the 23rd. Babban says it was in the afternoon that he went over to see what was up. But the sub-registrar, who is above all suspicion, and who was called for the respondents, after stating that on the 22nd of April two petitions were put in to him to go to Tekari "to register two deeds executed by Narain Das," says: "I went on 23rd April arriving there very early; it was the hot weather. I saw Narain. He [466] had two deeds. But he apparently wished to amend one but could not find the writer." Dowlat's account may be true. To a certain extent she is corroborated by Babban himself. After stating that Khurey was afterwards given as a hereditary lease to Tunu he adds: "This was on the advice of Dowlat Koer." Whether Babban had any special reason for saying so or not, the statement is a remarkable tribute to the influence which Dowlat had over Narain.

Putting aside the visit of Rajkali and Babban to complain of alienations of property in favour of Dowlat's relations (if the visit really took place), the evidence is a blank as to what occurred between the date of the gift to Tunu and the 18th of May, the date of the alleged will. Dowlat Koer says that between the date she refused the lease and the date the will was given she had no talk about the will with her husband. She felt sure, she says, that he would do what he promised. Her reticence on the subject of the will during the period in question was naturally commented upon by the learned counsel for the respondents. It is certainly a matter for observation. But it does not go very far. It is possible that Dowalt's story may be true throughout. It is at least as possible that it may be true in the main, though she may have deviated from the truth in her anxiety to make out that Narain was ready to fulfil his promise of his own free will and without any pressure from her.

The document put forward as Narain's will and the fulfilment of his promise to Dowlat is simple enough in its dispositive clauses. His entire property is left to Dowlat Koer absolutely subject to the payment to Uttim and Rajkali each of Rs. 25 a month.

The document purports to bear the signature of Narain Das and the signatures of twelve witnesses including the writer.

No one comes forward to say that Narain's alleged signature is not his own handwriting, and yet his handwriting must have been well known to some of the persons who were witnesses for the respondents. The District Judge notices the point, but observes that it may have been an accidental omission, and says that he does not wish to lay too much stress upon it. The omission, however, acquires much greater significance [467] from what took place in the Court of appeal. One of the learned Judges in the High Court was familiar with the native character, and evidently not disposed to overlook the assistance to be derived in such a question as this from a comparison of handwriting. He scrutinized the signatures appended to the document in question. He saw, or thought he saw, some indication tending to show that the signatures had not all been written at the same time. He compared the signature of one witness with a signature which that witness subscribed to his deposition in Court, and came to the conclusion that the two signatures were not made by the same person. But as to the signature of Narain Das, he says nothing, although he had actually before him in documents put in evidence signatures of Narain which were unquestionably genuine.

The alleged writer of the will was one Sheo Pershad, a young mukhtar. It seems that in May 1893 there was a local investigation going on in regard to some litigation in connection with a village called Paluhan, which

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was situated about two miles from Tikari. A number of lawyers and others concerned in the inquiry were gathered together at Tikari. Among them came Sheo Pershad and Sheo Sahai, another young mukhtar. They put up in the same house at Tikari. They were old acquaintances they said of Narain. They heard he was ill and went to see him on the 12th. On the 16th he sent for them and consulted them about making over his property to Dowlat Koer. At first a deed was suggested, but the amount of the stamp duty seemed a formidable objection, and so after some discussion they advised a will. He told them how he wished to dispose of his property and they prepared a draft from his verbal instructions. It was their joint production. They left the draft with Narain that evening. On the evening of the 18th they were summoned again to Narain's house in order to complete the transaction. Sheo Pershad "faired out" the draft. Witnesses were collected and the will was duly executed. They both saw Narain execute it and they both attested his execution. That was their story. Of the other ten seven deposed to seeing Narain sign the will. They signed as witnesses and saw the other witnesses sign. That leaves three of the alleged witnesses to be accounted for. One [468] was absent from illness. The remaining two were Kali Churn and Bankey Behari, a young pleader in the Gya Court, whose name on the will appears in English with the word "witnessed" also in English before it. Kali Churn was summoned as a witness by the petitioner. He evaded service and then was arrested. When he was brought into Court neither side would call him. He was called by the Judge. He said the writing of his name on the will resembled his, but was not his, and he tried to make out an *alibi*. The Judge did not believe the *alibi* and thought his evidence of no weight. Bankey Behari was also distrusted by both sides and called by the Judge. He admitted that one day just after the application for probate when he was in the Bar Library he was taxed with having signed Narain's will and that he did not deny it directly. What he said was. "As far as I recollect I have not signed any will." "Those," he adds, "were the words I uttered. I meant to absolutely deny my signature. But I did not say that I had never signed." Before Mr. Brett he was more positive and more intelligible. He declared that his name on the document in dispute was not his signature. "My signature," he said, "has been forged." To some extent, however, his evidence curiously corroborates the appellant's case. He admits that on the evening of the 18th of May somebody came to him and said Narain wanted him. "The messenger," he says, "told me that Narain Das had heard I was in Tikari, and that others were with him and he wanted to see me as he was ill. He said, perhaps, that the men were writing something." "My grandfather," he said in another part of his evidence, "was a pleader of the Raj, and Narain Das had been an influential servant, so it did not strike me as peculiar that he sent for me." All this is entirely in accordance with the story told by the witnesses for the appellant. As to what followed there is a direct conflict of evidence. The appellant's witnesses say, Bankey Behari obeyed the summons and witnessed Narain's will. He says he "was tired and did not go," showing, as the Judge thought, an indifference to his professional prospects remarkable, to say the least of it, in so youthful a practitioner. The District Judge in whose Court he practises did not believe him. The High [469] Court did. They found no resemblance between the signature he made at the foot of his deposition in Court and the signature shown to him a few minutes before and denounced by him as a forgery. They seem to have thought a difference in the handwriting at that critical moment conclusive

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in his favour. Moreover, they thought the writing on the will "an unformed writing like that of a schoolboy"—the signature "of a beginner just learning to write," while the signature on the deposition was "in the running hand of a person much accustomed to writing in English." On the other hand, the District Judge observes that the words on the will have a genuine look about them" . . . they do not look like an imitation. Their Lordships have had the will before them. So far as regards the character of the writing they are unable to agree with the learned Judges of the High Court. No fault is to be found with the signature. It seems to be written boldly and would pass for the writing of a well educated English gentleman.

It is unnecessary to discuss in detail the evidence of the witnesses for the appellant. The District Judge has gone through it very carefully noticing apparently everything that struck him as suspicious in statement or demeanour. On the whole he came to the conclusion that there was no sufficient reason for refusing credence to the appellant's story. One circumstance may be noticed in passing which, in the view of Trevelyan, J., tells strongly against the appellant, while the District Judge thinks it throws no light on the case. It is this: Narain's accounts were kept by Tunu. The accounts for the last year are missing. If they had been forthcoming, and if they could have been trusted, they might have been useful in clearing up some disputed points. The absence of these accounts gave rise to a good deal of argument before the District Judge. But he was, he says, "unable to form any definite opinion as to the question as to on whom the disappearance casts suspicion." Trevelyan, J., felt no difficulty on that score. "There is," he says, "no doubt to my mind that this book can only have been kept back by Dowlat's party." And then he proceeds to draw the inference which suppression of evidence invariably suggests. Their Lordships do not think it by any means clear [470] that Dowlat's party ought to be held accountable for the non-production of the last year's book of accounts. At any rate, it is obvious, that an unscrupulous man concerned in forging a will would not scruple to manipulate accounts for his own purposes, if he thought he could do so without fear of detection. As the whole book was written up by Tunu, there would be no difficulty in his replacing an incriminating page by a new leaf with all necessary entries to confirm his story. It is difficult to see why Tunu should have suppressed a piece of evidence which he might so easily have made to serve his purpose.

The District Judge and the learned Judges of the High Court both deal with the main question at issue on a broad view of the whole case. It is little wonder that they come to opposite conclusions, for they approach the matter from very different points of view. Patiently, and with every appearance of impartiality, the District Judge sets himself to investigate the actual facts. He tries to place himself in the position of the alleged testator with all his actual surroundings. On the other hand, Ameer Ali, J., who claims to be intimately acquainted with the usages and habits of thought of his Hindu fellow-countrymen, though not himself, it may be presumed, a member of their community, approaches the question from the point of view apparently of a pious Hindu gentleman, scrupulous and exact in the discharge of every moral and religious duty—so scrupulous indeed and so exact that in the opinion of the learned Judge it becomes a matter of grave importance that no provision is to be found in the will for the worship of a family idol, whose worship, as it appears, was maintained during the testator's lifetime by the annual expenditure of the sum of one rupee. Tried by so high a standard the

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will is found wanting in many things. But for all that it is not an unlikely disposition for such a man as Narain Das to have made under the circumstances. As regards the monthly allowance to Uttim and Rajkali it will be observed that the aggregate of the two allowances is precisely the sum which Narain had been in the habit of providing for the maintenance of the north house. And it is perhaps remarkable that the allowance to Uttim, which seems to the High Court so niggardly as to throw doubts on the genuineness [471] of the will, is the exact amount which Rajkali and Babban allotted to her when they assumed to divide the inheritance between them on the 6th of July 1893 under a deed of compromise.

The learned Judges of the High Court have embarked upon an enquiry as to the truth of the charges against Rajkali and Babban contained in the introductory part of the will. Their Lordships cannot think that the enquiry is much to the purpose There is certainly no evidence in support of these charges. But in estimating their value and importance, one cannot help seeing that something must be attributed to the zeal of the two young mukhtars who would probably exert all their skill to amplify and embellish whatever Narain may have said in disparagement of those whom he proposed to disinherit. Something, too, may be due to the ill-feeling between the inmates of the two houses which must have been tolerably bitter, if one is to judge from the steps which Babban thought fit to take against Dowlat, when Narain lay a-dying. Whatever the will may say to the discredit of Babban, all that seems to be alleged against Rajkali is ill-temper coupled with disobedience. We know that Narain preferred living with Dowlat whatever the reason was. The will hints at "several other reasons"—a suggestion one would think too vague to be taken seriously. But in its vague generality, Ameer Ali, J., finds a deep meaning. He has no doubt that those apparently innocent words were intended to convey "an insinuation of unchastity." It is obviously quite impossible to accept that construction on the faith of a statement, whatever may be its source or apparent authority, which the appellant had no opportunity of meeting by direct evidence or testing by cross-examination. In the Court of first instance, as far as we can see, the point was not even suggested. It is not alluded to in any one of the 27 reasons set forth in the memorandum of appeal, and certainly it is satisfactory to find that it escaped the notice of Rajkali and her advisers. In her petition of objection put in on the 14th of July 1893 she alleges that "several of the statements made in the alleged will are false." She avers that "she was never disobedient to her husband nor was he ever displeased with her," but she makes no reference to the imputation of unchastity which she naturally would have resented, [472] if she had supposed that the will contained any insinuation of the sort. In the course of the litigation and at the trial the appellant certainly made a direct charge of unchastity against Rajkali, a charge for which there appears to have been no foundation whatever. But it would be a mistake to connect that charge with anything in the will. It seems to have been provoked by the attacks which Babban and Rajkali made on the appellant at the time of Narain's death. Insulted as she was and treated with great cruelty, it is hardly surprising that Dowlat Koer should attempt to retaliate with any weapon she could think of.

Some minor points were pressed. There was the non-registration of the will—due perhaps to Narain's state at the time. Then it was said that the witnesses to the will were in social position inferior to the persons who attested the lease to Chhedi and the lease to Tunu. That may be accounted for by the circumstances under which the will was executed,

and after all the inferiority may not have been so great as it was represented. At least we find that one of the witnesses to the two leases, who is described as a "rais" or "big man," says of himself "my profession is service, but I am not in any employ." Then it was pointed out that the witnesses to the will were on their own showing singularly reticent as to the transaction in which they say they were engaged. So they were, and this reticence is one of the difficulties in the case. But even here the evidence is not all one way. Sheo Pershad, for example, says he told some mukhtars. Among others, he says, he told Gopal Lal whom he pointed out in Court. About the 23rd May he says he told him that Narain Das was ill and had made a will. Now Gopal Lal seems to have been an adherent of Babban and to have been the writer of the deed of compromise between Babban and Rajkali which has already been mentioned, and he was not called to contradict Sheo Pershad's statement.

It is not necessary, however, to discuss these points further. On a review of the whole case, their Lordships are of opinion that the appellant has established the genuineness of the will, and that the High Court were not justified in overruling the decision of the District Judge.

[473] Their Lordships will, therefore, humbly advise Her Majesty that the decision of the High Court ought to be reversed with costs and the judgment of the District Court restored. The respondents will pay the costs of the appeal.

Solicitor for the appellant: Mr. *H. G. Dallimore.*

Solicitors for the respondents: Messrs. *T. H. Wilson & Co.*

C. B. *Appeal allowed.*

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PRIVY COUNCIL.

PRESENT:

Lords Watson, Hobhouse, and Davey and Sir R. Couch.

[*On appeal from the Court of the Judicial Commissioner of Oudh.*]

SULEIMAN KADR BAHADUR (*Plaintiff*) *v.* MEHNDI BEGUM (*Defendant*). [11th November and 8th December, 1897.]

Benami Transaction—Onus *of Proof—Purchase* ism farzi, *in the name of a person other than the real purchaser—Proof of the actual transaction.*

In liquidation of a mortgage debt the mortgagors sold the mortgaged property and executed a sale deed with a recital that they had received from the wife of the mortgagee the amount of the mortgage debt and interest with also a small sum of money.

In after years the husband, now plaintiff, and the wife, defendant, contested which of the two was the real purchaser.

Held, that the burden of proving that the mortgagee gave the consideration for the sale was upon him at the outset, as he claimed contrary to the tenor of the admitted document; which burden had been discharged by his evidence that the substantial consideration for the sale by the mortgagors was the extinction of the mortgage debt due to him.

This proof shifted on to the wife the burden of showing that this extinction was effected by her money, or of showing that she had continuous possession in accordance with the sale deed. She did not prove that any money was paid by her, either to the vendors or to the mortgagee; nor was there such an amount of possession proved as affected the question either way. The conclusion was that the wife's name was used *ism farzi* for the husband's, as alleged.

[R., 29 B. 305 (312).]

1897 DEC. 8. — PRIVY COUNCIL. — 25 C. 473 (P.C.) = 25 I.A. 15 = 2 C.W.N. 186 = 7 Sar. P.C.J. 254.

APPEAL from a decree (11th August 1892) reversing a decree (12th April 1890) of the District Judge of Lucknow.

The plaintiff in the suit giving rise to this appeal was Mirza Suleiman Kadr, and the defendant was his wife, Nawab Mehndi [474] Begum Sahiba, who was living apart from her husband. Both were members of the ex-Royal family of Oudh. (See I. L. R.. 21 Calc., 135.)

The question between them was as to which of them was the real purchaser of the property in suit under the purchase evidenced by deed of the 14th May 1875, which purported to convey to the wife, an arrangement which the husband, now appealing, contended was *ism farzi* for himself.

On the 10th May 1870, before the marriage of the parties which took place in July 1871, the plaintiff became mortgagee of the property (houses in Lucknow) for Rs. 8,500, at 6 per cent. per annum repayable in five years.

On the 14th May 1875, while the parties were still living together, the mortgagors executed a sale deed of the property to the wife. The recitals and other contents of that document appear in their Lordships' judgment. In 1886 the husband and wife separated, and this suit was commenced on the 2nd August 1888. The plaint alleged that the possession of the property by the wife began in May 1888, and prayed a declaration that the sale deed had been taken by the husband as purchaser in his wife's name, he being the real vendee, and that the transaction was *ism farzi* for his benefit. The defence was that the wife had purchased the property with her own money in 1875, having since then been in adverse proprietary possession.

The issue raised questions on these contentions, and the District Judge decided that "the sale deed was fictitiously executed in the defendant's name," making a decree which declared the plaintiff entitled to the property.

The appellate Court, composed of the Judicial Commissioner and the Additional Judicial Commissioner, reversed the lower Court's decree. In their judgment the plaintiff had failed to discharge the burden of proof upon him, both as to title and possession. They dismissed the suit with costs in both Courts.

The plaintiff having appealed,—

Mr. *C. W. Arathoon*, for the appellant, argued that the respondent had not proved the payment of the purchase money by her, [475] or her possession for more than a brief period, it having been necessary for her to prove her case, when it had been shown that the consideration for the purchase of the property was the discharge and extinction of the mortgage debt. The appellant had explained why the sale deed had been in the name of the respondent; so that the source of the money, whereby the mortgage and sale were obtained, was the governing question. The whole evidence was before the appellate Court to consider its effect.

Mr. *J. D. Mayne*, for the respondent, referred to the burden of proof that was on the plaintiff to outweigh the presumptions that arose from the statements in the sale deed. The use of the wife's name, and those statements, threw the burden on to the appellant, and it had not been effectively discharged.

Mr. *C. W. Arathoon*, in reply, referred to the judgment in *Sham Lall Mitra* v. *Amarendro Nath Bose* (1). This had cited *Debia Chowdhrain*

(1) 23 C. 460 (475).

v. *Bimola Soonduree Debia* (1), as establishing, on the authority of *Ram Surun Singh* v. *Pran Peary*(2), that the right of a party to an *ism farzi* transaction of this kind was to have the true position ascertained, and that effect should be given to it, although he had taken part in concealing it at another time.

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JUDGMENT.

Their Lordships' judgment was delivered on the 8th December 1897 by

LORD DAVEY.—The appellant is a son of the late King of Oudh. The respondent is his wife. They were living together in the year 1875, but in the year 1886 they separated and they have since lived apart. By a mortgage bond, dated the 10th May 1870, two ladies mortgaged certain houses and lands to the appellant to secure Rs. 8,500 with interest at the rate of 8 annas per cent. per mensem for a stipulated period of five years. Nothing was paid by the mortgagors on account of either principal or interest, and on the 14th May 1875 a sale deed of the mortgaged property was executed by the mortgagors, whereby, after reciting the mortgage and that the mortgagors had not been [476] able to pay anything up to date, and that according to accounts it appeared that they had then to pay to the appellant the sum of Rs, 11,000 on account of principal and interest, it was witnessed that the mortgagors sold the mortgaged property in lieu of Rs. 11,000 to the respondent, and that the mortgagors having received the purchase money in full from the said vendee had paid it to the appellant in liquidation of the debt due to him under the deed of the 10th May 1870. It appears from the endorsement on the sale deed that a further sum of Rs. 250 was paid in cash to the mortgagors, and this sum seems to have found its way back into the hands of the appellant's then agent.

The question on this appeal is what the transaction recorded in this sale deed really was. The appellant contends that the sale deed was executed *ism farzi* (fictitiously) in the name of the respondent, and that he was the real purchaser and assumed proprietary possession of the property comprised in the deed. The respondent, on the other hand, alleges that she purchased the property in suit with her own money and has ever since been in adverse proprietary possession thereof.

The burden of proof is in the first place upon the appellant who claims against the tenor of the deed. He states in his evidence that the consideration for the sale was the mortgage money plus interest, and the sum of Rs. 250 which he says that he paid through his then agent one Achche Sahib, and again that the mortgage money was not recovered in cash but formed part of the consideration. The substance of his evidence is that no money passed in the transaction except the Rs. 250. He accounts for the production of the title deeds by the respondent by saying that they were in the custody of Achche Sahib who was formerly his agent, but had been dismissed, and who was prior to and at the time of the suit acting exclusively for the respondent. He further says that Achche Sahib advised him to have the sale deed in the name of the respondent in consequence of some threatened litigation. The appellant's evidence is confirmed by that of Kirpa Ram and Maharajah Tej Krishna Sahib who were relatives of the vendors and negotiated the transaction on their behalf. They both state that the consideration was not received in cash

(1) 21 W. R. 422. (2) 13 M.I. A. 551.

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[477] except as to the Rs. 250, which was taken back from the vendor's agent by Achche Sahib, and that the sale deed was executed in the name of the respondent by the orders of the appellant. The evidence of the vendors, who were both purdah ladies, is less precise, but to the same effect.

It is apparent from this evidence, and indeed it is not denied, that no money in fact passed from the nominal purchaser to the vendors, and from the latter to the mortgagee, and that the narrative of the deed is not, therefore, in accordance with the facts. The effect, and doubtless the object, of the deed is to make it appear that the consideration to the vendors for the sale proceeded to them from the respondent, so as to give her an apparent title for value, whereas the real consideration to the vendors being the extinction of the mortgage debt, which was the property of the appellant, it proceeded from him. Their Lordships think that this circumstance and the other evidence of the appellant and his witnesses are sufficient to call upon the respondent for an answer and to shift the burden of proof upon her. This burden she may discharge by showing that the purchase money, though not paid by her to the vendors, was paid to the appellant out of her moneys, or by evidence of continuous possession in accordance with the deed. The respondent was called as a witness by the appellant. In her evidence she states as follows :—

" My husband told me that there was no use in keeping money, that he had a house in mortgage which I should buy, that it was very cheap, that I will get rents and that it will be sold for Rs. 11,000. I told him that he should speak to my aunt (Ammi Jan), if she accepts, I will accept. The plaintiff then spoke to her and she consented. Thereupon I also consented. Then the plaintiff told my aunt that the Rani's mukhtar had come, and if she, my aunt, gives the money the plaintiff will make arrangements for the purchase. Thereupon my aunt sent Rs. 10,000 in cash with the plaintiff and asked Achche Sahib to send for the remaining Rs. 1,000 thereafter. This Rs. 10,000 belonged to me and was kept in deposit with my aunt. Then I sent Agha Nawab, my mukhtar, who got the deed executed. The plaintiff got the remaining Rs. 1,000 from Achche Sahib. The latter paid the money on my [478] behalf as my mother had told him to pay. Then Agha Nawab got the deed of sale duly executed and registered, and then gave over to me the said deed of sale as well as the mortgage deed. Agha Nawab took Rs. 250 more from me which he said the plaintiff had told him to pay to Kripa Ram, mukhtar of the Ranis. Since purchase, the house in dispute has been all along in my possession . . . . The above facts were known to Agha Nawab, Mirza Muhammad, Daroga, Achche Sahib, Saiyid Mustafa and others whose names I cannot recollect. . . . . When my aunt paid the money to the plaintiff I was sleeping; when I got up my aunt told me that she had paid the money and Taijan Mahaldar told me that she had carried the money with the plaintiff." Achche Sahib states he was told that Rs. 1,000 was short and was asked to pay it, and paid it to Taijan Mahaldar and so far he confirms the respondent's evidence. He further states that he did not see the price Rs. 11,000 paid. Achche Sahib, however, was a dismissed servant of the appellant. He says he resigned the appellant's service, because the appellant gave him orders to oppress the respondent, and he is now the agent of the repondent and was made a defendant in the appellant's suit for restitution of conjugal rights. The District Judge described him as "a most shifty and unsatisfactory witness.

On the other hand the respondent did not call as witnesses her aunt, her mother, Taijan, Agha Nawab or Saiyid Mustafa and there is no explanation of their absence. Nor were any questions addressed to the appellant in cross-examination with a view to showing that money was paid to him by the respondent's direction or on her behalf. There is, therefore, no real corroboration of the respondent's evidence, and their Lordships cannot accept her evidence as reliable proof that any money was paid by her either to the vendors or the mortgagee on their account.

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The evidence as to possession is vague and unsatisfactory on both sides. The balance, perhaps, inclines in favour of the respondent, but in the opinion of their Lordships there is not such an amount of possession proved as to affect the question either way.

Their Lordships will, therefore, humbly advise Her Majesty [479] that the order appealed from be reversed, and instead thereof an order be made dismissing the respondent's appeal to the Court of the Judicial Commissiouer with costs. The respondent will pay the costs of this appeal.

Appeal dismissed.

Solictiors for the appellant; Messrs. *T. L. Wilson & Co.*

Solicitors for the respondent: Messrs. *Young, Jackson, Beard and King.*

C. B.

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25 C. 479 (P.C.) = 7 Sar. P.C.J. 350.

PRIVY COUNCIL.

PRESENT:

Lords Watson, Hobhouse, and Davey, and Sir R. Couch.

[*On appeal from the Court of the Judicial Commissioner of Oudh.*]

PERTAB BAHADUR SINGH (*Plaintiff*) v. BADLU AND OTHERS (*Defendants*).* [10th November, 1897.]

Oudh Land Reveuue Act (XVII of 1876), ss. 52,53—Claim to resume grant.

A proprietor in Oudh claimed to resume a perpetual lease as having been granted hy his ancestor at a favourable rent, without the sanction, but otherwise under the circumstances, contemplated by s. 52 of the "Oudh Land Revenue Act," XVII of 1876, so that the grant was resumable.

Held, that the claim failed. The undefined charges, expenses of management, and other payments incidental to the lease, might have been such as to make the rent paid a reasonable one as between lessor and lessee; and that the favourable nature of the rate of rent had not been established.

APPEAL from a decree (8th June 1894) of the Judicial Commissioner of Oudb, affirming a decree (30th April 1891) of the District Judge of Rae Bareli.

The question raised on this appeal was whether a perpetual lease of three villages in the district of Partabgarh granted by a *talukdar* of Tarwal, the ancestor of the plaintiff, who was his heir and the devisee under his will, was or was not resumable under s. 52 of the Oudh Land Revenue Act, XVII of 1876.

Section 52 enacts as follows: "All grants, whether in writing or otherwise, by proprietors, or the persons whom they represent, of land to be held exempt from the payment of rent, or at a favourable rate of rent,

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are hereby declared to be liable to resumption, [480] unless such grants have been sanctioned or confirmed by the Governor-General in Council or the Chief Commissioner."

The plaintiff's ancestor and predecessor in estate, Raja Ajit Singh, *talukdar* of Partabgarh, executed on the 7th March 1874, in favour of Bhikha Ahir, the father of the defendants, a perpetual lease (*naslan bad naslan*) of three villages. It was agreed in the deed of lease that the lessee should pay annually to the lessor for rent Rs. 2,191, and should be liable to contributions such as *bhent* (presents), *nachna* (presents to dancers), *rasad* (supply) and other dues, paying also the (*patwaris* and *chaukidars*, and defraying the village expenses. The lessee was not to alienate on pain of the lease becoming void.

Lessor and lessee both died in 1889.

The suit was brought on the 6th September 1890 for a declaration that the lease was liable to resumption by the present owner of the proprietary right, on the ground that it was granted at a favourable rate of rent, without the sanction referred to in s. 52 of the Oudh Revenue Act, 1876.

The defendants, some of whom were minors, answered that the lease was not a grant within the meaning of the section, and was a lease at a reasonable rate. It was added that the villages had been granted in consideration of services during the troubles in Oudh. The Raja, having received the grant of the *taluk* Tarwal, thereupon made the grant of the lease now in question to the defendants' father for services at the same time.

Whether the rent was a favourable one, and whether s. 52 was applicable to permit the resumption, were questions raised by the issues.

The plaintiff filed accounts showing the gross rental of the villages comprised in the lease, at the date of the grant, and at the date of suit brought.

The District Judge was of opinion that the lease was not a grant within the meaning of s. 52, and that the rent reserved by the lease in 1874 was not a favourable one. He therefore dismissed the suit.

[481] On an appeal heard by a Court consisting of the Judicial Commissioner and the Additional Judicial Commissioner, the lease was held to be a grant within the meaning of the Act. But the Court found that the plaintiff had failed to prove that the lease was granted at a favourable rate of rent; and the suit was dismissed.

The material part of the Judicial Commissioner's judgment was as follows :—

"It appears to me that the words 'at a favourable rate of rent' mean at a rent which is not a fair, reasonable and equitable rent." Badlu, one of the defendants, distinctly pleaded that the rent was reasonable; and it was incumbent on the plaintiff to prove the issue framed by the lower Court, *viz.*, whether the rent reserved by the lease was favourable.

"This the plaintiff attempted to do by producing evidence with the view of showing what the gross rental (including *sair* and *sewai* items) of the three villages was in 1280 Fasli (when the lease was granted) and 1296 Fasli (when these proceedings were instituted), respectively, according to the *jamabandis*, corrected where necessary by the imposition of full rents on lands held by the lessee's family. The gross rental of the three villages (including *sewai* and *sair* items) according to the *jamabandis* as corrected by the *patwaris*, amounted to about Rs. 3,960 and 3,980 in

1280 Fasli and 1296 Fasli respectively average Rs. 3,970. According to the uncorrected *jamabandis* the gross rental in 1280 Falsi and 1296 Fasli was Rs. 2,728 and Rs. 3,094, respectively.

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"The appellant contends that this evidence is sufficient, and that it must be inferred under the circumstances that the rent fixed by the lease (Rs. 2,191) was favourable. It appears to me, however, that it is not sufficient for the plaintiff to prove that the gross rental (including *sair* and *sawai* items) of the three villages according to the corrected *jamabandis* was much in excess of the rent reserved by the lease: but that it was also incumbent upon him to show by some standard or criterion that the rent reserved by the lease was not fair and reasonable, but favourable. In the absence of such standard or criterion how is the Court to determine in the case of a lease of a village whether the rent is a fair and reasonable one or otherwise? The appellant has not attempted to show by the evidence that the three villages or any of them had been previously leased, or could have been leased at a rent in excess of that entered in the lease; nor has he endeavoured to show what percentage of the gross rental is ordinarily left to the lessee of a village in the pargana, district or division in which the three villages in question are situated, *i.e.*, what percentage of the gross rental is ordinarily considered to be a fair and reasonable rent payable by the lessee of a village, and to what extent the liability to contribute *bhent*, *nachna*, *rasad*, etc., on the occasions of marriages and deaths in the lessor's family would affect the letting value of a village.

[482] "In the absence, therefore, of any evidence showing what rent might fairly and reasonably have been obtained by the *talukdar* by a perpetual lease of the three villages in question under conditions similar to those contained in the lease under consideration, I would hold that the plaintiff has failed to prove that the lease was granted at a favourable rate of rent."

The Additional Judicial Commissioner concurred in dismissing the suit.

On the plaintiff's appeal,—

Mr. *J. D. Mayne*, for the appellant, argued that the lease was granted at a favourable rent within the meaning of s. 52. The defendants had not denied that the rent was at a favourable rate. The amount expended by lessee had not been stated, nor what result had followed upon expenditures. Their pleadings substantially admitted that the rate was favourable, and they accounted for its being favourable by the statement of meritorious service rendered by the grantee to the grantor; the accounts produced by the plaintiff were at all events *prima facie* evidence that the rent was a favourable one, and it had not been rebutted.

The respondents did not appear.

JUDGMENT.

Their Lordships' judgment was delivered by

LORD HOBHOUSE.—Their Lordships see no reason for differing from the Courts below in this case. The Courts below have treated the matter as a question of inquiry whether the rent was a favourable one or not, and they have held, as it appears to their Lordships quite justly, that the appellant has not produced any proof to show that the rent was a favourable rent. The undefined charges, the expenses of management, and so forth, may have been such as to make it a perfectly reasonable rent as between lessor and lessee. The case, therefore, fails, and their

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Lordships must humbly recommend Her Majesty that the appeal be dismissed. As the respondents do not appear there will be no costs.

Appeal dismissed.

Solicitors for the appellant: Messrs. *Lawford, Waterhouse and Lawford.*

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25 C. 483 = 2 C.W.N. 328.

[483] CRIMINAL REFERENCE.

Before Mr. Justice Banerjee and Mr. Justice Hill.

CORPORATION OF CALCUTTA *v.* EASTERN MORTGAGE AGENCY CO., LTD.* [21st December, 1897.]

Calcutta Municipal Consolidation Act, Bengal Act (II of 1888), s. 87 and sch. II, Rule 7, cl. (b)—License tax—Liability to tax of Company carrying on business through Agents in Calcutta and not having a registered place of business.

A joint-stock company carrying on money-lending business through Agents in Calcutta, where it has no registered place of business, is liable to pay license tax under s. 87 and sch. II of the Calcutta Municipal Act of 1888.

Corporation of Calcutta v. *Standard Marine Insurance Company* (1), distinguished.

THIS was a reference made by an Honorary Presidency Magistrate of Calcutta under s. 432 of the Criminal Procedure Code (Act X of 1882).

The facts of the case and the questions referred for the opinion of the High Court appear from the following letter of reference:—

"During the official years 1893-94, 1894-95 and 1895-96, commencing on the 1st April and ending on the 31st March every year Messrs. Gillanders, Arbuthnot & Co., merchants, carried on as they still carry on business in Calcutta, as agents of the Eastern Mortgage Agency Company, Limited, a Joint Stock Company registered and having their principal place of business in England and having a paid-up capital of more than ten lakhs of rupees. The defendant Company have no place of business in India. The business of the Company, as carried on by their agents, Messrs. Gillanders, Arbuthnot & Co., consists in lending money on mortgages in Calcutta. The moneys so advanced belong to the defendant Company, and the profit or loss in these transactions accrues to the defendant Company, and not to Messrs. Gillanders, Arbuthnot & Co. Messrs Gillanders, Arbuthnot & Co. take out licenses in their own name for the business carried on by them in Calcutta, and have done so for the years 1895-96 and 1896-97, The defendant Company took out licenses in their name through Messrs. [484] Gillanders, Arbuthnot & Co., for the official years 1893-94 and 1894-95 under ss. 87 and 88 of Act II. (B. C.) of 1888, the licenses being, granted under class I in the second schedule to the Act. No license however, has been taken out by the defendant Company for the official year 1895-96, and the present proceedings were instituted in consequence by the Corporation. The defendant Company made no application to the Commissioners for exemption in accordance with Rule 7, cl. (*b*) in the second schedule to the Municipal Act. Rule 7 down to the end of cl. (*b*) is as follows:—

(7) The liability of any person to take out a license and the class under which he is liable shall be determined in the following manner.

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* Criminal Reference No. 2 of 1897, made by J. C. Dutt, Esq., an Honorary Presidency Magistrate of Calcutta, dated the 16th of December 1897.

(1) 22 C. 581.

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Any person who has taken out a license for the preceding year or been fined under section ninety for not taking out a license during such year, shall be presumed to be liable and entitled to take out a license under the class in which he was then placed in the year for which the tax is being levied.

(*b*) Any person who, in consequence of any change in his profession, trade or calling or place of, business, or for any other reason, considers himself entitled to take out a license in a lower class than before, or to be altogether exempted, may present an application to that effect to the Commissioners at any time before the first day of July. If no application is made by that date he will be liable to take out a license as prescribed in cl. (*a*).

The Commissioners shall pass orders on such application, and the license shall be taken out in accordance with such orders unless appealed against under cl. (*e*).

It is urged on behalf of the Corporation that the defendant Company are liable to take out a license under s. 87 of the Municipal Act inasmuch as they exercise in Calcutta within the meaning of that section one of the professions, trades or callings prescribed in the second schedule to the Act, namely, the profession, trade or calling of money-lender, and further that the fact that licenses for the official years 1893-94 and 1894-95 were taken out by the defendant Company, and no application for exemption was made on their behalf before the 1st of July 1895 in accordance with Rule 7, cl. (*b*) quoted above, absolutely precludes the Company from raising the question of liability or non-liability under s. 87 of the Act, and the defendant Company are therefore bound to take out a license for the official year 1895-96.

On behalf of the defence it is contended that exercising a profession, trade or calling in Calcutta does not mean exercising a profession, trade or calling through agents in Calcutta by a person or Company having no registered place of business in India, and that therefore the defendant Company do not come under s. 87 of the Act, that this has been held by the High Court in the case of *Corporation of Calcutta* v. *Standard Marine Insurance Company* (1). That Messrs. Gillanders, Arbuthnot & Co. having **[485]** taken out a license for the year 1895-96 for the business carried on by them including the business of the defendant Company which they carry on as their agents, it will be taxing the same business twice over if the defendant Company be held liable to take out a license; that apart from the fact that the agents of the defendant Company were not acquainted with the provisions of the Municipal Act, Rule 7, cl. (*b*), referred to above cannot override s. 87 of the Act, and does not preclude a person from contending that s. 87 does not apply to him, and that therefore he is not liable. As this case is of some importance, and the points involved in it frequently come up for decision, I have thought it advisable to submit the following questions for the opinion of the High Court.

1. Do the words in s. 87 of the Municipal Act "exercise in Calcutta any of the professions, trades or callings prescribed in the second schedule" mean and include the exercising through agents in Calcutta of any such profession, trade or calling by a person or Company having no registered place of business in Calcutta?

2. Is the Eastern Mortgage Agency Company, Limited, bound under s. 87 of the Act or Rule 7, cl. (*b*) in the second schedule to the

(1) 22 C. 581.

1897 DEC. 21. — CRIMINAL REFERENCE. — 25 C. 483 = 2 C.W.N. 328.

Act to take out a license for the official year 1895-96 under class I in that schedule?

In connection with the second question I have found that Messrs. Gillanders, Arbuthnot & Co. came to know of the decision in the case of the *Corporation of Calcutta* v. *The Standard Marine Insurance Company, Limited*, in April 1895, but they not only did not apply to the Commissioners for exemption before 1st July 1895, but took out the license for the official year 1894-95 on the 27th of March 1896.

As to the first question it seems to me that all that their Lordships decided in the case of the *Corporation of Calcutta* v. *The Standard Marine Insurance Company, Limited*, was that the Standard Marine Insurance Company, Limited, were not liable to take out a "personal license" inasmuch as the business of insurance was not one of the occupations mentioned in the second schedule to the Act, and that the said Company were also not liable to take out a "local" license as keepers of a place of business under class VI, because they had no place of business in Calcutta. It was not decided, so far as I can make out, as to whether the said Company would have been held liable to take out a personal license if the business of insurance had been one of the occupations mentioned in the second schedule to the Act. I think, therefore, that the decision in that case does not apply to the present case. I am inclined to hold, however, that the defendant Company in the present case are not liable to take out a license under s. 87. The mere carrying on of business through agents does not seem to me to be within the meaning of that section, especially when the agents take out a license for the business carried on by them, which includes the business of the defendant Company. The tax levied by the Municipality is not in respect of the income derived from a business, but for the privilege of carrying on the business itself. [486] Such cases therefore as those of *Erichsen* v. *Last* (1), *Werle & Co.* v. *Colquhoun* (2) which are under the Income Tax Act stand on a different footing, and have no application to a case like the present.

As to whether the defendant Company are bound under the circumstances stated above to take out a license for the official year 1895-96, I am inclined to hold that they are bound to take out a license for that year. The wording of Rule 7, cl. (*b*) seems to me to be imperative and to give no discretion to the Court in the matter. The fact that no application for exemption was made before the 1st of July 1895, seems to me to be fatal to the defence; and the plea of ignorance of the Municipal law cannot of course be entertained in the face of the well known maxim *ignorantia juris non excusat.*"

The parties were not represented at the hearing of the reference.

The judgment of the High Court (BANERJEE and HILL, JJ.) was as follows:—

JUDGMENT.

In this case Mr. J. C. Dutt, an Honorary Presidency Magistrate of Calcutta, has referred for the opinion of this Court the two following questions of law under s. 432 of the Code of Criminal Procedure.

Do the words in s. 87 of the Municipal Act "exercise in Calcutta any of the professions, trades, or callings prescribed in the second schedule" mean and include the exercising through agents in Calcutta of any such profession, trade or calling by a person or company having no registered place of business in Calcutta?

(1) (1881) L.R. 8 Q.B.D. 414. (2) (1888) L. R. 20 Q. B. D. 753.

1897 DEC. 21. — CRIMINAL REFERENCE. — 25 C. 483 = 2 C.W.N. 328.

Is the Eastern Mortgage Agency Company, Limited, bound under s. 87 of the Act or Rule 7, cl. (*b*) in the second schedule to the Act to take out a license for the official year 1895-96 under class I in that schedule?

We are of opinion that upon the facts stated in the reference the first question should be answered in the affirmative. There is no reason why a Joint Stock Company exercising through an agent in Calcutta the profession, trade or calling of a money-lender, should not be held to exercise in Calcutta one of "the professions, trades or callings prescribed in the second schedule" within the [487] meaning of s. 87 of Act II of 1888 (B. C.) the profession, trade or calling of a banker and a money-lender being distinctly mentioned in the said schedule. We quite agree with the learned Presidency Magistrate in thinking that the case of *Corporation of Calcutta* v. *Standard Marine Insurance Company* (1) does not decide the present question, the point decided in that case being that an Insurance Company carrying on business by an agent in Calcutta is not bound to take a personal license, as it does not exercise any profession, trade or calling prescribed in the second schedule to the Act, the business of an Insurance Company not being mentioned in that schedule, and that it is not bound to take any local license, as it has no place of business in Calcutta. In the present case the defendant Company must, upon the authority of that case, be held not bound to take any local license; but the case referred to is no authority for the position that it is not bound to take a personal license, when the profession, trade or calling which it exercises is mentioned in the second schedule to the Act. Nor can we accept as correct the view taken by the learned Presidency Magistrate that the defendant Company is not bound to take out any license because it carries on business by an agent, and because the Municipal license tax is not a tax on income, but is a tax levied for the privilege of carrying on business within the limits of the Municipality. It is quite true that the license tax is levied for the last mentioned privilege, and the capital of the Company is taken into account only in judging of the value of the privilege; but the privilege is exercised none the less, and should therefore be paid for none the less, when the profession, trade or calling is exercised through an agent than when it is exercised directly by the Company itself. In the view we take upon the first question, it is not necessary for us to say more in answer to the second question than this, that the Eastern Mortgage Agency Company is liable as much under s. 87 as under Rule 7, cl. (*b*) of the second schedule, to take out a license for the year 1895-96 under class 1.

(1) 22 C. 581.

1897 JAN. 19. — REFERENCE FROM THE RECORDER OF RANGOON. — 25 C. 488 = 1 C.W.N. 172.

25 C 488 = 1 C.W.N. 172.

[488] REFERENCE FROM THE RECORDER OF RANGOON.

Before Sir Francis Maclean, Kt., Chief Justice, Mr. Justice Macpherson and Mr. Justice Trevelyan.

MAHOMED HADY (*Plaintiff*) *v.* SWEE CHEANG AND COMPANY (*Defendants*).* [19th January, 1897.]

Recorder of Rangoon, Jurisdiction of—Reference to High Court, Calcutta—Lower Burma Courts Act (*XI of* 1889), *s.* 42—*Doubt—Conflicting decisions—Decision of Superior Court—Power of Recorder to refer.*

The Recorder of Rangoon, in a suit tried by him, referred to certain decisions of the High Courts at Calcutta, Bombay and Madras, which were in conflict; and, not agreeing with the decision of the Calcutta High Court, referred the case to the High Court in its appellate jurisdiction.

Held, that as the decisions of the High Court at Calcutta are binding on the Recorder, he had no jurisdiction to make the reference, and that it must be returned.

THIS was a reference from the Recorder of Rangoon in the following terms:—

"This is a suit to recover the sum of Rs. 3,300, being the difference between the contract and market rates on a contract for 4,000 bags of rice. The making of the contract is not disputed, but the defendant pleads that it is void under s. 30 of the Contract Act; that he carries on business as a speculator in the rise and fall of prices of rice; that by the custom of the Rangoon market, a market rate of rice is fixed by a committee authorized thereto, on the last day of each month; and that an agreement of the nature sued on is treated as fulfilled when the difference between the settlement rate and the contract rate is paid; and that the parties to the agreement are speculators in differences, and entered into the agreement, having in view the custom of the market and with the full knowledge that the actual delivery of rice was in no wise a necessary or intended incident of the contract.

"At the hearing it was contended on behalf of the plaintiff, on the authority of *Juggernath Sew Bux* v. *Ram Doyal* (1), that evidence was not admissible to show that the contract was void. In that case the contract was for the sale of Government securities, and upon the evidence the learned **[489]** Judge of the Small Cause Court found that it came within ss. 23 and 30 of the Contract Act, and referred the following questions for the opinion of the High Court:—

"First, whether upon the facts, as found by me, the contract was an agreement by way of wager and therefore void within the meaning of s. 30, and contrary to public policy under s. 23 of the Indian Contract Act?"

"Second, whether the tender was a good legal tender?"

"The High Court held that the contract being in writing, and there being no ambiguity about it, evidence was not admissible to vary or contradict its terms. It was argued that evidence was admissible for the purpose of showing illegality, but Garth, C. J., said: I have considerable doubt whether oral evidence is admissible for the purpose of showing that the contract is in its nature illegal. So long as there is no ambiguity about it, the question whether it is illegal or not depends, as it seems to me, upon

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* Civil Reference No. 11 of 1896 made by W. F. Agnew, Esq., Recorder of Rangoon, dated the 23rd September 1896.

(1) 9 C. 791.

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the terms of the contract itself." In *Anupchand Hemchand* v. *Champsi Ugerchand* (1) a similar question was raised, and the Bombay High Court held that oral evidence was admissible to prove that the contract, which on the face of it was for goods to be delivered at future dates, was in reality a contract by way of wager, Sargent, C. J., saying that the provisions of proviso I to s. 92 of the Evidence Act, which allow evidence to be given of any fact which would invalidate any document, did not appear to have been considered from that point of view in *Juggernath Sew Bux* v. *Ram Doyal* (2). The point was again raised before the Madras High Court in *Eshoor Dass* v. *Venkatasubba Rau* (3), and the decision of the Bombay High Court was followed and that of the Calcutta High Court dissented from.

The English authorities are clear that parol evidence is admissible to show what the true nature of the transaction is, and that the Court is not bound to look at the form of the document only. *In re Watson* (4); *Madell* v. *Thomas* (5); *Universal Stock Exchange* v. *Strachan* (6).

"The weight of authority is therefore decidedly in favour of admitting the evidence. But the decision in *Juggernath Sew Bux* v. *Ram Doyal* (2) is absolutely binding upon me, and I must therefore hold that the contract being on the face of it unambiguous, parol evidence is not admissible to show that it is in reality illegal.

[490] "But there being this difference of opinion, and as the case is one of the highest importance to the mercantile community of Rangoon, for I am informed that the same point must arise in numerous cases now pending in this Court and in the Court of Small Causes, I refer the following question under s. 42 of the Lower Burma Courts Act for the opinion of the High Court. When a written contract is on the face of it unambiguous, is parol evidence admissible for the purpose of showing that the contract is in reality illegal?"

Mr. *Jackson*, for the plaintiff.—I take the preliminary objection that the Recorder is not in a position to refer the case, because, as he himself says, there is a decision of this Court which is absolutely binding on him. His judgment shows that he had no doubt on the matter; and therefore he cannot refer the case under s. 42 of the Lower Burma Courts Act. He should have decided the case, and let the unsuccessful party appeal. The reference must be returned.

The Advocate-General (Sir *Charles Paul*) and Moulvie *Mahomed Yusuf*, for the defendant.—The Recorder has the power to refer. He dissents from the decision of this Court, which decision is absolutely wrong—see s. 92 (*a*) of the Evidence Act, and he finds that the Bombay and Madras High Courts have also dissented. Therefore he has a doubt on the matter; and, if so, he can refer the case for the opinion of this Court. [MACLEAN, C. J.—Can he in his judicial capacity express a doubt as to the soundness of a decision of this Court?] I submit he can. This Court has no power to return the reference. Section 42 of the Lower Burma Courts Act says that on receiving the reference, the Courts "shall decide the question referred therein." The section must be read so as to assist the administration of justice. The Calcutta decision, being opposed to s. 92 (*a*) of the Evidence Act, and to the current of authority, this Court ought to answer the question put by the Recorder.

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(1) 12 B. 585.
(2) 9 C. 791.
(3) 17 M. 480.
(4) (1890) L.R. 25 Q.B.D. 27.
(5) (1891) L.R. 1 Q.B. 230.
(6) (1896) L.R. App. Cas. 166.

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Mr. *Jackson* in reply.—If a reference like this be permitted, the very next time the Recorder finds himself in disagreement with a decision of this High Court he could refer the case again on the ground that he differed from the decision just given; and that might go on indefinitely. The contention that this Court [491] must decide the point comes to this,—that, although the Recorder had no power to send the case up, yet, if he did so, the Court is bound to decide it.

The following judgments were delivered by the High Court:—

JUDGMENTS.

MACLEAN, C.J.—A preliminary objection is taken by Mr. Jackson that this reference does not come within s. 42 of the Lower Burma Courts Act (Act XI of 1889), and consequently that we cannot hear it. We will deal with that objection. By the above section the Recorder of Rangoon, if he entertains any doubt upon any question of law, or of custom having the force of law, or as to the construction of any document, or the admissibility of any evidence affecting the merits, may, if he think fit, draw up a statement of the question and submit it to the High Court. In this case what has happened is this: Upon the point at issue in the case there are conflicting decisions of this Court with those of the High Courts of Madras and Bombay. Under these circumstances the position of the Recorder is clear. He is not bound by the decisions of the High Court of Madras and Bombay, but he is bound by the decision of this Court. He should therefore have followed, as he was bound to follow, the decision of this Court, and have left the party who felt aggrieved by his decision to appeal under s. 40 of the Act. What doubt, then, has the learned Recorder expressed in the reference upon any question of law arising in the case? He has expressed none; on the contrary he has stated in the most explicit terms that he is bound by the decision of this Court.

If he entertain any doubt, it is a doubt as to the soundness of the decision of this Court. Personally he may, but judicially he cannot, indulge in that doubt He is bound by the decision. Were it otherwise, in every case in which the learned Recorder doubted the soundness of a decision of this Court he might send up a reference. This cannot be the meaning of the section. I do not think this reference comes within s. 42, and that the preliminary objection must prevail.

The papers will be returned to the Recorder with this expression of our opinion.

[492] MACPHERSON, J.—I concur.

TREVELYAN, J.—I should like to say that I think it clear, having regard to the terms of s. 42 of the Lower Burma Courts Act, that the doubt which the Recorder entertains must be a doubt as to the way in which he ought to determine the particular question of law, or of usage having the force of law, or as to the construction of any document, or the admissibility of any evidence affecting the merits which may arise in the case before him. No other doubt can possibly be the basis of any reference having regard to the terms of the section. In this case the Recorder himself says that the decision of the Calcutta High Court is absolutely binding upon him. That being so, there is, in my opinion, no basis for this reference.

25 C. 492 = 2 C.W.N. 145.

1897 Dec. 14. — Criminal Revision. — 25 C. 492 = 2 C.W.N. 145.

CRIMINAL REVISION.

Before Mr. Justice Banerjee and Mr. Justice Hill.

LUTFUR RAHMAN NUSKUR (*Petitioner*) *v.* MUNICIPAL WARD INSPECTOR (*Opposite Party*).* [14th December, 1897.]

Calcutta Municipal Consolidation Act (Bengal Act II of 1888), ss. 381, 382—*Burial ground—Certificate for closing a burial ground, Requisite of.*

The Municipal authorities issuing a certificate under the provisions of s. 381 of the Calcutta Municipal Act (Bengal Act II of 1888), prohibiting the use of a burial ground, must definitely specify the point of time from which the period fixed by them under that section is to run.

THE Municipal Commissioners of Calcutta issued a certificate, dated 28th April 1897, prohibiting the use of a certain burial ground, under s. 381 of the Calcutta Municipal Consolidation Act of 1888 in the following terms: "No person shall after two months bury or permit to be buried any corpse in, within, or under the ground to which the certificate relates," without specifying the point of time from which the "two months" were to run. The [493] certificate was published in the *Calcutta Gazette* on the 2nd June 1897. And the petitioner, who was one of the proprietors of the burial ground, was tried and convicted under s. 382 of the aforesaid Act for having permitted corpses to be buried there on the 28th June and 9th July 1897.

The petitioner moved the High Court under s. 439 of the Criminal Procedure Code to set this conviction aside, mainly on the ground that the certificate issued did not definitely specify the time as required by s. 381 of the Municipal Act.

Babu *Debendra Chunder Mullick*, for the petitioner.

No one appeared to show cause.

The judgment of the High Court (BANERJEE and HILL, JJ.) was as follows :—

JUDGMENT.

This is a rule calling upon the District Magistrate to show cause why the conviction and sentence in this case should not be set aside on the ground that the provisions of s. 382 of the Calcutta Municipal Consolidation Act (Bengal Act II of 1888) have not been contravened by the petitioner in this case.

No one appears to show cause, and the learned District Magistrate, in his letter to the Registrar of this Court, says that the Deputy Magistrate who tried this case has no cause to show. The offence complained of is stated in the record in these terms: Permitting corpses to be buried at the Talbagan burial ground after it had been closed, as seen on the 28th June 1897 and 9th July 1897. The plea of the accused was that he could not say whether there was any burial on those two particular dates mentioned, but since then several burials have taken place; that he was one of the proprietors of Talbagan burial ground; and that he did not know that it was closed, and therefore allowed the burial of corpses on that ground. There was evidence adduced to show that the burials alleged did take place there. Upon that fact being proved, and the Magistrate being of opinion that the period of two months allowed in this case for closing the

* Criminal Revision No. 756 of 1897, against the order passed by Babu Shamadhava Roy, Deputy Magistrate of Sealdah, dated the 1st of October 1897.

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burial ground ran from the date of the certificate mentioned in s. 381 of the Act, which was the 28th of April 1897, he has convicted the petitioner under s. 382 of the Calcutta Municipal Consolidation [494] Act (Bengal Act II of 1888) and sentenced him to pay a fine of Rs. 10 and annas 8 as costs.

The contention urged on behalf of the petitioner before us is that the conviction is wrong, because the certificate issued under s. 381 of the Act does not definitely specify any time as required by the section; and that if it does name any, it has not been shown that burials have taken place since the expiry of such time. Section 382, under which the petitioner has been convicted, runs thus: "Whoever after due publication of such certificate buries or burns, or causes, permits or suffers to be buried or burned, any corpse contrary to the last preceding section, shall be liable to a fine not exceeding Rs. 200."

The offence in this case is said to consist in the petitioner having permitted, or suffered, corpses to be buried in the burial ground in question contrary to the provisions of s. 381. Now s. 381 enacts—we refer only to so much of it as has bearing upon this case—that if after certain preliminaries are complied with, the Commissioners shall "certify that a fitting place for interment or burning (as the case my be) exists within a convenient distance and is available, no person shall, after a time (not less than two months) to be named in such certificate, bury or burn, or permit or suffer to be buried or burned, any corpse in, upon, within or under, the ground to which the certificate relates;" and the latter part of s. 381 enacts that "every such certificate shall be published in the *Calcutta Gazette*, and a translation thereof in Bengali shall, in the case of a burial or burning ground, be affixed conspicuously on some part of the said ground."

In the present case the certificate that was made by the Commissioners, and is filed with the record as Ex. H., bears date the 28th April 1897, and runs in these terms: "The Commissioners in meeting hereby certify that the condition of the cemeteries of Gobra, New Kasia Bagan, Talbagan and Khoyrati is in such a state as to be dangerous to the health of persons living in the neighbourhood thereof, and that a fitting place for interment exists within a convenient distance and is available. No person shall after two months bury or permit to be buried any corpse in, within or under the ground to which the [495] certificate relates;" and this certificate was published in the *Calcutta Gazette* on the 2nd June 1897. There was also what purports to be a translation in Bengali of the certificate affixed on some part of the burial ground. The certificate, Ex. H, though it specifies the period as being two months, does not name the time from which the two months will run. In what purports to be a translation of it in Bengali, certain words are inserted, which do not occur in the original, and which have the effect of making the period run from the date of the certificate. That will appear from Ex. D. And the questions for determination are, whether the provisions of s. 381, so far as they require the naming of a period in the certificate and the publication of the certificate in the two-fold manner prescribed by the section have been complied with; and if these requirements have been complied with, whether the burials in question took place after the expiry of the period mentioned in the certificate.

We are of opinion that the first question must be answered in the negative. For though a period is named in the certificate, Ex. H, the point of time from which the period is to run is not mentioned. We do

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not think that it would be reasonable to hold that in the absence of any express mention of the point of time from which the period is to run, it must be taken to run from the date of the certificate itself, because the law requires that a time should be mentioned in the certificate, and it also requires that the certificate should be published in the *Gazette*, and affixed on a conspicuous part of the burial ground in question. These two provisions clearly indicate that before the use of a burial ground, closed, under this section, can be treated as an offence punishable under the next following section, the public should have sufficient notice given to them; and to ensure this, s. 381 provides that a time should be mentioned in the certificate, which must not be less than two months; and it is for the authority issuing the certificate to determine the point of time from which the period of two months or such other period as may be fixed is to run, the point of time being evidently intended to be so determined that it may not be anterior to the date of the publication contemplated by the last paragraph of the section, that is to say, the publication in the *Gazette*, and the posting of the certificate in some conspicuous [496] part of the ground. It would be manifestly contravening that intention to hold, in a case like this, that in the absence of any express mention of the point of time from which the period is to run, the starting point should be the date of the certificate, especially when it appears in this case that it was not published until the 2nd of June; nor was it affixed conspicuously on the spot until the 21st of May.

That being so, it becomes unnecessary to consider the second question. We must hold that the provisions of s. 381 have not been complied with in the matter of the issuing and publishing of the certificate.

The conviction and sentence in this case must, therefore, be set aside, and the fine, if realized, refunded.

B. D. B. *Conviction set aside.*

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25 C. 496 (F.B.) = 2 C.W.N. 269.

FULL BENCH REFERENCE.

Before Sir Francis William Maclean, Kt., Chief Justice and Mr. Justice O'Kinealy, Mr. Justice Trevelyan, Mr. Justice Ghose and Mr. Justice Ameer Ali.

POORNO CHUNDER GHOSE AND OTHERS (*Plaintiffs*) v. SASSOON AND OTHERS (*Defendants*).* [4th February, 1898.]

Limitation Act (XV of 1877), s. 13—Absence of defendant from British India—Defendant carrying on business in British India through an authorised agent.

Section 13 of Limitation Act, which excludes the time during which a defendant has been absent from British India in computing the period of limitation for any suit, applies even where, to the knowledge of the plaintiffs, the defendants, partners in a firm, are during the period of their absence carrying on business in British India through an authorised agent.

Harrington v. *Gonesh Roy* (1), overruled.

THIS was a reference by the Chief Judge of the Small Cause Court to the High Court on 15th March 1897. The case stated [497] for the

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* Reference to the Full Bench in the reference from the Presidency Small Cause Court, No. 1 of 1897.

(1) 10 C. 440.

1898 FEB. 4. opinion of the High Court by the Chief Judge of the Small Cause Court was as follows :—

FULL BENCH.

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"In this case Poorno Chunder Ghose, Kedar Nath Mukerji and Khetter Nath Sircar carrying on business under the style of Poorno Chunder Ghose, Kedar Nath Mukerji, sued Messrs. E. D. Sassoon & Co. for Rs. 774-6-0, the balance price of myrabollams sold by the plaintiffs to the defendants under a contract, dated 12th July 1893, delivery to be taken by the 20th August 1893. The facts are admitted, but the defendants pleaded that the plaintiffs' suit was barred by limitation. I found that the plaintiffs' suit was not barred by limitation, and gave a decree with costs in their favour. The plaintiffs' pleader argued that the suit was not barred on several grounds, some of which I found against him. Both parties have asked me to refer the case to the High Court; if their Lordships are of opinion that the plaintiffs' claim is barred by limitation, then the plaintiffs' suit will be dismissed with costs; if their Lordships are of opinion that the plaintiffs' claim is not barred by limitation, then the decree in the plaintiffs' favour for Rs. 774-6-0 with costs will stand,

"In order to understand fully how the question of limitation arises, it is necessary for me to refer to a cross-suit which was tried by me at the time when this suit was first tried. In that suit Messrs. E. D. Sassoon & Co. sued Kedar Nath Mukerji, Poorno Chunder Ghose and Khetter Nath Sircar carrying on business in partnership for Rs. 572-1-0 as compensation for inferiority in quality and for short weight of the myrabollams bought under the contract, dated 12th July 1893. Kedar Nath Mukerji and Poorno Chunder Ghose sued Messrs. E. D. Sassoon & Co. for Rs. 77-6-0, balance of price of the myrabollams. The two suits came on before me, and I gave my judgment on the 17th day of February 1896. Khetter Nath Sircar pleaded in the suit brought by Messrs. E. D. Sassoon & Co. that he was not a partner of Kedar and Poorno, and asked that the suit should be dismissed against him with costs. On the evidence I was satisfied that Khetter Nath Sircar was a partner of Kedar and Poorno. Just before delivering judgment the pleader for Khetter Nath said that if I was of opinion that Khetter Nath was a partner, he would ask me to add him as a plaintiff in the suit brought by Kedar and Poorno. I declined to add Khetter Nath at that stage and gave judgment dismissing both suits, Kedar's and Poorno's, on the ground that Khetter Nath ought to have been a plaintiff. Thereupon Kedar Nath Mukerji and Poorno Chunder Ghose moved the High Court under s. 622 of Act XIV of 1882. On the 7th May 1890, Mr. Justice Ameer Ali set aside my order of dismissal in Kedar's and Poorno's suit, and ordered me to re-try the suit. His Lordship was of opinion that I ought to have added Khetter Nath Sircar as a plaintiff when I was asked so to do.

"The judgment of the High Court was read on the 8th July 1896 in the [498] officiating Chief Judge's Court. The case came on before me on my return from furlough on 9th December 1896, but nothing was done on that day. On the 14th January 1897 the case came on again before me, and Khetter Nath Sircar was added as a plaintiff at the request of plaintiffs' pleader and with his own consent. Messrs. E. D. Sassoon & Co's pleader then pleaded that the suit was barred by limitation. The cause of action arose on the 20th August 1893. Khetter Nath Sircar was added as a plaintiff on 14th January 1897 more than three years afterwards. If the claim of a necessary party to a suit is barred by limitation at the time when he is added as a party the whole suit is barred—See *Ramdoyal*

v. *Junmenjoy Coondoo* (1). I held the plaintiffs' suit was barred unless they could show me that limitation did not run against them."

The plaintiffs' pleader contended that limitation did not run against them on the four following grounds:—

"*Firstly.*—That Khetter Nath Sircar was not a necessary party to the suit. I held that he was a necessary party, and that plaintiffs had recognised that fact by applying to me to have him made a plaintiff.

"*Secondly.*—That Khetter Nath Sircar became a plaintiff on May 7th, 1896, when Mr. Justice Ameer Ali said he ought to have been made a plaintiff. I decided that Khetter Nath Sircar did not become a plaintiff until January 14th, 1897, when he was placed on the record as a plaintiff. He might have been added on July 8th, 1896, when the judgment of the High Court was read, but no application to add him was made then. If he became a plaintiff on May 7th, 1896, there was no necessity for the application of January 14th, 1897—See *Rampartab Samrathrai* v. *Fooli Bai* (2).

"*Thirdly.*—The plaintiffs' pleader contended that in two letters, dated 23rd January 1894 and 7th February 1894, Messrs. E. D. Sassoon & Co. acknowledged their debt to the plaintiffs in the following words: 'Please call at our office to settle your account, as we have received the result of your 100 tons myrabollams,' and 'since writing you on the 23rd ultimo we have neither seen nor heard from you; we now again request you to call and settle about the shipment of your myrabollams guaranteed by you at London, failing which we shall demand the same through our attorneys without any reference.' Mr. Abrahams, an assistant in Messrs. E. D. Sassoon & Co., gave evidence and said the letters were not an acknowledgment of a debt to the plaintiffs, but a demand on the plaintiffs to pay what was due to the defendants as compensation for inferiority in quality, and for short weight of the myrabollams sold by the plaintiffs to the defendants. The letters support Mr. Abrahams, and I decided against the plaintiffs on this point.

[499] "*Fourthly*—The plaintiffs' pleader contended that the suit was not barred, inasmuch as the partners in the defendants' business were all absent from British India. J. E. Sassoon, M. E. Sassoon and E. E. Sassoon are the only partners in the defendants' business. M. E. and E. E. Sassoon always reside in Europe. J. E. Sassoon resides in Bombay, and goes home about once in three years; he went to England in February 1896, and returned in November 1896, and during that time there was no partner in British India. The defendants had a place of business here which was carried on by a manager to the knowledge of the plaintiffs, as appears from the description of the defendants on the point. The defendants' manager held a power-of-attorney, which authorised him to institute and defend suits."

On the authority of *Atul Kristo Bose* v. *Lyon & Co.* (3), I found for the plaintiffs on this point, and decreed the case in their favour. *Harrington* v. *Gonesh Roy* is opposed to *Atul Kristo Bose* v. *Lyon & Co.*, but is a prior case, and I considered that I was bound to follow the later case.

The Advocate-General (Sir *C. Paul*), for the defendants.—This suit is barred by limitation. Section 13 of Act XV of 1877 cannot apply in a case like the present one. Here, although the partners in the defendants' firm were not resident in India during the whole of the three years, the business of the defendants' firm was carried on in British India by a manager who held a power-of-attorney authorising him to institute and defend suits. The case of *Atul Kristo Bose* v. *Lyon & Co.* (3) does not apply. At the time

(1) 14 C. 791. (2) 20 B. 767 (776). (3) 14 C. 457.

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of the suit the defendants were carrying on business here, and that was made the subject of jurisdiction. There has been no absence sufficient to bring the case within the exception of s. 13 of Act XV of 1877. That section only applies where actual residence is needed to give a ground of jurisdiction. Here the carrying on of the business is the ground of jurisdiction. If this were not so, the only partner in a Calcutta firm might be absent for six months in every year, and the period of limitation would be extended to six years. If he was absent for eleven months in every year the period of limitation would be extended to 36 years. If he was only present in India for quarter of a month in each year, the period of limitation would go on for 144 years. This is not the intention of the Legislature. The judgment of Wilson, J., is based on a fallacy as **[500]** appears from the report. If not you are led to an unreasonable construction. As long as the defendants were carrying on business here through their manager they were never absent according to the section of the Code of Civil Procedure. Section 13 of Act XV of 1877 is intended to apply to cases where the defendant cannot be got at, but that is not the case here. The decision of Tottenham and Norris, JJ., (1) is correct. The case before the Privy Council (2) construes the Statutes of James, the words in that case deal with the word "return" in the statute. The statute gives a cause of action on the return. Section 7 says the plaintiff shall have a right of action on the return. Statutes, however, are always intended to be construed in a reasonable way. See the case of *In re Dhunput Sing* (3) where it was held that although the person was not present he could commit an act of insolvency through his *gomastha*. See the case of *Hawkins* v. *Gathercole* (4) on the necessity of considering the intention of the statute.

Mr. *Woodroffe*, for the plaintiffs.—The words of the section are clear. *Beake & Co.* v. *Davis* (5). Act XV of 1882, Presidency Small Cause Courts Act, says the foundation of the jurisdiction is that all the defendants at the time of the institution of the suit must reside within the local limits. The laws are adapted to what happens in the ordinary course of business. If the defendants choose to be absent from British India that is not the plaintiffs' fault, and they are entitled to the exception given by s. 13 of Act XV of 1877. Assuming a partner has an agent within the jurisdiction will he be exempted from the provisions of s. 13? Mitra's Limitation Act, p. 602. The case before the Privy Council (2) is in plaintiffs' favour. So also is the case of *Atul Kristo Bose* v. *Lyon* (6) and *Rampartab* **[501]** *Samrathrai* v. *Foolibai* (7). If the Limitation Act gives the plaintiff a right to bring a suit within certain periods, the fact that he can effect service of the summons on the agent of the defendants under the Civil Procedure Code is *nihil ad rem*. The law of limitation is not controlled by the question of jurisdiction. The words in the Act are express. In the case of *Harrington* v. *Gonesh Roy* (1) this point was not argued. Starling's Limitation Act, p. 62.

The Reference by MACLEAN, C. J., MACPHERSON and TREVELYAN, JJ., to the Full Bench on 24th January 1898, was as follows:—

The facts of this case appear in the case stated for the opinion of this Court by Mr. A. P. Handley, the Chief Judge of the Court of Small Causes of Calcutta.

(1) 10 C. 440. (2) 5 M.I.A. 234 (260).
(3) 20 C. 771 and on appeal to Privy Council 23 C. 26.
(4) (1855) 6 De. G. M. & G. 1. (5) 4 A. 530.
(6) 14 C. 457. (7) 20 B. 767.

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The question that has been argued before us is, whether, having regard to the fact that the defendants' firm has to the knowledge of the plaintiffs been represented in Calcutta by a manager holding a power-of-attorney which authorized him to institute and defend suits, the provisions of s. 13 of the Limitation Act of 1877 have any application.

It is contended on behalf of the plaintiffs that the period during which no one of the defendants was in British India, *viz*., from February 1896 to November in the same year, should be excluded in computing the period of limitation.

After hearing the argument we agree with this view, but having regard to a decision to the contrary in the case of *Harrington* v. *Gonesh Roy* (1) we refer this case for decision by a Full Bench.

The case of *Atul Kristo Bose* v. *Lyon* (2) and *Ruckmaboye* v. *Lulloobhoy Motichand* (3) have also been cited to us.

We reserved liberty to Mr. Woodroffe, counsel for the plaintiffs, to argue any other questions which may arise in the case **[502]** should the opinion of the Court be against him on the question to which we have referred.

The case came on for hearing before the Full Bench on 4th February 1898.

The Advocate-General (Sir *C. Paul*), for the defendants.

Mr. *Woodroffe*, for the plaintiffs.

The following judgments were delivered by the Full Bench (MACLEAN, C.J., and O'KINEALY, TREVELYAN, GHOSE, and AMEER ALI, JJ.).

JUDGMENTS.

MACLEAN, C.J.—I had the advantage of hearing this case argued before the Division Bench of which I was a member, and I have had the further advantage now of having heard the case re-argued by the learned Advocate-General, but the later arguments have not shaken the view I entertained and expressed when the case was before us on the previous occasion. The facts in this case have been found in the reference, and the short question we have to decide is, whether or not, having regard to s. 13 of the Limitation Act, and to the fact found in the reference that all the partners in the defendants' firm were absent from British India from February to November 1896, the time of such absence is to be excluded in computing the period of limitation prescribed for the suit. It is conceded by the defendants that, if such time be excluded, the suit has been instituted within the prescribed period, and is not barred by the statute.

It is found as a fact in the case, that the defendants had a place of business, I assume, in Calcutta, which was carried on by a manager, to the knowledge of the plaintiffs, and that the defendants' manager held a power-of-attorney which authorized him to institute and defend suits.

It is contended for the defendants that s. 13 only applies to cases where the jurisdiction is founded upon residence, and that it does not apply to cases in which the carrying on of a business in Calcutta is the basis of the jurisdiction, in other words, that the section does not apply, and could not have been intended to apply, when the defendants, to the knowledge of the plaintiffs, have a place of business in **[503]** Calcutta carried on by a manager, who is authorised to institute and defend suits, and when in fact, the defendants, to the knowledge of the plaintiffs, are represented in British India by a duly authorised agent. In

(1) 10 C. 440. (2) 14 C. 457. (3) 5 M. I. A. 234.

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support of this contention the case of *Harrington* v. *Gonesh Roy* (1) is strongly relied on by the defendants. I doubt, however, whether, having regard to the clear and precise language of s. 13, that decision is well founded, for it seems to me that, whatever may be the common sense of the decision, it can only be arrived at by interpolating into the section words that are not there, words to the effect that the time of absence is not to be excluded if the defendants are, during the period of personal absence, represented by a duly constituted agent in British India. Although we have been referred to the case of *Hawkins* v. *Gathercole* (2) as to the manner in which statutes are to be construed, I do not see my way to put the construction upon the section for which the defendants contend; if he did so, I think we should be rather legislating than adjudicating upon the section as it stands. It may well be that it would be expedient not to allow the time of absence from British India to be excluded, if the defendants be carrying on business in British India, and be represented by a duly authorised agent during such absence; but, if this change is to be made, it must be made by the Legislature. Reading the language of s. 13—a section be it remembered in a Limitation Act, the provisions of which must be construed strictly, and which, when set up as a defence, must not be extended to cases which are not strictly within the enactment, whilst exceptions or an exemption from its operation are to be construed liberally [see per Lord Cranworth in *Roddam* v. *Morley* (3)] reading, I say that section according to the ordinary significance of the words used, I think we are not warranted in holding that the section does not apply to cases where the defendants are, during the period of absence, carrying on business in British India through an authorised agent.

In other words, I do not see my way to getting over the clear and precise language of the section, feeling as I do that the words **[504]** of the section are too strong against the view contended for by the defendants, and that we could only support that view by the interpolation of words to the effect I have stated above. This I do not think we are justified in doing. My opinion is supported by the case of *Atul Kristo Bose* v. *Lyon & Co.* (4) in which decision, notwithstanding the able criticism of the Advocate-General upon it, I concur, and is strengthened by the consideration that the words in the corresponding section of Act IX of 1871 as to service of a summons to appear and answer in the suit have been omitted in the present section.

With reference to the further argument which has been addressed to us to-day that s. 9 of the Limitation Act must be read in conjunction with s. 13 of the same Act, it is no doubt a cardinal rule of construction that in construing any Act of Parliament one may look at the whole Act to ascertain what the intention of the Legislature was, but to my mind, notwithstanding the decision to which our attention has been called in the case of *Narrowji Bhimji* v. *Mugniram Chandaji* (5), I am unable to see how s. 9, even if read with s. 13, can assist the defendants in the present case. Section 9 only says that "when once the period of limitation has commenced to run in any case, it will not cease to do so by reason of any subsequent disability or inability to sue." I do not see the application of that section to the present case. Here there is neither subsequent disability nor, in my judgment, inability to sue. What disability or inability is suggested? None so far as I have heard. In his

(1) 10 C. 440. (2) (1855) 6 DeG. M. & G. 1. (3) (1857) 1 De G. & J. 1 (23). (4) 14 C. 457. (5) 6 B. 103.

work on the Law of Limitation Baboo Upendra Nath Mitter, the author, at p. 240, gives this definition of disability and inability: "Disability," he says, "is want of a legal qualification to act." "Inability is want of a physical power to act." I do not say these definitions are exhaustive: a few definitions are, but so far as they go I am not prepared to dissent from them. It is perhaps unnecessary to prosecute this matter further, for I am unable to see where, in this case, disability or inability existed. I think therefore that the Chief Judge of the Court of Small Causes was [505] right in holding that the case came within s. 13 of the Limitation Act, and that the plaintiffs have brought their suit within time.

O'KINEALY, J.—I agree in thinking that the suit has been brought within time, and that the view taken by the Chief Justice of s. 13 of the Limitation Act is correct.

TREVELYAN, J.—I agree entirely with what has fallen from the learned Chief Justice.

GHOSE, J.—And so do I.

AMEER ALI, J.—I also agree with the learned Chief Justice.

MACLEAN, C. J.—We can only award such costs as the Rules allow and this we do, to be paid by the defendants in the suit.

Attorney for the plaintiffs: Babu *R. C. Mitter.*

Attorney for the defendants: Mr. *Sowton.*

C.E.G.

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25 C. 505 (F.B.) = 2 C.W.N. 283.

FULL BENCH REFERENCE.

Before Sir Francis William Maclean, Kt., Chief Justice, and Mr. Justice O'Kinealy, Mr. Justice Trevelyan, Mr. Justice Ghose and Mr. Justice Ameer Ali.

MOLL SCHUTTE & CO. (*Plaintiffs*) *v.* LUCHMI CHAND (*Defendant*).* [4th February, 1898.]

Contract—Sale of unascertained goods—Breach of contract—Power of re-sale—Contract Act (IX of 1872), *s.* 107*—Damages.*

The plaintiffs sold to the defendant under an "Indent" contract ten cases of tobacco at an agreed price. On arrival the defendant refused to pay for and take delivery of the goods on the ground that they were not the goods contracted for. After notice to the defendant the plaintiffs resold the goods and sued to recover the expenses of the re-sale, and the difference between the price realized and the contract price with interest.

Held, that cl. 1 of the Indent Contract gave the plaintiffs a right to re-sell the goods, and sue for the damages mentioned therein. Section 107 of the Contract Act had no bearing on the case.

Yule & Co. v. *Mahomed Hossain* (1), dissented from.

[F., 22 A. 55 (65); 23 M. 18 (23); R., 32 C. 816 (830); D., 39 C. 568 = 16 C.W.N. 593 = 13 Ind. Cas. 705.]

[506] THIS was a case stated for the opinion of the High Court by the Officiating Chief Judge of the Small Cause Court on 14th September 1897; the terms of the reference were as follows:—

"The questions which I have the honour to submit for your Lordships' decision deal with two distinct matters—one relating to the plaintiffs' right of re-sale under the contract in suit and the other relating

* Reference to a Full Bench, in reference from the Presidency Small Cause Court, No. 3 of 1897, on case stated for opinion by E. W. Ormond, Esq., Officiating Chief Judge of that Court.

(1) 24 C. 154.

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to the necessity of filing an award under s. 525 of the Civil Procedure Code.

"The plaintiffs sold to the defendant under an 'Indent' contract ten cases of tobacco at a net price C.F.I. The contract is sent herewith for reference, if required, the first clause of which is as follows:—

"The goods are to be shipped by steamer to Calcutta and to be at our risk as soon as they are landed, $\frac{\text{I}}{\text{we}}$ herewith pledge $\frac{\text{myself}}{\text{ourselves}}$ to pay for them before delivery within 30 days after arrival of the bill of lading from Europe, failing which you are authorised to resell the goods or any portion of them, or at your option cancel this indent, and you have absolute discretion as to when and how to re-sell the goods. In case of any resale, we shall pay to you any loss or deficiency arising from such resale together with interest at 12 per cent. per annum. Should there, however, be any surplus after payment of the indent-price, charges, costs and expenses of re-sale the same shall belong to you.

"The plaintiffs ordered ten cases only of tobacco and caused them to be shipped and consigned to themselves for the purpose of fulfilling this contract. The goods duly arrived, but the defendant refused to pay for and take delivery of the goods on the ground that they were not the goods contracted for; the plaintiffs subsequently re-sold the goods after notice and now sue to recover the expenses of such re-sale and the difference between the price realized and the contract price together with interest as stipulated for in cl. 1 of the contract. The defendant contends that the plaintiffs had no right to re-sell the goods, etc., as he (defendant) had never approved of the goods. I found that the goods imported by the plaintiffs for the defendant and tendered to him were in accordance with the contract, and I held that upon default in payment by the defendant, the plaintiffs had the right to re-sell the goods and sue for the above damages under cl. 1 of the contract whether the property in the goods had actually passed to the defendant or not. I decreed the suit therefore in favour of the plaintiffs for the amount claimed, making my judgment contingent upon the opinion of the High Court at the request of the defendant's pleader. No evidence as to any market-rate was adduced, and if the plaintiffs are not entitled to the damages as stated above, the suit must be dismissed.

"The case of *Yule and Co.* v. *Mahomed Hossain* (1) which was referred from this Court, decided that in a contract for the sale of goods to arrive, the [507] 'buyer' not having approved of the goods, the property in the goods had not passed to him under s. 83 of the Contract Act; and that the proviso for re-sale in the contract itself could have no application 'as no such power is required to enable a man to sell his own goods.' It will be seen that the High Court decided a point which was not included in the reference, it having been assumed in this Court that a right of resale arose to the plaintiffs in that case upon default by the defendant in taking delivery and making payment. I presume that that case was not intended to decide that a proviso for re-sale in a contract should have no application even though the parties agree in express terms that the right of resale and to recover the abovementioned damages should arise whether the property in the goods had passed to the party in default or not. Such a stipulation in a contract (for the sale of goods to be imported) merely provides a practical, convenient and reasonable method for ascertaining the actual damages sustained by the importer in case of default by the other party

(1) 24 C. 124.

to the contract. In the present case it would seem from cl. 4 of the contract that the parties intended that the plaintiffs should be at liberty to resell and to recover the above damages even though the defendant had not approved of the goods, *i.e.*, even though property in the goods had not passed to the defendant under s. 83 of the Contract Act. The word "re-sell" itself does not mean selling the property of the defaulting party, but rather selling the goods contracted for "against" the party in default in order to ascertain the amount of damages to be recovered from him.

"The first question, therefore, that I submit for your Lordships' decision is :—

"1. The defendant having committed default in payment (for goods tendered to him which were in accordance with the contract) does cl. 1 of the contract give the plaintiffs a right to re-sell the goods and to sue for the damages mentioned in cl. 1, irrespective of whether the property in the goods had passed to the defendant or not?

"In case it should be found necessary to determine the question of the property passing to the defendant or not, I held that the property had passed to the defendant for the following reasons :—

"(*a*) Property can pass by agreement at any time. The parties agreed that the plaintiffs should have a right of re-sale in a certain event (*viz.*, upon default in payment by the defendant); if the property passing is a necessary incident to that right, the property must be deemed to have passed when the plaintiffs exercised their right of re-sale.

"(*b*) If risk attaches to the buyer it is a very strong argument that the property was meant to be in him. Clause 1 of the contract, therefore, would show that the property in the goods was in [508] defendant from the time of arrival. In the above case of *Yule & Co.* v. *Mahomed Hossein*, the contract contained a clause to the effect that the goods should be at the 'buyer's' risk from the delivery due date; but this fact in all probability was not brought to the notice of the High Court, for it was not mentioned in the case submitted by this Court, and the arguments of counsel as to the property passing appear from the report to have been confined to the question of property passing under s. 83 of the Contract Act.

"(*c*) I think the property in the goods passed from the plaintiffs to the defendant at the time of shipment under s. 84 of the Contract Act. The contract is called an Indent, the price covered 'cost, freight and insurance,' and cl. 15 of the contract is a request by the defendant to the plaintiffs to take charge of the goods on arrival on the defendant's account. It would seem, therefore, that the plaintiffs shipped the goods and insured them on account of the defendant, although done in his own name.

"I submit, therefore, this second question :—

"2. Did the property in these goods pass to the defendant at or before the time of the resale by the plaintiffs?

"The third question submitted refers to the necessity of filing an award in this suit under s. 525 of the Civil Procedure Code and as framed by the defendant's pleader is as follows :—

"3. Is the suit maintainable in its present form—plaintiffs not having made the award a Rule of Court—when the latter part of cl. 4 of the contract says that the award may be made a rule of the High Court?

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"The facts material to this part of the case are as follows: The defendant objected to the goods as not being goods of the description contracted for; the parties referred the matter to arbitration under the contract; the arbitrators disagreed and thereupon appointed an umpire who decided that the goods were in accordance with the contract. The plaint merely states these facts and asks for damages by way of re-sale. In cl. 4 of the contract it is provided that the arbitrators *before* acting shall appoint an umpire; but at the time the umpire was surveying the goods to the defendant's knowledge, the defendant agreed to be bound by his decision. I held therefore that the defendant was bound by the umpire's award. Direct evidence also was given to show that the goods were in accordance with the contract, and I found this as a fact, although the awards, or rather the report of the umpire for the, "award," does not direct any sum of money to be paid by defendant to the plaintiffs, but in effect states that the goods are in accordance with the contract. The defendant contends that the matter having once been **[509]** submitted to arbitration, the plaintiffs' remedy under the contract is gone; that their remedy rests solely upon the award which can only be enforced by making the award a rule of the High Court under s. 525 of the Civil Procedure Code in accordance with cl. 4 of the contract, and therefore this Court has no jurisdiction to try this suit. The defendant at the same time impugns the validity of the award on the ground that the umpire was not appointed by the aribitrators before acting, and apparently he was never desirous of having the matter re-submitted to arbitration. I held against all these contentions. The summary procedure provided under s. 525 of the Civil Procedure Code does not prevent a plaintiff from suing upon the award in the ordinary way, and the clause in the contract as to making the award a rule of Court is also permissive. The plaintiffs are not bound under the contract to go to arbitration or to obtain an award before suing for a breach of the contract, and unless the defendant sets up an award in answer to the plaintiffs' claim, I see no reason why the plantiffs should not succeed in a suit for such breach. If the award is bad (as the defendant contends it is) the whole proceedings relating to the submission are void and the parties are relegated to their original position under the contract."

Mr. *O'Kinealy*, for the defendant.—Here there was a refusal to take delivery of the tobacco on the ground that they were not the goods contracted for. Can there be a resale of the goods so as to bind the seller and buyer. The first three clauses of the Indent deal with the rights of the parties and what they are to do if a dispute arises between them. I rely on the case of *Yule & Co.* v. *Mahomed Hossain*(1). If the buyer does not examine the goods within ten days property does not pass. The seller ought to sue for the value between the contract price and the market price of the day. They are atill the vendor's goods. Buyer is liable in damages for breach of the contract. Under s. 74 of the Contract Act, whether it is stipulated damages or penalty, the Court can give what they please. Section 73 rules what a person is entitled to when the contract is broken. Supposing the property has not passed, then there can be no resale. The property in the goods had not passed under s. 83 of the Contract Act.

Mr. *Dunne*, for the plaintiffs.—This case is distinguishable from the case of *Yule & Co.* v. *Mahomed Hossain* (1). There the **[510]** question as to the right of resale was never really referred. On the facts the property may have been shown to have passed. That case was decided on a

(1) 24 C. 124 (126).

reference in which the facts were never dealt with. A vendor cannot, when goods are at the risk of the buyers, change them. The plaintiffs can only resell the goods under s. 107 of the Contract Act.

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The judgment of the High Court (MACLEAN, C. J., and MACPHERSON and TREVELYAN, JJ.) referring the case to a Full Bench on 24th January 1898, was as follows :—

The facts of this case appear in the case stated for the opinion of this Court by Mr. E. W. Ormond, Officiating Chief Judge of the Court of Small Causes at Calcutta.

The question that has been argued before us is, whether, under the terms of the first clause of the contract, the plaintiffs were at liberty to re-sell the goods, and are entitled to recover the loss on such re-sale.

It has been contended on behalf of the defendant that the plaintiffs are not entitled, either under the contract or under s. 107 of the Indian Contract Act, to re-sell the goods, and that they are only entitled to the difference between the contract rate and the market rate at the time of breach.

In support of their contention they have relied upon the decision of this Court in the case of *Yule & Co.* v. *Mahomed Hossain* (1). As the terms of the contract in that case were similar to those in the present case, and as we differ from the view taken by the learned Judges in that case with regard to the rights of the plaintiffs under a contract of that description, we refer this case for decision by a Full Bench.

Mr. *O' Kinealy*, for the defendant.

Mr. *Dunne*, for the plaintiffs.

OPINION.

The opinion of the Full Bench was delivered by

MACLEAN, C.J., (O'KINEALY, TREVELYAN, GHOSE and AMEER ALI, JJ. concurring).

MACLEAN, C. J.—If it had not been for one passage in the[511] judgment in the case of *Yule & Co.* v. *Mahomed Hossain* (1) I should scarcely have thought that the point which we have to decide, and which has been submitted to us, was susceptible of serious argument. The passage I refer to is at p. 128 of the report, and it is as follows :—

"To such a case as this neither s. 107 of the Contract Act nor the proviso for re-sale in the contract itself can have any application, as no such power is required to enable a man to sell his own goods."

I may point out in passing that that passage scarcely appears to me to have been necessary for the decision of the case, having regard to the real question which was then submitted by the reference. The question we have first to decide is the first question submitted to us in the reference. In my opinion that question ought to be answered in the affirmative. Section 107 of the Contract Act has, in my judgment, no bearing on this case. I base my decision on the terms of the contract between the parties. Here the parties, two mercantile men, perfectly competent to contract, have made their own bargain, and one of the terms of that bargain is that if there were any such default on the part of the purchaser as is mentioned in cl. 1 (as there was) the vendor was to have the right to resell the goods, and any loss or deficiency arising from such re-sale, with interest thereon at the rate of 12 per cent. per annum, was to be paid by the purchaser to the vendor. We

(1) 24 C. 124.

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are told upon the authority of the passage in the case to which I have referred, and upon that authority alone, that such a re-sale is bad, and that the course which the vendor (the plaintiff) took in this case was not justified under the contract. I am quite unable to assent to that view. There is nothing in the contract which is contrary to public policy. It is a perfectly good contract. It is not an unreasonable contract for two mercantile men to have made, and having made it why should not effect be given to it? It is said that the term "re-sell" can only apply to a case where the property has passed to the purchaser, and that that term presupposes a previous valid and effectual sale. In the ordinary [512] acceptation and use of the term there was a sale to the defendant, and the bargain was that if he did not pay the purchase-money the plaintiff might resell the goods and hold the defendant responsible for any loss. There is nothing in the contract about the property having or not having passed, or that the re-sale was only to be made if it had passed.

The clause was intended to provide for the very case which has arisen, and I think it would be rather a shock to mercantile men to be told that when a clause like this has been introduced into a mercantile bargain no effect can be given to it. I hope that is not the law. I do not think it is the law. If such a clause as this were only to become operative if and when the property in the goods had passed to the defaulting purchaser, the operation of such a clause would, probably, not be effective in many cases. But I do not think such is the meaning of the clause. As I have said before, the first question must be answered in the affirmative.

That being so, the second question submitted to us does not arise, and the third question, when the matter was before us originally, was abandoned by the learned counsel who appeared for the defendant. As regards the costs we can only give such costs as are provided for by the Rules, and this we do, and order the defendant to pay to the plaintiffs such costs.

Attorneys for the plaintiffs: Messrs. *Morgan & Co.*

Attorneys for the defendant: Mr. *N. C. Bose.*

C. E. G.

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25 C. 512 (F.B.) = 1 C.W.N. 255.

FULL BENCH REFERENCE.

Before Sir Francis Maclean, Kt., Chief Justice, Mr. Justice O'Kinealy, Mr. Justice Macpherson, Mr. Justice Trevelyan, and Mr. Justice Jenkins.

QUEEN-EMPRESS *v.* ABBAS ALI.*

[22nd and 29th December, 1896 and 29th January, 1897.]

Forgery—Using a forged Document—Penal Code (Act XLV of 1860), ss. 463, 471—"*Fraudulently,*" *Meaning of.*

Deprivation of property, actual or intended, is not an essential element in the offence of fraudulently using as genuine a document which the accused knew or had reason to believe to be false—*Queen-Empress* v. *Haradhan* (1) overruled.

[F., 28 M. 90 (96) = 1 Weir 538-A; R., 28 A. 358 = 3 A.L.J. 149 (155) = A.W.N. (1906) 48 = 3 Cr.L.J. 249; 38 C. 75 (90) = 12 C.L.J. 277 = 14 C.W.N. 1076 = 11 Cr.L.J. 505 = 7 Ind. Cas. 629; 5 C.W.N. 897 (899); 10 P.R. 1902 Cr. = 75 P.L.R. 1902.]

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* Reference to a Full Bench, by Jenkins, J., sitting in the exercise of Original Criminal Jurisdiction.

(1) 19 C. 380.

[513] THIS was a reference made under s. 35 of the Letters Patent, and s. 434 of the Code of Criminal Procedure, by Jenkins, J., to a Full Bench in the following terms :—

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"1. Under cl. 25 of the Letters Patent and s. 434 of the Code of Criminal Procedure, I reserve and refer for the decision of the Court the question of law which (as hereinafter stated) has arisen in the course of the trial of the abovenamed accused and the determination of which will affect the event of the trial.

"2. The accused was tried before me and a common Jury at the Criminal Sessions now pending on a charge expressed in the following terms :—

"That he, the said Abbas Ali, on or about the fourteenth day of August in the year of Our Lord one thousand eight hundred and ninety-six in Calcutta aforesaid fraudulently and dishonestly used as genuine a certein forged document, to wit, a document purporting to be a certificate of competency as an Engine-room First Tindal and purporting to be signed by one H. Abern, Chief Engineer of the Steam Launch *Nicol*, and being a forged document (intended to be used for the purpose of cheating) knowing or having reason to believe the same to be a forged document and thereby he, the said Abbas Ali, committed an offence punishable under ss. 465 and 471 of the Indian Penal Code."

"3. Ultimately the case went to the Jury, as though the words enclosed in brackets had been omitted from the charge, and by their unanimous verdict the accused was convicted under ss. 465 and 471 of the Indian Penal Code.

"The certificate mentioned in the charge and hereinafter referred to as Ex. E was in the following form :—

"This is to certify that Abbas Ali has served with me as Engine-room First Tindal in Steam Launch *Nicol* for a period of one year and one month, and he is still in service. I found him a sober, intelligent, smart and trustworthy man."

CALCUTTA : *The 12th August 1896.* — H. ABERN, *Chief Engineer.*

[514] The materiality of the certificate and the use to which it was put will appear from the evidence of Dino Nath Mukerji, and the facts hereinafter alleged taken in conjunction with Act VII of 1884, and the Regulations issued under that Act to which as well as to the application forms hereinafter mentioned I refer.

"The evidence of Dino Nath Mukerji, so far as material, is as follows :—

"I am an examination clerk at the Calcutta Port Office."

"I have held the post eight years continuously and did so during last August.

"I have an Assistant, Anukul Chandra Neogy.

"My duty is to receive papers and testimonials from candidates and fees, *i.e.*, candidates who want to go up for examination to obtain certificates under Act VII of 1884.

"I receive these testimonials in accordance with Rules under the Act.

"These are the printed regulations of the Government of Bengal under that Act.

"They were printed in the Gazette; they have been in force since 1890. I act under the orders of the Port Officer."

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"My practice is as follows:—

"When a man comes for examination as an Engine driver of a sea-going steamer he comes to me and delivers his testimonials to me. I look into the certificates to see, if he has the required service or not. Then if the men can write their applications themselves I give them the forms of application."

"If any one cannot write then I write out the application for him. Then I receive the fees and take him before the Port Officer to sign his name or affix his mark on the application form in the presence of the Port Officer who then signs his name. I keep the application form with me till the last date of receiving candidates' papers, and then on that last day before the office closes I forward those applications to the [515] Resident and Engineer Examiners at the Government dock-yard."

"Engine drivers are examined there and not in the Port Office. There is a Board of Examiners nominated by the Government. After the examination is over the applications are returned to the Port Office, showing the result of the examination signed by the Examiners."

"There are regular dates which are notified in the newspapers. I make a note on the application forms with regard to the vessel the applicant has served in, the period, and capacity of his service; these particulars I get from the certificate which the applicant produces."

"I always make that entry with regard to the certificates before the applicant is taken to the Port Officer to sign. If a man comes up and fails he must produce a fresh testimonial of further service since his failure, but there is no period of subsequent service demanded: if this subsequent service did not cover a period of two months I in practice reject the application. He must produce a certificate of having served as principal Serang or Tindal in the Engine-room of a sea-going steamer for three years signed by a certificated Engineer under whom he has served."

"In the case of failure six months must elapse before a candidate may present himself again."

"On the 14th August 1896 the accused produced Ex. E to Dino Nath Mukerji at the Port Office, Calcutta, and at the same time asked Dino Nath Mukerji to write out for him (the accused) the requisite application for examination.

"The evidence in the case establishes that the accused used Ex. E for the purpose of having the requisite application for examination filled up and of qualifying himself as a candidate for the examination of engine drivers under Act VII of 1884, and further that he used Ex. E as genuine, though he knew it to be a false document made with the intent that it should be used in the manner in which it was in fact used by him. Exhibit E, if not a forged document, would [516] with the other testimonials produced by the accused have satisfied the conditions, as to testimonials under which candidates are entitled to have the requisite applications filled up, and become qualified for examinations held under Act VII of 1884; without Ex. E those conditions would not have been satisfied.

"The question which I reserve is whether the facts herein before stated are sufficient to satisfy the intent prescribed by s. 463 of the Indian Penal Code, and whether having regard to those facts the accused fraudulently or dishonestly used Ex. E within the terms of s. 471 of the Indian Penal Code."

The Officiating Standing Counsel (Mr. *A. M. Dunne*) represented the Crown.

No one appeared on behalf of the accused.

The *Officiating Standing Counsel.*—Apart from the words "fraudulently or dishonestly," there is no doubt that the certificate was a false document; it had not been signed or made by the person by whom it purported to have been made. It was made and used for the purpose of committing a fraud within the meaning of s. 463. The intention to defraud is the intention to commit a fraud upon somebody; it is not necessary that there should be an intent to deprive any person of some property. The Penal Code is intended to carry out the English law on the subject of forgery. In England the charge would be that the act was one that intended to defraud; and that would be upheld. In the case of *Queen-Emprees* v. *Haradhan* (1) the Court felt a difficulty in construing the word "fraudulently," and the learned Judge drew a distinction between primary and the more remote intention. But an act cannot be split up like that. *Reg* v. *Toshack* (2) is exactly in point; there the indictment was that the accused had forged certificates for the purpose of inducing the Trinity House Examiners to pass him; the gist of the offence was the intent to defraud. In the case of *The Empress* v. *Dhunum Kazee* (3) Norris, J., himself deals with the question **[517]** of fraud, and shows that the element of wrongful gain or loss does not come into it, but that it is sufficient that there should be an intention to defraud. It is a fraudulent making if there was a fraud in the making of the document, or if there was an intention to commit a fraud by means of the document—*Lolit Mohan Sarkar* v. *Queen-Empress* (4), *In Reg.* v. *Hodgson* (5) there was no intent to commit any particular fraud; but if there had been any particular person to be deceived the decision would have been different. The decision in *Queen-Empress* v. *Haradhan* (1) has been dissented from in *Queen-Empress* v. *Soshi Bhushan* (6). [O'KINEALY, J.—I think Norris, J., really found that the intention was wanting.] Possibly. [MACLEAN, C.J.—In the case of *Queen-Empress* v. *Shosi Bhushan* the prisoner got the benefit of a course of lectures for nothing.] It is true there was also a question of dishonesty. [JENKINS, J.—And the professor lost his fees]. No doubt the dishonesty alone was sufficient to convict the accused. In the present case the offence consists in the fraud; not in his attaining the results he aimed at. It is the intention to deceive that constitutes the offence—*Queen-Empress* v. *Ganesh Khanderao* (7). [JENKINS, J.—The question is, whether, the purpose being limited, as it was in this case, there was an intention to defraud. It comes to this, whether "defraud" does not imply some deprivation of property.] That is so. The term 'fraudulently' is used apart from 'dishonestly' and is not intended to cover the same ground. [JENKINS, J.—Does not s. 496 of the Penal Code help you?] Yes, greatly. The essence of the offence there is getting a marriage performed with a fraudulent intention. [JENKINS, J.—On the other hand, in s. 239, there is a distinction between fraudulent intention and an intention to commit a fraud]. I submit that no distinction is intended; but that, on the contrary, if A delivers counterfeit coin to B, he would be guilty, and if he delivers it to B., not with the intention of defrauding B, but with the intention that B **[518]** should commit a fraud upon C, A would be equally guilty. [TREVELYAN, J.—There is a high text-book authority in Morgan and Macpherson's note, where they say that fraud does not relate only to loss of property]. If the view of Norris, J., in *Queen-Empress* v. *Haradhan* (1) were correct,

(1) 19 C. 380.
(2) (1849) 4 Cox. C. C. 38; 1 Den. Cr. C. 492.
(3) 9 C. 53 (60).
(4) 22 C. 313 (321).
(5) (1856) Dearsley and Bell 3.
(6) 15 A. 210.
(7) 13 B. 506 (514).

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the definition of "dishonestly" would not be necessary, as it would be included in the definition of "fraudulently." It cannot be supposed that a higher element is required to make a document a false document than to make a false document a forgery. [JENKINS, J.—Section 262 separates the two terms—" whoever *fraudulently* or *with intent to cause loss*"].

MACLEAN, C. J.—We are unanimously of opinion in this case that the conviction must be upheld. But as the point is of importance, we will reduce our judgment into writing.

C. A. V.

OPINION.

The opinion of the Full Bench was delivered by

MACLEAN, C. J. (O'KINEALY, MACPHERSON, TREVELYAN and JENKINS, JJ., concurring.)—The accused in this case was tried before Mr. Justice Jenkins and a common jury on a charge of having fraudulently or dishonestly used as genuine a certain forged document, to wit, a document purporting to be a certificate of competency as an Engine-room First Tindal and purporting to be signed by one H. Abern, Chief Engineer of the Steam Launch *Nicol*, and being a forged document, knowing or having reason to believe the same to be a forged document, and that thereby he committed an offence punishable under ss. 465 and 471 of the Indian Penal Code.

The certificate in question purported to be a testimonial of service and good character.

It seems that in accordance with the provisions of Act VII of 1884 and the regulations issued under that Act, examinations are from time to time held in Calcutta of those who desire to obtain certificates of competency as engine drivers of ocean-going steamers. As a condition precedent to his qualification for any such examination each candidate has to produce to an appointed officer a certificate or testimonial [519] of his having served as principal or first serang or tindal in the engine-room of a steamer for the prescribed period, and this certificate has to be signed by a certificated engineer under whom he has served.

On the production of the required certificate or testimonial a form of application is filled up, and then signed by the candidate in the presence of the Port Officer; thereupon the candidate is entitled to present himself for examination.

On the 14th of August 1886 the accused produced the certificate mentioned in the charge to Dinonath Mukerji, the officer deputed to receive and examine candidates' certificates.

It is established by the evidence that this was done by the accused for the purpose of having the requisite application for examination filled up and of qualifying himself as a candidate for the examination of engine-drivers under Act VII of 1884, and further that the accused used the certificate as genuine, though he knew that it was a document made with the intention of causing it to be believed that it was made by a person by whom it was not made, and with the further intention that it should be used in the manner in which it was in fact used by the accused.

It also appears that the use to which the certificate was put by the accused was an essential and necessary condition of the success of his scheme.

A verdict of guilty was returned in accordance with the ruling of the Judge, who, however, reserved and referred for our decision the question

whether, having regard to the decision in *Queen-Empress* v. *Haradhan* (1), his ruling and the conviction could be upheld.

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The *Queen-Empress* v. *Haradhan* has been dissented from in *Queen-Empress* v. *Shoshi Bhushan* (2), and the point reserved has no doubt been the subject of conflicting decisions.

It will, however, serve no useful purpose to enter into a minute examination of the several authorities to which we have been [520] referred: the law is contained in the Code, and whether the conviction now under consideration is sanctioned by its provisions is best to be determined by an examination of the Code itself.

Now s. 471 of the Indian Penal Code is in the following terms: "Whoever fraudulently or dishonestly uses as genuine any document which he knows or has reason to believe to be a forged document, shall be punished in the same manner as if he had forged such document."

It will be seen that the essential elements of the offence are (1) that the document in question should be a forged document, (2) that the accused should have used it as genuine, and (3) that he should have so used it fraudulently or dishonestly, knowing or having reason to believe that it was a forged document.

A forged document is a false document made wholly or in part by forgery (s. 470), and we learn the meaning of a false document from s. 464 which (omitting the portions immaterial to the present purpose) provides, that a person is said to make a false document who dishonestly or fraudulently makes a document with the intention of causing it to be believed that such document was made by a person by whom he knows it was not made. Forgery is in turn defined by s. 463, which is in the following terms: "Whoever makes any false document or part of a document with intent to cause damage or injury to the public or to any person, or to support any claim or title, or to cause any person to part with property, or to enter into any express or implied contract, or with intent to commit fraud or that fraud may be committed, commits forgery."

This referential definition of a forged document is to a certain extent tautologous, but be that as it may, it is clear that the person against whom the offence is charged must have acted dishonestly or fraudulently, and the sole question in the present case is whether that can be predicated of the accused Abbas Ali.

"Dishonestly" is defined by s. 24, which provides that whoever does anything with the intention of causing wrongful gain to one person or wrongful loss to another person, is said to do that thing dishonestly; and the meaning of the expression [521] wrongful gain and wrongful loss is made clear by s. 23. "Fraudulently" is defined by s. 25 in the following words: —

"A person is said to do a thing fraudulently if he does that thing with intent to defraud, but not otherwise." As a definition this provision is obviously imperfect, and perhaps introduces an element of doubt, which did not previously exist; for it leaves it to be determined, and that really is the point on which the present case turns, whether the word "defraud" as used in s. 25 implies the deprivation or intended deprivation of property as a part or result of the fraud. The word defraud is of double meaning in the sense that it either may or may not imply deprivation, and as it is not defined in the Code and is not, so far as we are aware, to be found

(1) 19 C. 380. (2) 15 A. 210.

1897 JAN. 29. — FULL BENCH. — 25 C. 512 (F.B.) = 1 C.W.N. 255.

in the Code except in s. 25, its meaning must be sought by a consideration of the context in which the word fraudulently is found.

The word "fraudulently" is used in ss. 471 and 464 together with the word "dishonestly" and presumably in a sense not covered by the latter word. If, however, it be held that fraudulently implies deprivation either actual or intended, then apparently that word would perform no function which would not have been fully discharged by the word dishonestly and its use would be mere surplusage. So far as such a consideration carries any weight, it obviously inclines in favour of the view that the word "fraudulently" should not be confined to transactions of which deprivation of property forms a part.

There appears to us, however, to be a still more potent reason based on the language of s. 463 for arriving at this conclusion.

Section 463 defines the offence of forgery, and in so doing prescribes the intents necessary to that offence. The words of the section are as follows: "Whoever makes any false document or part of a document, with intent to cause damage or injury to the public or to any person, or to support any claim or title, or to cause any person to part with property, or to enter into any express or implied contract or with intent to commit fraud or that fraud may be committed, commits forgery."

The section contemplates two classes of intents, and it is clear [522] (especially if regard be had to the context) that it is not an essential quality of the fraud mentioned in the section that it should result in or aim at the deprivation of property. If this be so, it cannot be supposed that the definition of a false document, which is but a part of the definition of forgery, requires as a condition of criminality an intent different in its quality and its aims from that prescribed by s. 463.

It appears to us, therefore, that deprivation, actual or intended, is not a necessary ingredient of the intent to defraud referentially imported into s. 464, and by a similar train of reasoning we are led to the like conclusion as to the true construction of s. 471.

Though we are in no way bound by the decisions of the English Courts, still we are fortified in the view we take of the expression "intent to defraud" by the decision in *Reg* v. *Toshack* (1). We therefore hold, so far as the question reserved and referred for our decision is concerned, that the accused Abbas Ali was rightly convicted of the offence with which he was charged.

H. W.

(1) (1849) 4 Cox C. C. 33 ; 1 Den. C. C. 492.

25 C. 522 (F.B.)=2 C.W.N. 501.

1898 JAN. 31. FULL BENCH. 25 C. 522 (F.B.)= 2 C.W.N. 501.

FULL BENCH REFERENCE.

Before Sir Francis William Maclean, Kt., Chief Justice, Mr. Justice Macpherson, Mr. Justice Trevelyan, Mr. Justice Banerjee and Mr. Justice Jenkins.

TEPU KHAN AND OTHERS (*Defendants*) v. RAJANI MOHUN DAS (*Plaintiff*) AND OTHERS (*Defendants Nos.* 4 *to* 10).*
[31st January, 1898.]

Evidence Act (I *of* 1872), *ss.* 11 *and* 13—*Judgment not* inter partes—*Admissibility in evidence of judgment in former case—The subject-matter of the former suit not being identical with that of the latter suit, judgment irrelevant.*

The rule laid down in the cases of *Gujju Lall* v. *Fatteh Lall* (1) and of *Surender Nath Pal Chowdhry* v. *Brojo Nath Pal Chowdhry* (2) has been materially qualified by the decisions of the Privy Council, in the cases of [523] *Ram Ranjan Chakerbati* v. *Ram Narain Singh*(3) and *Bitto Kunwar* v. *Kasho Pershad* (4).

Under certain circumstances, in certain cases, the judgment in a previous suit, to which one of the parties in the subsequent suit was not a party, may be admissible in evidence for certain purposes and with certain objects in the subsequent suit.

In a case where the previous suit was to recover a two-thirds share of the property in question, and the subsequent suit was by a different plaintiff to recover the remaining one-third share of the same property :—

Held in the subsequent suit, the judgment in the previous suit was not admissible in evidence, the subject-matter in the two suits not being identical.

[F., 1 Bom. L.R. 486 ; 10 C.W.N. 1034 ; R., 31 C 567 (671) ; 5 C.L.J. 55 (57) ; 7 C. L.J. 384 (386) ; 9 C.W.N. 402 : 12 C.W.N. 739 (744) ; 13 C.W.N. 217 (220) ; 17 C.W.N. 1016 ; 2 O.C. 149 (162); 7 O.C. 122 (124): D., 9 C.L.J. 16 (18) = 13 C.W.N. 217 = 5 M.L.T. 274 = 5 M.L.T. 359 = 1 Ind. Cas. 572 ; 9 C.L.J. 597 = 12 C.W.N. 739 = 4 Ind. Cas. 81 = 6 M.L.T. 363 ; 15 Ind. Cas. 624.]

THIS case was referred to the Full Bench by MACLEAN, C.J., and BANERJEE, J.

The facts of this case, so far as they are necessary for purposes of this report, and the arguments, appear sufficiently from the order of reference which was as follows :—

BANERJEE, J.—"This appeal arises out of a suit brought by the plaintiff, respondent, for possession of a one-third share of a plot of land measuring 21 bighas, on the allegation that the said land appertained to resumed estate No. 9870 of the Dacca Collectorate, which belonged originally to the *pro forma* defendants ; that defendant No. 4 was in possession of two-thirds share of the same, having purchased it at a sale in execution of a decree ; that the plaintiff purchased the remaining one-third share thereof from the *pro forma* defendants after they and their predecessors had held possession of the same for upwards of twelve years ; and that the plaintiff had been unjustly kept out of possession of the land in dispute by the principal defendants since 1891.

"The principal defendants in their defence urged that the suit was barred by limitation ; that the suit was also barred under ss. 13 and 43 of the Code of Civil Procedure ; that the land in dispute originally belonged to one Mr. Panioty, who held it for upwards of a hundred years ; that by successive [524] transfers the land came to the hands of the defendants; and that defendant No. 4, with the object of ousting the defendants from the same, instituted several suits against them ; but

* Reference to the Full Bench in Appeal from Appellate Decree No. 1747 of 1895.

(1) 6 C. 171.
(2) 13 C. 352.
(3) 22 C. 533 = 22 I.A. 60.
(4) 24 I.A. 10.

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being unsuccessful now caused the plaintiff to bring this suit. The defendant No. 4 supported the plaintiff.

"The first Court found after a local investigation by an Amin that 8 bighas and odd cottahs of the disputed land appertained to the plaintiff's estate, but it dismissed the suit altogether on the ground of limitation.

"Against the decision of the first Court the plaintiff preferred an appeal, and the principal defendants put in a cross-appeal, urging that the Munsif had improperly refused to admit certain judgments in evidence. The lower appellate Court has decreed the appeal of the plaintiff and dismissed the defendants' cross-appeal.

"In second appeal it is contended for the defendants, *first*, that the Court of appeal below was wrong in holding that the judgments tendered in evidence by the defendants were inadmissible; and, *secondly*, that the decree in favour of the plaintiff should in any case have been limited to a one-third share of 8 bighas and odd cottahs only.

"The second point need not detain us long, as the learned Vakil for the respondents concedes that the decree ought to be limited in the manner contended for on behalf of the appellants.

"The first point, however, involves a question which is not altogether free from difficulty.

"If the cases of *Gujju Lall* v. *Fatteh Lall* (1), and *Surender Nath Pal Chowdhry* v. *Brojo Nath Pal Chowdhry* (2), upon the authority of which the lower appellate Court has held the judgments tendered in evidence for the defendants to be inadmissible, are good law, the first ground urged before us must fail. But if those cases have in effect been overruled by the decisions of the Privy Council in *Ram Ranjan Chakerbati* v. [525] *Ram Narain Singh*(3), and *Bitto Kunwar* v. *Kesho Pershad* (4), then the question arises whether the judgments referred to are admissible in evidence.

"In the two cases relied upon by the lower appellate Court, namely, *Gujju Lall* v. *Fatteh Lall* (1) and *Surender Nath* v. *Brojo* (2), it was held by this Court that a former judgment, which is not a judgment *in rem* nor one relating to matters of a public nature, is not admissible in evidence in a subsequent suit either as *res judicata* or as proof of the particular point decided, unless between the same parties or those claiming under them. But in the case of *Ram Ranjan Chakerbati* v. *Ram Narain Singh* (3), it was held by the Privy Council that a judgment passed in a suit to which the plaintiff was no party, was admissible against the plaintiff as evidence showing the rent paid; and in *Bitto Kunwar* v. *Kesho Pershad* (4) their Lordships of the Privy Council, speaking of the judgment in a former suit against one of the defendants, Bacha Tewari, observe: "This decision is not conclusive against Bacha Tewari as the suit was not between the same parties as the present suit, but their Lordships agree with the Subordinate Judge that it was admissible as evidence against him." These two decisions of the Privy Council must be taken to have in effect overruled the cases relied upon by the lower appellate Court. That being so, the question arises whether, apart from those cases, the judgments referred to in the argument were admissible in evidence against the plaintiff, respondents.

"Now the provisions of the Indian Evidence Act expressly relating to judgments are ss. 40 to 44. The judgments which are said to have been

(1) 6 C. 171.
(2) 13 C. 352.
(3) 22 C. 533 = 22 I.A. 60.
(4) 24 I.A. 10.

improperly rejected in this case not being evidence of any of the descriptions referred to in ss. 40, 41 and 42, and they not having been excluded on [526] any of the grounds mentioned in s. 44, it is not necessary to dwell upon the provisions of those sections. The question we have to consider is, whether the judgments, which have been held to be inadmissible by the Courts below, are really admissible under s. 43 of the Evidence Act, which enacts that 'judgments, orders or decrees other than those mentioned in ss. 40, 41 and 42 are irrelevant, unless the existence of such judgment, order or decree is a fact in issue or is relevant under some other provision of this Act.'

"I am inclined to think that this question ought to be answered in the affirmative, and that the existence of the judgments under consideration, or at any rate the existence of one of them, is relevant under ss. 11 and 13 of the Evidence Act.

"The judgments that were tendered in evidence and rejected as inadmissible by the Courts below are three in number, being (as I gather from the judgment of the lower appellate Court and from paragraph 10 of the written statement of defendants No. 1—3) (1) the judgment in suit No. 742 of 1887 brought by the present defendant No. 4, Protab Chunder Das, co-sharer of the plaintiff, against the present defendants for possession of two-thirds share of the land now in dispute; (2) the judgment in suit No. 165 of 1892 brought by the said Protab Chunder Das against the said defendants; (3) the judgment in suit No. 1219 of 1886 brought by one Emdad Ali against the present defendants. Though the relevancy of the last two may not be quite clear, the existence of the first-mentioned judgment seems to be a relevant fact, as well under s. 11 of the Evidence Act, as under s. 13. This may be seen from the following considerations.

"First as to the relevancy of the judgment in suit No. 742 of 1887 under s. 11. The existence of the judgment, that is, the circumstance that that particular judgment was passed, is clearly a fact within the meaning assigned to the term in s. 3. Now the existence of the judgment (which will be established by the judgment being filed) shows that a suit had been brought by plaintiff's co-sharer Protab Chunder [527] so far back as 1887 against the principal defendants for possession of his two-thirds share of the disputed land, and that suit was dismissed. The plaintiff's case now is that the said Protab Chunder was in possession of the two-thirds share in dispute, while he and his vendor were in possession of the remaining one-third share down to a period within twelve years before the institution of the present suit. And the existence of the abovementioned adverse judgment taken in connection with the other facts of the case might, if the judgment had been admitted in evidence by the Court below, have been found to make the non-existence of the plaintiff's possession and the existence of the defendants' possession highly probable within the meaning of s. 11 of the Evidence Act. I cannot say it would have that effect, because, sitting here in second appeal, it is not open to us to enter into questions of fact. But I do say that it might have that effect, and if it might, a substantial error in the procedure consisting in the improper rejection of evidence is made out which may possibly have produced error in the decision of the case upon the merits within the meaning of s. 584, cl. (*c*) of the Code of Civil Procedure.

"Next as to the relevancy of the judgment in suit No. 742 of 1887 under s. 13. If the existence of the judgment is not a transaction within the meaning of cl. (*a*) of s. 13, it proves that a litigation terminating in the judgment took place; and the litigation comes well within the meaning of

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the clause as being a transaction by which the right now claimed by the defendants was asserted. So again the litigation which is evidenced by the existence of the judgment was a particular instance within the meaning of cl. (*b*) of s. 13, in which the right of possession now claimed by the defendants was claimed. It has been said that the right spoken of in this section is an incorporeal right. I do not think that there is any sufficient reason for putting this limitation on the meaning of the term as used in the section. The judgment, therefore, is in my opinion relevant under s. 13.

"If such judgments were not relevant under either of the two ss. 11 and 13, they could not be admissible in evidence, [528] as the Privy Council have held them to be in the two cases referred to above.

"The strongest argument against the admissibility of such judgments in evidence is, to use the language of a well-known writer on the Law of Evidence (*see* Taylor on Evidence, 9th edition, s. 1682). 'That no man ought to be bound by proceedings to which he was a stranger and over the conduct of which he could, therefore, have exercised no control.' But in the first place, the judgments in question are sought to be used, not as binding and conclusive evidence, but only as evidence for what they are worth, the weight to be attached to the evidence being left to the Court to determine. And in the second place, the reason stated above, though it is a good reason for excluding from consideration as against a stranger, the evidence afforded by a judgment, so far as it is the opinion of a Court upon materials in the placing of which before the Court the stranger could have had no control, does not appear to hold equally good where what is sought to be taken into consideration is the evidence afforded by the existence of the judgment as to a litigation relating to the right in question and the way in which that litigation terminated. For such collateral purposes, judgments are admissible in evidence against strangers under the English Law. See *Davies* v. *Lowndes* (1). It is true that their Lordships of the Privy Council in the two cases referred to above while overruling in effect the decision of this Court in *Gujju Lal* v. *Fatteh Lal* (2) and *Surender Nath* v. *Brojo Nath* (3) do not refer to any section of the Evidence Act. But I may add that the view I take is supported to some extent by the cases of *Hira Lal Pal* v. *A. Hills* (4); *Venkata Sami* v. *Venkatreddi* (5); and the *Collector of Goruckhpur* v. *Palakdhari Singh* (6). It has sometimes been said (see *Ranchhod Dass* v. *Bapu* [529] *Narhar* (7) that if the Legislature in this country had intended to make judgments admissible in evidence against strangers, as it was an important departure from the English Law, the intention would have been expressed, not indirectly by the provisions embodied in ss. 11 and 13, but directly by some express provision in that part of the Evidence Act which relates to judgments. I think the answer to this remark is furnished by s. 43, which is one of the group of sections relating to judgments, and which contains the provision applicable to cases like the one before us, relating to the relevancy of judgments as evidence against strangers.

"For these reasons I think the judgment in suit No. 742 of 1887 ought to have been admitted in evidence. But as the point raised is not altogether free from doubt and difficulty, and is one of frequent occurrence and of great importance, I agree with the learned Chief Justice in thinking that the case should be referred to a Full Bench, the main question for

(1) (1843) 6 M. & G. 471 (520). (2) 6 C. 171. (3) 13 C. 352.
(4) 11 C.L.R. 528. (5) 15 M. 12. (6) 12 A. 1. (7) 10 B. 439.

determination being whether the judgments referred to above to which the plaintiff respondent was no party are admissible in evidence against him under ss. 11 and 13 of the Evidence Act, or under any other provision of law.

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MACLEAN, C. J.—" I concur in thinking, as the point often arises and is of great importance, that this case should be referred to a Full Bench, but I reserve my opinion upon the point submitted for decision."

Babu *Hari Mohun Chuckerbutty*, for the appellants.

Babu *Lal Mohan Dass*, for the respondents.

The following opinions were delivered by the Full Bench (MACLEAN, C.J., and MACPHERSON, TREVELYAN, BANERJEE and JENKINS, JJ.) :—

OPINIONS.

MACLEAN, C. J.—Although I was a party to this reference, I am not quite satisfied, after the discussion which we have heard to-day, that the question submitted in its broader aspect really arises. In my opinion, the judgments in question are not admissible in evidence in this suit, because now that the matter [530] has been fully laid before us, it appears that the subject-matter of the present suit is not identical with the subject-matter in the previous suits, in which those judgments were delivered. In the previous suit the subject-matter was to recover a two-thirds share of the property in question, but in the present case it is a suit by a different plaintiff to recover the remaining one-third share. The subject-matter, therefore, of the two suits is not identical; the title to the one-third share may be, and apparently is, different from that of the other shares. In this view the judgments which were sought to be admitted as evidence in this case were irrelevant, and, therefore, not admissible as evidence. This point, so far as I recollect, I am speaking only from memory, was not very clearly brought to the attention of Mr. Justice Banerjee and myself on the previous occasion, and if it had been, we might possibly have thought that this reference was not necessary. But as the two cases decided by the Full Bench in this Court, the case of *Gujju Lall* v. *Fatteh Lall* (1) and a later case of *Surender Nath Pal Chowdhry* v. *Brojo Nath Pal Chowdhry* (2) have been referred to, I feel bound to express my opinion that, having regard to the recent observations of the Privy Council in the case of *Ram Ranjan Chakerbati* v. *Ram Narain Singh* (3) and in the more recent case of *Bitto Kunwar* v. *Kesho Pershad* (4), the Full Bench decisions referred to must be regarded as materially qualified, because it is clear from the decisions in the Privy Council that under certain circumstances, and in certain cases, the judgment in a previous suit, to which one of the parties in the subsequent suit was not a party, may be admissible in evidence for certain purposes and with certain objects in the subsequent suit.

The decree in the present suit in favour of the plaintiff must be limited to a one-third share of 8 bighas and odd cottahs only; subject to the decree being varied to that extent the appeal fails, and must be dismissed with costs, including the costs of this reference.

[531] MACPHERSON, J.—I agree in the view expressed by the learned Chief Justice.

TREVELYAN, J.—I also agree.

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(1) 6 C. 171. (2) 13 C. 352.
(3) 22 C. 533=22 I.A. 60. (4) 24 I.A. 10.

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BANERJEE, J.—I agree with the learned Chief Justice in holding that the rule laid down in the cases of *Gujju Lall* v. *Fatteh Lall* (1) and *Surender Nath Pal Chowdhry* v. *Brojo Nath Pal Chowdhry* (2) must be taken to have been materially qualified by the decisions in the Privy Council in the cases of *Ram Ranjan Chakerbati* v. *Ram Narain Singh* (3) and *Bitto Kunwar* v. *Kesho Pershad* (4). Upon the question whether the judgment mentioned in the referring order is admissible or not, I feel bound to say that I am not quite satisfied that the mere fact of the subject-matter of the present suit being a one-third share in the property in dispute, whereas the subject-matter of the previous suit was the remaining two-thirds of the same property, would make any real difference in the case, having regard to the nature of the case made by the parties to the suit. For the reasons given by me in the referring order, I still have my doubts as to whether the lower appellate Court was right in excluding that judgment altogether. But I must add that my doubts on the point are not so strong as to justify my expressing myself in the language of positive dissent.

JENKINS, J.—I agree with the learned Chief Justice.

S. C. G. *Decree varied.*

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25 C. 531 (F.B.) = 2 C.W.N. 375.

FULL BENCH REFERENCE.

Before Sir Francis William Maclean, Kt.; Chief Justice, Mr. Justice Macpherson, Mr. Justice Trevelyan, Mr. Justice Banerjee and Mr. Justice Jenkins.

PYARI MOHUN MUKHOPADHYA (*Plaintiff*) *v.* GOPAL PAIK, MINOR, REPRESENTED BY HIS NEXT FRIEND, GUARDIAN AND MOTHER SRIMOTI NIDRA DASI (*Defendant*).* [25th January, 1898.]

Landlord and tenant—Suit for rent—Sub-division of tenancy—Rent receipt signed by the agent—Bengal Tenancy Act (VIII of 1885), s. 88.

[532] A receipt for rent granted by a landlord or his agent containing a recital that a tenant's name is registered in the landlord's *sherishta* as a tenant of a portion of the original holding at a rent which is a portion of the original rent. does amount to a consent in writing by the landlord to a sub-division of the holding and a distribution of the rent payable in respect thereof, within the meaning of s. 88 of the Bengal Tenancy Act.

[**F.**, 18 C.L.J. 174 = 21 Ind. Cas. 420; **Rel.**, 13 Ind. Cas. 449; **R.**, 15 C.W.N. 953 = 10 Ind. Cas. 456; **D.**, 31 C. 1026 (1033) = 8 C.W.N. 923; 10 C.W.N. 216 (218).]

THIS case was referred to a Full Bench by BANERJEE and RAMPINI, JJ., on the 23rd April 1897, with the following opinion :—

"This appeal arises out of a suit for arrears of rent. The plaintiff, in the plaint as originally filed, alleged that the defendant held 41 bighas 11 cottahs and 4 chittaks of land, bearing a rent of Rs. 31-1 anna 1¼ koras, and that arrears were due for the period from Bysak 1298 to Choitro 1300.

"The defence was, that the holding did not contain the area alleged by the plaintiff, nor did it bear the rent mentioned in the plaint, but that the defendant was really in possession of 37 bighas 12 cottahs and 4 chittaks of land, bearing a rent of Rs. 28-15 annas and 2¼ gundas, and that this reduced holding at the lower rent resulted from a sub-division of the former holding, an area of 3 bighas 19 cottahs, bearing a rent of

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* Reference to a Full Bench in appeal from Appellate Decree No. 1453 of 1895.

(1) 6 C. 171. (2) 13 C. 352. (3) 22 C. 533. (4) 24 I.A. 10.

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Rs. 2-14 annas 15¾ gundas, having been sold to one Sridhur Haldar. Subsequently, the plaint was amended with the permission of the Court; and the plaintiff stated in the amended plaint that the area of the holding was 45 bighas 6 cottahs, and the annual rent Rs. 33-14 annas 10¼ gundas. Upon the plaint being amended, a fresh written statement was put in, in which the defendant alleged that, in addition to the transfer to Sridhur Haldar, there had been transfers to three other persons; and that the quantity of land that was in the possession of the defendant, and the rent that was payable by him, were as alleged in the first written statement. There was also a plea of payment raised."

Upon these pleadings, the parties went to trial upon three issues: "First whether the *jama* payable by the defendant, is Rs. 33-14 annas, or Rs. 28-1 anna, after *kharij*." "Second, whether the plaintiff's suit is not maintainable as the plaintiff has not filed the road-cess returns, and whether the defendant is not [533] entitled to raise that plea now." "Thirdly, whether the defendant's allegation of payment is true."

The Court of first instance found against the defendant upon all these issues, and it decreed the claim in full. On appeal by the defendant, the lower appellate Court gave effect to the plea of sub-division of the holding, and it accordingly modified the decree of the first Court, holding that the annual rent payable by the defendant was Rs. 28-1 anna.

Against that decision of the lower appellate Court, the plaintiff has preferred this second appeal, and it is contended on his behalf, *first*, that the lower appellate Court was wrong in giving effect to the plea of sub-division of the holding, and the consequent reduction of the rent, so far as that plea related to the deduction unsuccessfully pleaded in a previous suit, by reason of the transfer of a part of the holding to Sridhur Haldar; and, *secondly*, that the lower appellate Court was wrong in giving effect to the defendant's plea of sub-division of the tenure when it was not shown that such sub-division was made with the consent in writing of the plaintiff, as required by s. 88 of the Bengal Tenancy Act. As it is necessary for the disposal of this case to determine the point raised in the second contention of the appellant, and as upon the question raised in that contention there is a conflict of authority in this Court between the case of *Aubhoy Churn Maji* v. *Shoshi Bhusan Bose* (1) and the unreported decision in second appeal No. 1537 (2) of 1891, *Jagadishwar* [534] *Battacharji* v. *Joymoni Debi*, dated the 9th August 1892, it becomes necessary under Rule I of Chap. V of the rules of this Court

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(1) 16 C. 155.

25 C. 533-N = 2 C.W.N. 378-N.

(2) *Before Mr. Justice Norris and Mr. Justice Beverley.*

JAGADISHUR BHUTTACHARJI (*Defendant*) v. JOYMONI DEVI (*Plaintiff*).* [9th August, 1892.]

Landlord and Tenant—Suit for rent—Receipt granted by the gomastha of the landlord, containing recital that the tenant's name was registered in the landlord's sherishta in respect of a holding which is a portion of the original holding—Effect of such receipt—Sub-division of tenancy—Bengal Tenancy Act (*VIII of* 1885), *s.* 88.

[534] A rent receipt signed by the landlord's *gomastha*, and containing a recital that the defendant's name is registered in the landlord's *sherishta*, as a tenant in respect

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* Appeal from Appellate Decree No. 1537 of 1891 against the decree of R. F. Rampini, Esq., District Judge of 24-Pergunnahs, dated the 11th of June 1891, affirming the decree of Babu Kartic Chunder Pal, First Munsif of Alipur, dated the 8th of October 1890.

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on the appellate Side to refer this case for decision by a Full Bench. Though the receipts expressly referred to by the lower appellate Court are receipts not for rent but for bonus paid by the transferee, they do not cover all the transfers pleaded. To give effect to the plea as the lower Court has done, it is conceded that the receipts for rent filed in the case have to be referred to; and thus there arises the question upon which the conflict of authority referred to above exists, namely, whether a receipt for rent [535] granted by the landlord or his agent containing a recital that a tenant's name is registered in the landlord's *sherishta* as a tenant of a portion of the original holding, at a rent which is a portion of the original rent, amounts to a consent in writing by the landlord to a division of the holding, and a distribution of the rent payable in respect thereof, within the meaning of s. 88 of the Bengal Tenancy Act. As the question arises in a second appeal, the whole case must be referred to a Full Bench for decision."

Babu *Girish Chunder Chowdhry*, for the appellant, contended that a receipt signed by a *gomastha* does not amount to a consent in writing within the meaning of s. 88 of the Bengal Tenancy Act. The receipt may be binding upon the landlord, but it cannot be called a consent in writing of the landlord, so as to make a sub-division of a tenure.

Section 56 of the Bengal Tenancy Act speaks only of granting of receipts for the amount paid by the tenant, but such receipt cannot have the effect of a consent in writing of the landlord. Then again s. 187, cl. 3, of the Bengal Tenancy Act clearly indicates that in order to make a sub-division there must be a consent in writing to that effect by the

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of a holding which is a portion of the original holding, is evidence of the fact that the landlord consented to the sub-division of the tenure.

[Appr., 25 C. 531 ; **Expl.**, 15 C.W.N. 953=10 Ind. Cas. 456.]

THE facts of the case, for the purposes of this report, are sufficiently stated in the judgment of the High Court.

Babu *Ashutosh Mookerjee*, for the appellant.

No one appeared for the respondent.

The judgment of the High Court (NORRIS and BEVERLEY, JJ.) was as follows :—

JUDGMENT.

This is an appeal from the decision of the District Judge of 24-Pergunnahs, who has confirmed the decision of the Munsif of Alipur in a rent suit.

The suit was for arrears of rent, and the defendant No. 2 who is the appellant before us contended that the original rental of Rs. 28-13 annas had been sub-divided, and that he, at the time the suit was brought, held a portion only of the land in respect of which the rent was sued for and which had been consolidated with other lands of which he was in possession, which together formed a new holding.

The suit was decreed. The defence was held to fail on the ground that under the provisions of s. 88 of the Bengal Tenancy Act there was no evidence to show that the landlord had consented to the sub-division of the holding.

The case came before us on the 1st of this month, and it was adjourned in order that the learned vakil for the appellant might have the *dakhila* upon which he relied translated. It has now been translated and copies of the translations are before us. It appears that this *dakhila*, which is signed by the landlord's *gomashta*, states that in the landlord's *serishta* the appealing defendant is registered as a tenant in respect of a holding of 37 bighas 13 cottahs at a rent of Rs. 18-1-8 pie, plus 9 annas for road-cess and public works-cess.

[535] We think that this document containing the recital that the defendant is thus registered in the landlord's *serishta* and being signed by the *gomashta* of the plaintiff is evidence that the landlord consented to the sub-division of the tenure.

We are therefore of opinion that the appeal must be allowed, the decrees of the lower Courts set aside, and the plaintiff's suit dismissed with costs in all the Courts.

Appeal allowed.

landlord ; the mere granting of a receipt by a *gomastha* would not make a sub-division. 1898 JAN. 25.

Dr. *Ashutosh Mookerjee*, for the respondent, was not called upon.

The following opinions were delivered by the Full Bench (MACLEAN, C.J., and MACPHERSON, TREVELYAN, BANERJEE, and JENKINS, JJ.) :— FULL BENCH.

OPINIONS. 25 C. 531 (F.B.) = 2 C.W.N. 375.

MACLEAN, C. J.—The question for our decision on this reference is whether a receipt for rent granted by the landlord or his agent containing a recital that a tenant's name is registered in [536] the landlord's *sherishta* as the tenant of a portion of the original holding at a rent which is a portion of the original rent amounts to a consent in writing by the landlord to a division of the holding and a distribution of the rent payable in respect thereof within the meaning of s. 88 of the Bengal Tenancy Act.

The matter was referred to a Full Bench by reason of a difference of opinion which was regarded as existing between the case of *Aubhoy Churn Maji* v. *Shoshi Bhusan Bose* (1), and an unreported decision of Norris and Beverley, JJ., in S.A. No. 1537 of 1891, dated 9th August 1892, which is set out in the Paper Book. I am not myself quite satisfied that, as between these two cases, there is any real difference of opinion, for it is not very clear what the actual form of the receipt was in the case of *Aubhoy Churn Maji* v. *Shoshi Bhusan Bose* (1). In the present case, the receipt is in the form given in the schedule to the Bengal Tenancy Act. I assume for the purpose of our decision, and I think the question submitted to us pre-supposes, that the agent is duly authorised by the landlord to give such a receipt. If that be so, I entertain no doubt whatever that a receipt given by the landlord or by his duly authorised agent in the form of the receipt given in this case, amounts to a consent in writing by the landlord to a division of the holding and a distribution of the rent payable in respect thereof within the meaning of s. 88 of the Bengal Tenancy Act.

As regards the other point, which was rather hinted at than argued, *viz.*, that the matter was *res judicata* having regard to the findings of fact by the lower appellate Court, the point is not arguable.

The appeal therefore fails and must be dismissed with costs including the costs of this reference.

MACPHERSON, J.—I agree.

TREVELYAN, J.—I also agree.

BANERJEE, J.—I agree with the learned Chief Justice in thinking that the receipt produced in this case is sufficient to [537] answer the requirements of s. 88 of the Bengal Tenancy Act. I only wish to add one word with reference to the reason for this reference to a Full Bench. Although the form of the receipt in the case of *Aubhoy Churn Maji* v. *Shoshi Bhusan Bose* (1) is not set out, it appears from the statement of facts in the report that the receipt was one for the smaller rent payable in respect of the smaller area contended for by the defendant. That receipt was considered insufficient to meet the requirements of s. 88 by the lower appellate Court ; and in the judgment of this Court, the learned Judges observe, after referring to the view taken of s. 88 by the lower appellate Court : "In this view of s. 88 we agree." It was this observation that influenced me in referring the case to a Full Bench.

JENKINS, J.—I concur in the judgment of the Chief Justice.

S. C. G. *Appeal dismissed.*

(1) 16 C. 155.

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PRIVY COUNCIL.

PRESENT:

Lords Watson, Hobhouse and Davey and Sir R. Couch.

[*On appeal from the Chief Court of the Punjab.*]

ROBERT SKINNER *alias* SARDAR MIRZA (*Defendant*) *v.* CHARLOTTE SKINNER *alias* BADSHAH BEGUM (*Plaintiff*).*
[17th November and 8th December, 1897.]

Marriage—Personal status—Christian marriage followed by Mahomedan marriage—Rights of widow under Mahomedan law—Divorce.

In a suit to obtain a widow's share under Mahomedan law in the estate of the deceased, it was proved that the plaintiff and deceased had been married in 1855, as professed Christians in a church at Meerut; that subsequently, having reverted to Mahomedanism, they were married a second time according to Mahomedan law in *nikah* form which second marriage had not been dissolved by a Mahomedan divorce. In 1886 the husband died, leaving a will excluding the wife from all participation in his estate.

Held, that the personal status of the deceased being at the time of his death that of a Mahomedan, and the plaintiff's personal status being that of his wife under the same law, she was entitled to a share in his estate, notwithstanding his will, which purported, but under Mahomedan law was inoperative, to exclude her.

[538] *Quære.*—Whether in the case of spouses remaining domiciled in India where religious creed affects the rights incidental to marriage, such as that of divorce, a change of religion made honestly after marriage with the assent of both spouses, without any intent to commit a fraud on the law, affects any change in those rights.

APPEAL from a decree (12th July 1893) of the Chief Court, affirming a decree (25th June 1889) of the District Judge of Delhi. The appellant, first defendant in the suit, was a sharer, and represented minor defendants, also sharers, in the estate of the late Stuart Skinner, otherwise Sardar Mirza, who died a Mahomedan in 1886. The plaintiff, respondent (and cross appellant in the Chief Court) was also a Mahomedan, and *claimed to* share in his estate, according to that law, as his widow.

The facts are stated in their Lordships' judgment.

The main question as to the plaintiff's title, which was founded on her marriage to the deceased in the English form in a Church at Meerut, they having both been then Christians, was this: Whether the plaintiff, who afterwards with her husband had reverted to the Mahomedan religion, was precluded from claiming her widow's share in the distribution of her husband's estate on his decease, according to the latter law, by reason of her having been divorced from him in manner sanctioned thereby.

Both the Courts below decided that the widow's claim was established; but they differed as to whether, in fact, such a divorce, according to Mahomedan law, had taken place. The District Judge found that it had. But he decided that it had no effect to dissolve the Christian marriage. The Chief Court, on an appeal, found no sufficient evidence of the divorce: so that the result was identical in the judgment of both Courts in favour of the claim.

The decree made by the District Judge, and affirmed, with the above distinction as to the grounds, by the Chief Court, directed a partition of the estate of the deceased, and the delivery of her share to the plaintiff as one of the two widows of the deceased Mahomedan proprietor.

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The District Judge did not consider it necessary before giving his judgment, of the 25th June 1889, in favour of the plaintiff, to call on the defendants to produce all their evidence of the divorce **[539]** having taken place. The Christian marriage could not, in his opinion, have been dissolved by the divorce (*talak*), even if proved; and in support of this, he referred to the recognition, by the Mahomedan law itself, of a valid Christian marriage.

The first defendant appealed, and the plaintiff cross-appealed, to the Chief Court, who, on the 1st April 1891, remanded the suit to the first Court to take all the evidence for the defence. The District Judge, in his return of the 22nd June 1892, found that the plaintiff had pronounced what amounted to a divorce against his wife, according to Mahomedan law, before 1865; but that this had not effected a dissolution of the Christian marriage of 1855.

The final judgment of the Chief Court of the 12th July 1893 distinguished between the evidence as to the actual occurrences which constituted the divorce, and the evidence as to the supposed effect of those occurrences. It was clear, said the Court, as indeed it was admitted by the defendants, that it was for that Court to decide whether or not there was an effectual divorce; and it had been correctly argued that it was of no consequence whether the parties were afterwards reconciled; for that would not renew, or revive, the marriage tie. Proceeding to the facts on which they were to decide the legal question—Was there a divorce?—the Court summed up that they did not consider the evidence to have given a true or trustworthy account of the occurrence, concerning which a dispute afterwards arose as to whether the words used constituted a conditional divorce.

The Court said: "It must be remembered that the whole issue depends upon the precise words said by Nawab Mirza to his wife thirty-five years before suit. All that can be safely deduced from the evidence is that about the year 1859 something was said by the husband to the wife, which the wife chose to regard as amounting to a divorce, probably a conditional divorce, and which the husband did not so regard; that the difference of opinion between husband and wife was referred before 1865 to a council of experts (or possibly two councils) which differed as to the legal effect of whatever had been submitted to them; and that the parties to the marriage **[540]** adhered to their respective views for a considerable period afterwards, and probably up to the time of Nawab Mirza's death. What was actually said by the husband to the wife it is impossible to determine positively, and with reasonable certainty upon the evidence before us, and it is therefore impossible to say whether or not there was a divorce which under the Mahomedan law dissolved the marriage tie of the *nikah* at Delhi.

"As to the rest of the evidence, it is agreed on all hands that the parties separated in 1859, and we do not consider that any fact is proved which is inconsistent with the continuance of the marriage tie from that date onwards, though we are by no means satisfied that there was any renewal of conjugal co-habitation. The results of the evidence are merely negative, and no positive conclusions can be, or need be, arrived at upon the minor disputed points.

"We find accordingly that it is not proved that the plaintiff was divorced by her husband at any time after the marriage, and consequently she was still his wife at the time of his death."

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The Judges concurred with the lower Court in finding that the loss of a *kabin nama*, alleged by the plaintiff to have been executed, had not been proved; nor that any portion of dower was due thereunder.

They thus stated their conclusion: "The result of these findings of fact is that the decree of the District Judge stands affirmed; but on somewhat different grounds from those on which it was made. We must accordingly dismiss both appeals; and we think that the proper order is that each party should bear its own costs in both appeals."

On an appeal preferred by the first defendant,

Mr. *C. W. Arathoon*, for the appellant, argued that the Chief Court were wrong in their view of the facts as to the divorce, as to which they should have maintained the finding of the District Court. But, as to the legal effect of that divorce, he argued that the District Court had been wrong in holding that it had not operated to dissolve the Christian marriage of 1855. That [541] divorce had operated to disqualify the widow from claiming to share in her late husband's estate according to the Mahomedan law. Examination of the evidence showed that her conduct and assertions after her separation from her husband were sufficient to prove that she herself considered that she had been divorced and that she was free to marry again. The facts disentitled her to claim, on the principles of justice, equity, and good conscience, against the estate of the deceased,—principles which had been applied to members of the Skinner family in *Barlow* v. *Orde* (1).

Reference was made to *Moonshee Busul-ul Raheem* v. *Luteefutoon-Nissa* (2), *Abraham* v. *Abraham* (3), *Skinner* v. *Orde* (4), *Syud Mouzuffer Ali* v. *Kumurunissa Bibi* (5). The Indian Marriage Act, V of 1852, reciting 14 and 15 Vic., c. 40; Baillie's Mahomedan Law, Book III, of divorce, p. 205; Ameer Ali's Personal Law of the Mahomedans, Chap. XII, dissolution of the marriage contract; Macnaghten's Mahomedan Law, Chap. VII; Hedaya, Vol. I, Book 4, c. 2; Wilson's Gloss. 550; *In re Millard* (6); *Anon* (7); *In the matter of Ram Kumari* (8).

The respondent did not appear.

JUDGMENT.

The judgment of their Lordships was delivered on 8th December 1897 by

LORD WATSON.—Stuart Skinner, otherwise known as Nawab Mirza, was, on the 3rd May 1855, married to the respondent, who was the daughter of one Martin Blake of the Bengal Civil Service by a Mahomedan woman, Choti Begum. The ceremony was performed in the Protestant Church at Meerut, by the Rev. J. E. Wharton Rotton, the resident chaplain. It appears that the spouses were originally adherents of the Mahomedan faith; and that, in order to validate the marriage which they contemplated, they had previously become professing Christians, the respondent having [542] been baptized at Delhi on the 18th April 1855, and Stuart Skinner, at Meerut, on his marriage day. Some time after the marriage, but not later than the commencement of the Mutiny in 1857, both spouses reverted to their original creed; and, although they did not cohabit after the year 1859, they both continued in the practice and profession of the Mahomedan faith until the death of Stuart Skinner, which took place at Delhi, on the 29th of January 1886.

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(1) 13 M.I.A. 277. (2) 8 M.I.A. 395. (3) 9 M.I.A. 195. (4) 14 M.I.A. 309. (5) (1864) W.R. 32. (6) 10 M. 218. (7) 3 M.H.C.R. Ap. 7. (8) 18 C. 264.

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After their Christian marriage, the spouses went through the form of marriage a second time, according to Mahomedan law. The precise date of the ceremony is not satisfactorily fixed by the evidence; but it must have been shortly after the time when they reverted to Mahomedanism. In the year 1859, in consequence of domestic unpleasantness, occasioned by the circumstance that Stuart Skinner suspected his wife of having illicit intercourse with one Abdul Wahid, it is a fact proved beyond dispute that the respondent left his house and never returned to it. She stayed at first with her mother, and subsequently went to live with her alleged paramour, Abdul Wahid, to whom she bore several children. Before their separation, two children, a son and a daughter, whose legitimacy is not impeached, had been born of the marriage between her and Stuart Skinner, both of whom survived their father.

In the month of May 1871, Stuart Skinner began to cohabit with Sophia Skinner, daughter of one Thomas Skinner, whom he treated as his wife, and with whom he continued to live on that footing, until his decease in January 1886. He was survived by six children, born of that intercourse, by whom the present appeal has been brought.

This suit was commenced in May 1888, 16 months after the death of Stuart Skinner, by Charlotte Blake, *alias* Badshah Begum. In her plaint, Badshah Begum set forth their Christian marriage, and also alleged that "shortly after the said marriage, the plaintiff and Nawab Mirza were again married at Delhi according to Mahomedan law, as Sunnis, and "the plaintiff's dower was fixed at Rs. 50,000." She further averred that she and the deceased "lived together as husband and wife **[543]** according to the Mahomedan creed." Her claim was alternative, being for one-third of the deceased's estate according to the English law of inheritance, or otherwise, for Rs. 50,000 as dower, and one-eighth of the remaining estate according to Mahomedan law. The parties called by her as defendants were the two children born by her to the deceased during their cohabitation, and the six appellants, whom she described as being "looked upon as the heirs of Nawab Mirza, and entitled to succeed to the estate left by him." The plaintiff at the beginning of the litigation disputed that there had been any marriage between the deceased and Sophia Skinner, and the legitimacy of their offspring; but that contention was ultimately abandoned. By order of the District Judge of Delhi, before whom the action depended, Sophia Skinner was added as a defendant.

None of the defendants lodged written pleadings; but they appeared by their vakils before the District Judge, who made a note of the pleas orally stated in defence to the action, with a view to the adjustment of issues. The main pleas stated for the present appellants were to the effect (1) that the plaintiff was not, at the time of his decease, the wife of their father Stuart Skinner, she having been divorced by him, according to Mahomedan law, about the year 1859; and (2) that the deceased had left a last will, by the terms of which she was, in any event, excluded from his succession. The plaintiff, in replication, denied the execution of the will, and also contended that, assuming the will to have been executed with due formality, it was in law inoperative.

The learned Judge having adjusted 13 issues, which it is unnecessary to notice in detail, intimated to the parties, at the close of the plaintiff's evidence, that he would only take evidence from the defendants as to the *factum* of the will set up in answer to the plaintiff's claim, and then hear arguments upon the law points, when, if necessary, he would call upon the defendants to produce their remaining evidence. The effect of

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that order was to limit the evidence of the defendants to the 9th issue:—"Did Stuart Skinner execute a will excluding the plaintiff?"

When the evidence of the defendants bearing upon the [544] *factum* of the will was concluded, the District Judge heard parties, and gave judgment upon the 25th June 1889. He found that the Christian marriage of 1855 was valid and binding upon the parties; and he also held that the subsequent return of the spouses to Mahomedanism did not give the husband any right to dissolve that marriage by a divorce according to Mahomedan law. He found in fact that the will put forward by the defendants had been duly executed by Stuart Skinner; but he held that it was in law inoperative, because it was admitted on both sides that Stuart Skinner, after the *nikah* or second marriage ceremony with Badshah Begum, "continued to live as a Mahomedan, and died professing this faith." The learned Judge adds that, in the matter of his will, "Stuart Skinner was bound by the provisions of the Mahomedan law, and according to that law it was clearly invalid." Upon the assumption on which it proceeds, the Mahomedan law laid down by the learned Judge appears to their Lordships to be correct, and no attempt was made by the appellant's counsel to impugn it. Upon these findings, a decree of partition was given to Badshah Begum, which assigned to her, as one of the two legal wives of the deceased, one-half of the eighth share allotted to the widow, or widows as the case may be, under the Mahomedan law of intestacy.

Against that judgment cross appeals were taken to the Chief Court of the Punjab; and, on the 1st April 1891, Sir Meredyth Plowden and C. A. Roe, Esq., remanded the case to the District Judge, under s. 566 of the Civil Procedure Code, directing him to proceed with the trial of the 6th, 7th and 8th issues which he had framed, and to report the evidence and his findings thereon. The issues thus sent back were: 6. Did he (*i. e.*, Stuart Skinner) in fact divorce her (*i.e.*, Badsha Begum), and when? 7. Subsequently did plaintiff re-marry, and when? 8. What was plaintiff's dower on *nikah* with Stuart Skinner? In obedience to the remand, the District Judge took evidence bearing upon these issues, which he returned to the Court, along with his findings, upon the 22nd June 1892. Upon the 6th issue, his finding was, that Badshah Begum had been divorced, according to the form prescribed by Mahomedan law, some time [545] before 1865; upon the 7th issue, that Badshah Begum lived with Abdul Wahid as his wife, but that there was no evidence to show that they had contracted a Mahomedan or *nikah* marriage, and, upon the 8th issue, that, on the plaintiff's *nikah* marriage with Stuart Skinner, her dower was fixed at Rs. 50,000, such findings being subject to those qualifications, (1) that it was questionable whether the spouses, in going through the ceremony of a *nikah* marriage, and fixing the dower at Rs. 50,000, considered it more than an empty form, and (2) that it was "subject to the plaintiff's right to give secondary evidence of the contents of the deed of dower, which up to this date has not been produced."

The case was finally disposed of in the Chief Court of the Punjab, on the 12th July 1893, by the same learned Judges who had made the remand. Their decree simply affirmed the original decree of the District Judge, and ordered the parties to bear their own costs of appeal. In arriving at that result, the learned Judges expressed no opinion in regard to the finding of law by the District Judge in his original judgment of the 25th June 1889, to the effect that the fact of the spouses having returned to their Mahomedan faith after the Christian marriage of 1855 did not give Stuart Skinner any right to dissolve that marriage by a Mahomedan divorce;

but they reversed the later finding of the District Judge to the effect that there had been such a divorce. They agreed with him in holding, first, that, in the absence of secondary evidence of the contents of the deed of dower alleged by her, the plaintiff's claim for dower must fail; and, secondly, that the defendants had failed to prove their allegation that Badshah Begum had married Abdul Wahid during the lifetime of Stuart Skinner.

The decree made by the District Judge, and ultimately approved of by the Chief Court, is framed upon the footing that the personal status of Stuart Skinner, at the time of his death in 1886, was that of a Mahomedan, and that the rights of succession to his estate, including the right of his first wife, who had become and was then a Mahomedan, were governed by the rules of Mahomedan law. But the grounds upon which the two Courts [546] came to the conclusion that Badshah Begum continued to possess the status of a wife of the deceased were essentially different. Whilst the District Judge held, as matter of law, that the regular Christian marriage, celebrated between two persons domiciled in India, could not, upon the spouses subsequently embracing and professing Mahomedanism, be dissolved by a Mahomedan divorce, the learned Judges of the Chief Court were of opinion that, as a matter of fact, there had been no Mahomedan divorce, as alleged by the defendants.

One of the many peculiar features of this suit arises from the circumstance that in the case of spouses resident in India, their personal status, and what is frequently termed the status of the marriage, is not solely dependent upon domicile, but involves the element of religious creed. Whether a change of religion, made honestly after marriage with the assent of both spouses, without any intent to commit a fraud upon the law, will have the effect of altering rights incidental to the marriage, such as that of divorce, is a question of importance, and it may be of nicety. In the present case that question does not arise for decision, unless it is shown that Stuart Skinner did, in fact, divorce Badshah Begum according to Mahomedan form.

On the hearing of this appeal, which was *ex parte*, the appellants' counsel did not challenge any finding of the Court below with the exception of that of the Chief Court which negatives the fact of divorce. Upon that part of the case, their Lordships, after careful consideration of the evidence, which is not only contradictory, but is marked by peculiarities which are more perplexing than mere contradiction, have come to substantially the same conclusion with the learned Judges of the Chief Court. In these circumstances, and having regard to the fact that the case has come before them in such a shape as to make an exhaustive argument from the bar on both sides of the question impossible, they do not think it expedient to express any opinion as to the effect of a change of religion by the spouses, their domicile remaining the same, upon the rights of one or other of them which are incidental to marriage.

The bulk, and that not the least important part of the evidence [547] adduced in this case bearing upon the fact of divorce, consists of legal proceedings between the respondent Badshah Begum and the deceased Stuart Skinner, including depositions of witnesses taken in those proceedings. The difficulty, to say the least of it, of estimating the value of that evidence for the purposes of the present case, is occasioned by the fact that, in all these litigations, the respondent alleged and endeavoured to prove that she had been divorced about the year 1859, whereas the deceased alleged and endeavoured to prove that she had not. Accordingly,

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in the present suit, the appellants relied upon the statements made and proof furnished by the respondent, whilst she herself relies upon the statements made and proof furnished by Stuart Skinner, which she had controverted. It appears to their Lordships that these proceedings would have been insufficient to raise an estoppel, either against the respondent or against Stuart Skinner, in any question between them as to their status; and, in the argument upon this appeal, it was in their Lordships' opinion rightly conceded by the appellants' counsel, that the respondent was not estopped from maintaining that she never ceased to be the wife of Stuart Skinner, and that the question must now be decided upon the weight of the evidence before the Court.

The first of these proceedings, suit No. 257 of 1865, was instituted by the respondent against Stuart Skinner and the Official Trustee, who held certain funds in which the respondent and her children were interested. The immediate cause of action was the refusal of Stuart Skinner to sign papers to enable the respondent to obtain payment of interest on those funds to which she was entitled. The case was settled by a judgment adjusted with consent of the parties, in which, notwithstanding the respondent's contention that she had been divorced, Stuart Skinner is described as "her husband.'

The second (suit No. 33 of 1868) was brought against the respondent and also against Stuart Skinner, by Sophia Skinner, an infant, the legitimate daughter of their Christian marriage, and one John Van Cortland, as her next friend, for the appointment of a guardian to the infant. Stuart Skinner, who, by the consent decree in the previous suit, had become bound to give [548] the custody of the infant to the respondent, was the real instigator of the action, in which he repeated the allegation that the respondent was his wife, whilst she denied it. The suit was dismissed, with costs against both parents.

The third of these proceedings was an action brought by Stuart Skinner, in the year 1881, against Mrs. W. Orde and others, for the purpose of establishing his own legitimacy, and so proving his title to the share of an estate. The respondent was not a party to the suit, but she was examined as a witness on behalf of Stuart Skinner, when she again took the opportunity of stating that she had ceased to be his wife, by reason of his divorce.

There is, in their Lordships' opinion, an entire absence of facts established by reliable evidence, available for the purpose of testing the accuracy of the counter-statements made in the course of these proceedings by the respondent and by Stuart Skinner respectively. The only facts which appear to them to be proved are these: That, about 1869, there were dissensions between the spouses, in consequence of which the respondent left her husband's house, and never returned to it; that after, if not before she left, the respondent did not lead a chaste life, and gave her husband good cause for divorcing her, if he had chosen to dissolve the marriage tie; but it by no means follows that Stuart Skinner, either thought that it would be conducive to his interest, or that he intended to avail himself of that remedy. On the contrary, his repeated judicial assertions that, notwithstanding their actual separation, he still continued to be the husband of the respondent, strongly point to the inference that his design was to retain the hold over his wife which that relation gave him, in order that he might use it for his own advantage. If he had really been desirous to divorce the lady, he could have done so whenever he chose, according to Mahomedan law. It would, in their

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Lordships' opinion, be somewhat rash to assume that the counter-statements of these two parties were not affected by motives of self-interest, but they see no cause to prefer, as the District Judge did, the statements of the respondent, who had a clear object in stating that she **[549]** was divorced in the first and second of these suits, and, so far as they can see, she may have been actuated by the same motive when giving evidence in the year 1881.

The appellants relied strongly upon evidence which was furnished by them after the remand, as establishing that, subsequently to their disputes in Court, Stuart Skinner had a meeting with Badshah Begum, in her mother's house at Delhi, at which their controversy as to the fact of the divorce had been settled by Stuart Skinner admitting it. The date of the meeting is not precisely fixed, but it appears to have been about the year 1860 or 1861. Four maulvis, or sages learned in the law, are said to have been present, and to have had submitted to them, for their opinion, a paper containing the precise words which were addressed by Stuart Skinner to his wife in 1859, at the time when they separated. From the account given by Amanullah, a leading witness for the defendants, he had suggested to Badshah Begum "a reference to learned men (*ulama*) to whom the words used should be stated, and who should give their opinion whether they amounted to a divorce or not, she appointing some and Nawab Mirza some. To this she agreed. On behalf of Nawab Mirza, I called Maulvi Sayad Muhammad and Maulvi Karimullah, and she called Maulvi Said-ud-din and another, whose name I forget. I was present at their meeting. A friend of hers stated the words used by Nawab Mirza, Badshah Begum being behind the pardah. The deliberations of the learned conclave, and the result of the meeting, are thus stated by the same witness: After consultation, Maulvi Sayad Muhammad said that the divorce was not clear, while the other learned men said it amounted to a divorce." "No written opinion was recorded; before it could be done, dispute arose, and we dragged away Nawab Mirza from the house."

Assuming that such a meeting took place, terminating in a conflict which does not appear to have been confined to logic, and from which it was necessary to remove Stuart Skinner, *alias* Nawab Mirza, by force, their Lordships are unable to derive from it any inference that Stuart Skinner then admitted that Badshah Begum had ceased to be his lawful wife. There is, in their opinion, no satisfactory evidence to show that the words, **[550]** which on that occasion are said to have been represented to the maulvis as having been the precise words used by the husband in 1859, were so in fact, or were admitted by both parties to be so. Nor does it appear that either of the spouses intended or consented to be bound by the opinion of the maulvis. There is really no trustworthy evidence to prove the language used by the husband in 1859. The version which is said, by witnesses examined in this case, to have been used at the meeting of 1860 or 1861, depends upon the memory of people not altogether neutral, who are speaking after a lapse of thirty years. The District Judge, in his report, relies to some extent upon the depositions of certain witnesses, taken in Badshah Begum's suit of 1865, which have been put in evidence in this case, but the Judges of the High Court make no reference to them. That testimony does not appear to their Lordships to be calculated to dispel the obscurity in which the matter is involved. Ahmed Jan, one of Badshah Begum's witnesses, says that he and three others were present in her mother's house, when Stuart Skinner said to her three times "I have divorced you" and then went away. Another

1897 DEC 8. — PRIVY COUNCIL. — 25 C. 537 (P.C.) = 25 I.A. 34 = 2 C.W.N. 209 = 7 Sar. P.C.J. 262.

witness, servant of a female relative of Badshah Begum, tells a similar story, but says that, besides himself, there were only two persons present, including Ahmed Jan. Both those witnesses state that there were no relations of either spouse present. The evidence of Maulvi Said-ud-din refers, not to what took place in 1859, but at the meeting of 1860 or 1861, which has been already noticed. In these circumstances, their Lordships have come to the conclusion that the defendants have failed either to establish that Stuart Skinner admitted that he had divorced his wife according to Mahomedan law, or to prove the words which he actually used in 1859, so as to enable a Court of law to determine whether they did or did not amount to a Mohamedan divorce.

Their Lordships will, accordingly, humbly advise Her Majesty to affirm the judgment appealed from and to dismiss the appeal. There will be no order as to costs.

Appeal dismissed.

Solicitors for the appellant: Messrs. *T. L. Wilson & Co.*

C. B.

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25 C. 551.

[551] APPELLATE CIVIL.

Before Mr. Justice O'Kinealy and Mr. Justice Rampini.

PEARI LAL ROY (*Plaintiff*) *v.* MOHESWARI DEBI AND OTHERS (*Defendants*).* [1st March, 1898.]

Bengal Tenancy Act (*VIII of* 1885), *s.* 167—*Effect of service of notice—Annulling of incumbrance—Property in possession of a person other than the purchaser.*

Service of notice under s. 167 of the Bengal Tenancy Act has the effect of annulling an incumbrance. It is not necessary for the purchaser to bring a declaratory suit to have it declared that the incumbrance is annulled.

The incumbrance would be annulled even if the property be not at the time of the service of the notice under s. 167 in the possession of the purchaser, but of somebody else.

[F., 11 C.W.N. 248-N; R., 9 C.W.N. 551; D., 10 C.W.N. 976 (977).]

THIS suit was brought on a mortgage bond against the heirs of the mortgagor as well as against the purchaser of the mortgaged property at a sale in execution of a decree for rent due thereon. After the sale, notice was served by the purchaser through the Collector in the terms of s. 167 of the Bengal Tenancy Act (VIII of 1885) annulling the plaintiff's incumbrance. The lower Courts dismissed the plaintiff's suit holding that his incumbrance was annulled by operation of law. The plaintiff preferred a second appeal to the High Court.

Babu *Gobind Chunder Das*, for the appellant.

Dr. *Ashutosh Mookerjee*, for the respondent.

The judgment of the High Court (O'KINEALY and RAMPINI, JJ.) is as follows:—

JUDGMENT.

The learned pleader for the appellant in the case raises two contentions: *first*, that the service of notice under s. 167 of the Bengal

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* Appeal from Appellate Decree No. 687 of 1896, against the decree of B. G. Geidt, Esq., District Judge of Bankura, dated the 25th of January 1896, modifying the decree of Babu Tara Chand Sen, Munsif of Bankura, dated the 14th of September 1893.

Tenancy Act has not the effect *ipso facto* of annulling [552] an incumbrance; and, *secondly*, that the purchaser was not in possession at the time of annulling the incumbrance, the property having then been made over to the grandson of the original mortgagor.

1898 MARCH 1. — APPELLATE CIVIL. — 25 C. 551.

We think there is no force in either of these contentions. We quite agree with the learned Judge in the Court below that service of a notice under s. 167 does have the effect of annulling an incumbrance without it being necessary for the purchaser to bring a declaratory suit to have it declared that the incumbrance is annulled. This is quite clear from the second clause of s. 164 read with s. 167.

The learned pleader has also contended that the notice was bad, inasmuch as it was not served within one year from the date of the sale, or of the purchaser having become aware of the incumbrance. But this point was not raised in either of the lower Courts, and there are no facts before us upon which we could form any opinion upon it.

Then his second ground of appeal also seems to us to fail. There is no reason why an incumbrance should not be annulled simply because the property at the time of the service under s. 167 was in the possession, not of the purchaser, but of somebody else. The learned pleader urges that the notice under s. 167 was not served until after the transfer of the property in question by the purchaser at the sale under the mortgage decree, and that therefore it can have no effect. But we do not think it necessary to say anything further about this plea than that such does not appear from the proceedings of the Court below to be the case. There are no facts stated either in the pleadings or in the proceedings in the lower Courts upon which we could give effect to this contention, if we thought it necessary to do so.

For these reasons we dismiss the appeal with costs.

S. C. B.

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25 C. 553.

[553] TESTAMENTARY JURISDICTION.

Before Mr. Justice Sale.

IN THE GOODS OF TARAMONI DASI (*Deceased*).*
[15th, 16th and 17th February, 1898.]

Probate—Grant of Probate—Subsequent inconsistent will of which probate is also granted —Costs of Executor.

The executor of a will had obtained probate thereof, when the executor of a subsequent (and inconsistent) will applied for and obtained probate of the second will.

Held, that having regard to the circumstances of the case, and to the fact that the litigation was produced by the conduct of the testatrix herself, the executors of both wills were entitled to their costs to be paid out of the estate; but that in so far as the costs would not be covered by the estate, each party must bear his own costs.

THE testatrix died on the 26th November 1896, after having made two wills, one in September 1896 and the other dated the 23rd day of November 1896. By the first will she appointed the defendant her executor, and the will was made in favour of his infant son. After the death of the testatrix, the defendant obtaind probate of the will in common form.

Subsequently, the plaintiff produced the second will, and applied for probate thereof. The executor of the prior will opposed the application;

* Original Civil Suit No. 3 of 1897.

1898 FEB. 17. — TESTAMENTARY JURISDICTION. — 25 C. 553.

and the matter was set down as a contentious cause. At the hearing the Court pronounced in favour of the subsequent will; and thereupon the question arose as to what order should be made with regard to costs.

Mr. *Braunfeld* and Mr. *U. P. Roy*, on behalf of the defendant.—The costs should come out of the estate, or, failing that, the parties should pay their own costs. For the executor of the prior will, having obtained probate, and the estate having come into his hands, could charge the estate with his costs; and as such executor he was bound to call upon any person propounding a later will to prove it in solemn form. The costs should come out of the estate, because the conduct of the testatrix gave rise to [554] this litigation. An executor is called upon to pay costs personally only when he has been guilty of misconduct or has not acted properly, but that is not the case here.

Mr. *Avetoom* and Mr. *M. L. Dutta*, for the plaintiffs.—The costs should follow the result. The Court having pronounced in favour of the subsequent will, the executor of the prior will should personally bear the costs.

The following is the judgment of SALE, J., so far as it relates to the question of costs:—

JUDGMENT.

SALE, J.—I have considered the question of costs, and it appears to me the rule is this: The executor of the will of the testator is entitled, in the same way as the next of kin would be, to call upon the executor of a prior will to prove in solemn form and to cross-examine the witnesses in support of the will, supposing there are any suspicious circumstances in connection with the execution of that will.

In the present case I think the executor of the former will has done nothing more than discharge the duty cast on him. There were circumstances undoubtedly of suspicion in connection with the execution of the subsequent will. The testatrix very shortly after executing the former will left her place of residence, and, while living under the care and protection of her nephews, executed a will in their favour, which was certainly inconsistent with the terms of the provisions of the previous will. It is quite true the learned counsel for the executor of the first will did not confine himself to cross-examining the witnesses to the subsequent will, but also called evidence; but this was to allow the executor of the former will to give his version of an interview which took place after the death of the testatrix between him and the nephew of the deceased. Taking all the circumstances together, I prefer the account given by the nephews, but I think this circumstance should not disentitle the executor of the former will to his costs. The evidence given on his behalf was very short, and I think the litigation was produced by the conduct of the testatrix herself; and under the circumstances I think the order I should [555] make is that the costs of both parties shall be paid in the first instance out of the estate, and, as the estate is a very small one, so far as the costs would not be covered by the estate each party must bear his own costs.

The costs of the plaintiff and defendant will be paid rateably out of the estate, if the estate should be insufficient to pay the costs of both parties in full. So far as the estate may not be sufficient to pay these costs, each party will pay his own costs.

Attorney for the plaintiffs: Babu *J. C. Dutta*.

Attorney for the defendant: Babu *Sita Nauth Dass*.

H. W.

25 C. 555.

1898 JAN. 10.

APPELLATE CRIMINAL.

25 C 555.

APPELLATE CRIMINAL.

Before Mr. Justice Hill and Mr. Justice Stevens.

SURJA KURMI *v.* QUEEN-EMPRESS.* [10th January, 1898.]

Jury, Irregularity in trial of case by—Trial by Jury of an offence triable with assessors —Criminal Procedure Code (Act X of 1882), *ss.* 306, 307, 536—*Penal Code* (*Act XLV of* 1860), *ss.* 240, 241—*Government Notification of 1862.*

The accused was tried by a jury for an offence triable with the aid of assessors, and the jury by a majority found him "not guilty." The Sessions Judge, who disagreed with the verdict, convicted the accused, treating the verdict of the jury as the opinion of assessors:

Held, that the conviction was bad, inasmuch as the case was validly "tried by a jury" within the meaning of s. 536 of the Criminal Procedure Code (Act X of 1882), and the trial was complete when the jury had returned their verdict; and that the Judge was bound, under the circumstances, either to give judgment in accordance with the verdict or, if he disagreed with it, to submit the case for orders of the High Court, as provided by ss. 306 and 307 of the Code.

In the matter of Bhootnath Dey (1) followed.

A reference under s. 307 of the Criminal Procedure Code should be made when the Judge is "clearly of opinion" that he should do so for the ends of justice.

[R., 23 B. 696 (697); 26 M. 243 (249) = 2 Weir 453 (467).]

[556] THE facts of the case are shortly these: The appellant was tried by a jury at the Sessions Court of Burdwan for having "delivered" a counterfeit coin knowing it to be counterfeit, an offence punishable under s. 240 of the Penal Code. The jury by a majority of 4 to 1 returned a verdict of "not guilty." The Sessions Judge disagreeing with the verdict was about to refer the case to the High Court under s. 307 of the Criminal Procedure Code (Act X of 1882), when it was brought to his notice by the Public Prosecutor that the trial ought to have been conducted with the aid of assessors, and not jurors, as offences under ss. 240 and 241 of the Penal Code were not declared triable by jury, by the Government Notification of 1862. Thereupon the Sessions Judge, treating the verdict of the jury as the opinions of assessors, convicted the accused and sentenced him to two years' rigorous imprisonment.

Against this conviction and sentence the prisoner appealed to the High Court.

No one appeared for the appellant.

The judgment of the High Court (HILL and STEVENS, JJ.) was as follows:—

JUDGMENT.

The appellant was committed to the Court of Session for trial on the charge of having committed an offence punishable under s. 240 of the Indian Penal Code. At the sessions the case was tried by a jury, which by a majority of four to one found the appellant not guilty and returned a verdict accordingly.

The learned Sessions Judge records that he was about to refer the case to this Court under the provisions of s. 307 of the Code of Criminal Procedure when it was brought to his notice that the case was triable, not by a jury, but with the aid of assessors.

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* Criminal Appeal No. 946 of 1897, against the order passed by A. C. Sen, Esq., Offg. Sessions Judge of Burdwan, dated the 24th November 1897.

(1) 4 C.L.R. 405.

1898 JAN. 10. — APPELLATE CRIMINAL. — 25 C. 555.

The course which the Sessions Judge then adopted was to treat the verdict of the jury as the opinions of assessors and to record a judgment convicting the appellant under s. 241 of the Indian Penal Code and sentencing him to be rigorously imprisoned for two years.

The appellant has now appealed against the conviction so had.

[557] We are of opinion that the conviction, as it stands, cannot be supported. The case was "tried by a jury" within the meaning of s. 536 of the Code of Criminal Procedure, and under the provisions of that section the trial was not invalid on the ground only that the case had been so tried, although the offence in question was triable with the aid of assessors. The trial by the jury was complete when they had returned their verdict, and the Judge was bound to act either under s. 306 or under s. 307 of the Code of Criminal Procedure, that is, he was bound either to give judgment in accordance with the verdict, or to submit the case for orders of this Court, if he disagreed with the verdict, and was clearly of opinion that reference to this Court was necessary for the ends of justice.

We are supported in this view by the decision in the case of *In the matter of Bhootnath Dey* (1).

We set aside the conviction and remand the case to the Sessions Judge in order that he may deal with it according to law by passing an order under either s. 306 or s. 307 of the Code of Criminal Procedure.

B. D. B. *Conviction set aside and case remanded.*

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25 C. 557.

APPELLATE CRIMINAL.

Before Mr. Justice Banerjee and Mr. Justice Hill.

DAITARI DAS *v.* QUEEN-EMPRESS.* [6th December, 1897.]

Criminal Procedure Code (Act X of 1882), *s.* 35—*Sentence—Concurrent sentences of imprisonment—Penal Code (Act XLV of* 1860), *s.* 409.

Sentences of imprisonment passed for distinct offences to run concurrently are not warranted by law.

Queen-Empress v. *Wazir Jan* (2), referred to.

THE appellant was charged with having committed criminal breach of trust as a public servant in respect of three different sums of money, and was tried by the Court of Sessions on three [558] distinct charges under s. 409 of the Penal Code. The Sessions Judge found him guilty on all the three charges and passed sentence in the following terms :—

"The Court agreeing with both assessors finds accused Daitari Das guilty of the three offences of criminal breach of trust as a public servant charged against him, and sentences him under s. 409 of the Indian Penal Code to seven years' rigorous imprisonment on each charge ; the sentences to run concurrently."

Against this conviction and sentence the prisoner appealed to the High Court.

No one appeared for the appellant.

The Deputy Legal Remembrancer (Mr. *Gordon Leith*), for the Crown.

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* Criminal Appeal No. 820 of 1897, against the order passed by W.B. Brown, Esq., Officiating Sessions Judge of Cuttack, dated the 17th September 1897.

(1) 4 C.L.R. 405. (2) 10 A. 58.

The judgment of the High Court (BANERJEE and HILL, JJ.) was as follows:— 1897 DEC. 6.

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25 C. 557.

JUDGMENT.

The appellant in this case was tried before the Sessions Court of Cuttack on three charges under s. 409 of the Indian Penal Code for having committed criminal breach of trust as a public servant in respect of three different sums of money.

The learned Sessions Judge, agreeing with the assessors, has found the accused guilty on all the three charges, and has sentenced him under s. 409 of the Indian Penal Code to seven years' rigorous imprisonment on each charge, with this qualification that the sentences are to run concurrently. We see no reason to interfere with the conviction; but in regard to the sentence, we are of opinion that it is not warranted by law. There is no provision in the Code of Criminal Procedure, or in any other law that we are aware of, authorizing a Court to pass sentences which are to run concurrently. On the contrary, s. 35 of the Code of Criminal Procedure enacts that "when a person is convicted at one trial of two or more distinct offences, the Court may sentence him, for such offences, to the several punishments prescribed therefor, which such Court is competent to inflict, such punishments, when consisting of imprisonment or transportation, to commence the one after the expiration of the other in such order as the Court may direct.

[559] We may also refer to the case of *Queen-Empress* v. *Wasir Jan* (1), which goes to support the same view. That being so, the concurrent sentences passed in this case must be set aside.

The question then arises what should be the proper sentence in the case? We see no reason to dissent from the learned Sessions Judge's view that an aggregate sentence of seven years' rigorous imprisonment is required for the ends of justice; and our order, therefore, will be this—that the appellant be sentenced to five years' rigorous imprisonment in respect of the first count, one year's rigorous imprisonment in respect of the second charge, and one year's rigorous imprisonment in respect of the third, for the offences of criminal breach of trust as a public servant punishable under s. 409 of the Indian Penal Code. Such sentences to run the one after the other in the order in which they have been mentioned above.

B. D. B. *Sentence altered.*

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25 C. 559.

CRIMINAL REVISION.

Before Mr. Justice Banerjee and Mr. Justice Hill.

DOLEGOBIND CHOWDHRY AND OTHERS (*Petitioners*) *v.* DHANU KHAN (*Opposite Party*).* [14th December, 1897.]

Criminal Procedure Code (Act X of 1882), ss. 107, 145—*Disputes concerning land—Procedure—Recognizance.*

Where a dispute likely to cause a breach of the peace exists concerning possession of land, proceedings under s. 145, and not under s. 107, of the Criminal Procedure Code should be instituted.

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* Criminal Revision, No. 780 of 1897, against the order of G. C. Manisty, Esq., District Magistrate of Bankura, dated the 13th of October 1897.

(1) 10 A. 58.

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[Diss., 26 M. 471 (472)=2 Weir. 56; 5 N.L.R. 94=3 Ind. Cas. 64=10 Cr. L.J. 221; F., 35 C. 117 (119)=6 C.L.J. 697=6 Cr. L.J. 398; 6 C.W.N. 883 (884); R., 39 C.150=14 C.L.J 429=16 C.W.N. 83=12 Cr. L.J. 569=12 Ind. Cas. 833; D., 30 C. 112 (119); 2 S.L.R. 18 Cr.=10 Cr. L. J. 231.]

THE facts of the case are shortly these. One Dhanu Khan (opposite party) purchased the interests of two tenants in a village in the District of Bankura, at a sale in execution of a decree against them and was put in possession by the Civil Court; and while he was proceeding to cultivate the land in question he was prevented from doing so by the petitioners, who claimed the land [560] under a permanent lease granted to their ancestors in 1867, and objected to be disturbed in their possession thereof. Thereupon Dhanu Khan lodged a complaint before the Police, who, after an investigation, submitted a report to the Deputy Magistrate. The Deputy Magistrate having satisfied himself from the Police report that a breach of the peace was imminent in respect of possession of the land, instituted proceedings against the petitioners under s. 107 of the Criminal Procedure Code, and bound them down to keep the peace for one year. The petitioners applied to the District Magistrate under s. 125 to cancel the bonds, but he declined to interfere. Against this order of the District Magistrate the petitioners moved the High Court and obtained this Rule.

Mr. *Donogh* (Babu *Sarat Chunder Dutt* with him) for the petitioners.—The Deputy Magistrate's order shows that he was satisfied from the Police report that there was a dispute about a piece of land likely to end in a breach of the peace. Under such circumstances the Magistrate was bound to proceed under s. 145 of the Criminal Procedure Code, and to decide which party was in possession of the land; and having decided it to maintain such party in possession until evicted therefrom in due course of law. The language of s. 145 being imperative the Magistrate has no option in the matter. Section 107 of the Code is not intended to apply to disputes regarding land, but to cases of personal liability to preserve the peace.

Babu *Degumber Chatterjee* for the opposite party.

(The Magistrate not having shown cause against the Rule their Lordships declined to hear the opposite party).

The judgment of the High Court (BANERJEE and HILL, JJ.) was as follows:—

JUDGMENT.

This is a rule calling upon the Magistrate of the District to show cause why the orders complained of, purporting to have been made under s. 107 of the Code of Criminal Procedure, should not be set aside.

The ground upon which our interference is asked is, that the proceedings recorded show that the case is properly one for the [561] institution of proceedings under s. 145 of the Code of Criminal Procedure, and not under s. 107. The order complained of is one that has the evident effect of binding down only one of the parties to the dispute, leaving the other party free, without any adjudication upon the question as to which of the two parties is in possession. We think the contention urged on behalf of the petitioners is right and ought to prevail.

We, therefore, set aside the order under s. 107.

B. D. B. *Order set aside.*

25 C. 561.

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APPELLATE CRIMINAL.

Before Mr. Justice Banerjee and Mr. Justice Hill.

BIRU MANDAL AND OTHERS *v.* QUEEN-EMPRESS.*
[6th December, 1897.]

Jury, Verdict of—Charge to Jury—Misdirection—Criminal Procedure Code (Act X of 1882), ss. 297, 423 (*d*)—*Effect of omission to explain the law to Jury—Penal Code (Act XLV of* 1860), ss. 143, 147, 380, 395—*Practice.*

In a trial by jury, the accused were charged with offences under the Penal Code. The Judge while charging the jury omitted to explain the law by which they were to be guided. The jury returned a verdict of *guilty* on all counts except one, and the Judge agreeing with the verdict convicted the accused.

Held, that the omission to explain the law to the jury amounted to a misdirection vitiating the verdict within the meaning of s. 423 (*d*), Criminal Procedure Code.

Wajadar Khan v. *Queen-Empress* (1) relied upon.

Some statement should appear in the record of a trial by jury to show that the law bearing upon the charges has been explained to the jury.

THE appellants in this case were charged with (1) dacoity, (2) theft in a dwelling house, (3) rioting, and (4) being members of an unlawful assembly, under ss. 395, 380, 147 and 143 of the Penal Code, respectively, and were tried by a jury. The Sessions Judge, in his charge to the jury, summed up the evidence, but omitted to lay down or explain the law by which they were to be [562] guided, according to s. 297 of the Criminal Procedure Code. The jury retired for consideration of their verdict, and on being asked what their verdict was on the first charge replied, through their foreman, that they could give their opinion upon the whole case, but they had not considered their verdict on each charge. Thereupon the charges were once more read over to them, and they again retired to consider their verdict on each charge separately; and on their return pronounced a verdict of *guilty* on the first, third, and fourth charges, and that of *not guilty* on the second. The Judge agreeing with the verdict convicted the accused under ss. 143, 147 and 395 of the Penal Code, and sentenced each of them to five years rigorous imprisonment on the *first* charge only, observing that

"There will be no sentence on the other charges. The verdict of the jury on the second charge being contradictory to their verdict on the first charge, there will be no order by the Court as to this second charge."

Against this conviction and sentence the accused appealed to the High Court.

Babu *Dasarathi Sanyal*, for the appellants.

The Deputy Legal Remembrancer (Mr. *Gordon Leith*), for the Crown.

The judgment of the High Court (BANERJEE and HILL, JJ.) was as follows:—

JUDGMENT.

The appellants in this case were tried by a jury before the Sessions Court at Rajshahye on four charges: (1) dacoity punishable under s. 395 of the Indian Penal Code; (2) theft in a dwelling house, actual and constructive, punishable under s. 380 read with s. 149; (3) rioting punishable under s. 147; and (4) being members of an unlawful assembly, punishable under s. 143 of the Indian Penal Code.

* Criminal Appeal, No. 800 of 1897, against the order passed by H. E. Ransom, Esq., Sessions Judge of Rajshahye, dated 28th of August 1897.

(1) 21 C. 955.

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The learned Sessions Judge charged the jury by summing up the evidence, but without laying down the law by which the jury were to be guided, as laid down in s. 297 of the Code of Criminal Procedure. The jury, on being asked what their verdict was on the first charge, through their foreman replied that they could give their opinion upon the whole case, but they had not considered their verdict on each charge. Thereupon, as the record shows, the charges were once more read over to the jury, who [563] retired for some time to consider their verdict on each charge separately; and on their return they pronounced a verdict of guilty on the first charge, not guilty on the second charge, and guilty on the third and fourth charges. The learned Sessions Judge, agreeing with the verdict of the jury on the first, third and fourth charges, has convicted the accused under ss. 395, 147 and 143, and has sentenced each of them under s. 395 to rigorous imprisonment for five years.

In appeal it is contended by the learned vakil for the accused that the learned Judge's omission to explain the law to the jury in this case constitutes a material misdirection, for which the verdict ought to be set aside, and a new trial ordered.

The learned Deputy Legal Remembrancer very properly calls our attention to the fact that here the charge to the jury that has been recorded contains, not merely the heads of the charges, but is actually the charge that was read out to the jury and interpreted in Bengali; so that there is no room for any contention that the law might have been explained without the explanation being embodied in the charge to the jury as recorded. But even if there had been any room for a contention of that sort, we should observe that as a rule we expect some statement in the record to show that the law has been explained to the jury. In the present case there can be no manner of doubt, as far as we can judge from the record, that the law has not been explained; and, if that is so, the question is, whether that amounts to a misdirection within the meaning of s. 423, cl. (*d*) of the Code of Criminal Procedure. Perhaps, strictly speaking, the error here is rather of non-direction than misdirection, but we think that the term misdirection in s. 423 includes an omission of this description.

It is next necessary to consider whether this absence of direction, that is, this error, is not cured by s. 527, and whether the language of cl. (*d*) of s. 423 stands in the way of our interfering with the verdict. We are of opinion that the effect of the two provisions of the Code of Criminal Procedure which we have just referred to, is to require us, before we interfere with the verdict of a jury, to see whether the misdirection [564] complained of was one of a material character, that is one which has made the verdict erroneous and led to a failure of justice. In the present case we feel no hesitation in answering the question in the affirmative, because the accused were charged with having committed a number of offences which are of a complex character, and it was very necessary therefore that the Judge should have explained to the jury what the elements are which go to constitute each of those offences, and should have clearly placed before them the distinction between them. That the absence of such direction had an effect upon the verdict is clear from the fact that the jury, when they were first asked what their verdict was on the first charge, were unable to say what their verdict was upon each separate charge. Thereupon the only additional direction given to them by the Judge consisted in the reading of the charges, unaccompanied by any explanation of the law. Then the verdict they returned is somewhat

inconsistent and not quite intelligible; because while they find the accused guilty on the first charge, that is guilty of the offence of dacoity, they find them not guilty of the offence mentioned in the second charge, namely, theft in a dwelling house. It is difficult to say upon what view of the evidence they returned a verdict of guilty on the first charge convicting the accused of the offence of dacoity, and yet did not convict them of the offence of theft in a dwelling house under the second charge.

1897 DEC. 6. — APPELLATE CRIMINAL. — 25 C. 561.

Having regard to these circumstances we are of opinion that the misdirection in the charge has vitiated the verdict, and has thereby occasioned a failure of justice.

We may add that the view we take in this case is in accordance with that expressed in the case of *Wafadar Khan* v. *Queen-Empress* (1).

The result is, that the convictions and sentence must be set aside, and the case sent back for re-trial.

B. D. B. *Conviction set aside and re-trial ordered.*

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25 C. 565 = 2 C.W.N. 425.

[565] APPELLATE CIVIL.

Before Mr. Justice Banerjee and Mr. Justice Wilkins.

UPENDRA LAL MUKERJEE AND OTHERS (*Appellants*) *v.* GIRINDRA NATH MUKERJEE AND OTHERS (*Plaintiffs*) AND NILRATAN MUKERJEE AND OTHERS (*Defendants*), *Respondents.** [2nd February, 1898.]

Contribution, suit for—Contract Act (*IX of* 1872), *s.* 70—*Money deposited by the plaintiffs to save the property, of which they were co-sharers, from being sold for arrears of revenue—Personal liability—Appeal—Power of the appellate Court to add parties as respondents—Code of Civil Procedure* (*Act XIV of* 1882), *s.* 559.

In a suit for contribution by the plaintiffs against the defendants, the Court of first instance gave the plaintiffs a decree against one defendant, and exonerated the others. On an appeal by the defendants against whom the decree was passed, the appellate Court directed the defendants exonerated by the first Court to be added as respondents, set aside the decree against the appealing defendant, and passed a decree against the defendants who were added as respondents, as representatives of one Shyamamoyi, and ordered the amount so decreed to be recovered from the estate of her, Shyamamoyi's, husband. On appeal to the High Court by the defendants, who were thus made liable, on the grounds that they were wrongly made parties and no decrees could be passed against them, and that the liability to contribution being the personal liability of Shyamamoyi, they not being heirs to her *stridhan*, they were not liable for the plaintiff's claim :—

Held, that there was nothing wrong in the course adopted by the lower appellate Court, and by s. 559 of the Code of Civil Procedure the defendants were rightly made parties.

Atma Ram v. *Balkishen* (2) dissented from.

Held, also, that inasmuch as a claim for contribution creates only a personal liability against the co-sharers on account of whose share the payment has been made, and does not create a charge on the estate, the persons liable would not be the reversionary heirs to Shyamamoyi's husband's estates, but those who would inherit her *stridhan*.

[N.F., 31 M. 142 = 18 M.L.J. 452 = 4 M.L.T. 104; F., 26 C. 109 (113); 35 C. 538 (539) = 12 C.W.N. 720; 3 Bom. L. R. 172 (178); R., 32 B. 35 = 9 Bom.L.R. 1181; 26 C. 114 (120, 122); 30 C. 655 (658); 31 C. 643 = 8 C.W.N. 496 (F.B.); 12 C.L.J. 137 = 5 Ind. Cas. 654; 9 C.W.N. 865 (867); 16 C.P.L.R. 42 (44); 6 Ind. Cas. 430 = 6 N.L.R. 50; 23 P.R. 1901 = 17 P.L.R. 1901.]

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* Appeal from Appellate Decree, No. 1463 of 1896, against the decree of Babu Syam Chand Roy, Officiating Subordinate Judge of Rungpore, dated the 30th of May 1896, reversing the decree of Babu Rajendro Lal Ghose, Munsif of that district, dated the 23rd of December 1895.

(1) 21 C. 955. (2) 5 A. 266.

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THE facts of the case, so far as they are necessary for the purposes of this report and the arguments, appear sufficiently from the judgment of the High Court.

[566] Babu *Saroda Churn Mitter*, for the appellants.

Babu *Horendra Nath Mookerjee*, with him Babu *Joy Govind Shome*, for the respondents.

The judgment of the High Court (BANERJEE and WILKINS, JJ.) was as follows :—

JUDGMENT.

This appeal arises out of a suit for contribution brought by the plaintiffs, respondents, against certain persons described as principal defendants and certain other persons described as *pro forma* defendants, on the allegation that a four-annas share of a certain *mehal* bearing No. 76 on the Collector's rent roll belonged to one Shyamamoyi Debia, the plaintiff, and the *pro forma* defendants being co-sharers in that *mehal*; that defendants Nos. 1 to 8 were the heirs of Shyamamoyi ; that the amount of Government revenue payable in respect of Shyamamoyi's share was Rs. 650 on account of the September instalment of 1891 ; that out of this the amount of Rs. 325 having remained unpaid, the said amount was paid by the plaintiffs to save the estate from sale ; and that the plaintiffs are entitled to recover the said amount from the principal defendants. It was further stated in the plaint that the share of Shyamamoyi had been let out in *ijara* to Annada Prosad Mukerjee, the predecessor in title to defendants Nos. 1 to 5 and to Saroda Prosad Mukerjee, predecessor in title to defendants Nos. 10 to 12 in equal shares, and that the share leased out in the name of Saroda Prosad which was held by him and his (Saroda's) brother Nilratan, defendant No. 6 was sold in execution, and the *ijara* interest in respect of this two-annas share was purchased by the husband of the defendant No. 9. It is not clearly stated in the plaint on what ground the plaintiffs seek to make all the principal defendants liable, but it would appear from the tenor of the plaint that they sought to make the defendants liable, not merely as representatives of Shyamamoyi, in respect of whose share they had paid the Government revenue, but also as her *ijardars*, it being stated in the plain t that one of the terms of the *ijara* lease was that the *ijardars* were to pay the Government revenue payable by Shyamamoyi.

The suit was originally contested only by defendants Nos. 1 to 5. They were exonerated from liability and an *ex parte* decree [567] was passed against defendant No. 9. Subsequently the *ex parte* decree was set aside and the suit was reheard.

The defence of defendants Nos. 1 to 5 was that they had paid their share of the revenue due, and that the only share that was in default was that held in *ijara* by defendant No. 9.

The defence of defendant No. 9 was that neither she nor her predecessor in interest was a co-sharer of the plaintiffs ; that no suit for contribution was, therefore, maintainable against her ; that she had no possession of the property at the time when the default in payment of the revenue was committed ; and that money was due to her from the plaintiffs who were *darijardars* under the *ijara* and so she was not liable for the plaintiff's claim.

The first Court held that defendant No. 9 was the only person liable, and it accordingly upon the rehearing of the case made the same decree that had been originally made *ex parte*.

On appeal by defendant No. 9, the lower appellate Court ordered the

remaining defendants who apparently had not been made parties to the appeal, *viz.*, defendants Nos. 1 to 8, to be brought before the Court under s. 559 of the Code of Civil Procedure, and it has set aside the decree against defendant No. 9 and given the plaintiffs a decree against defendants Nos. 1 to 8 as representatives of Shyamamoyi, and has ordered that the plaintiffs shall recover the amount decreed from the estate of the husband of Shayamamoyi.

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In second appeal it is contended on behalf of defendants Nos. 1 to 5 that the decree of the lower appellate Court is wrong, *first*, because no decree could be passed against defendants Nos. 1 to 5, the suit having been dismissed against them by the first Court and the plaintiffs having preferred no appeal against that part of the decree; *secondly*, because the suit having been based by the plaintiffs mainly, if not solely, upon the terms of the *ijara* lease, and the defendants Nos. 1 to 5 having paid the share of the Government revenue that was due on account of the two-annas share held by them under the *ijara*, they were not liable for any part of the plaintiff's claim; and, *thirdly*, because the liability to contribution was a personal liability of Shyamamoyi, and defendants Nos. 1 to 5 were no heirs to her *stridhan*, but were the [568] reversionary heirs to the estate of her husband, and, as such, were not liable for the plaintiff's claim.

Upon the first point, the case of *Atma Ram* v. *Balkishen* (1) is no doubt in favour of the appellant's contention; but having regard to the language of s. 559, we think it authorizes the course that the lower appellate Court has taken in this case. The plaintiffs in their plaint stated all the necessary facts, and they asked for a decree against the defendants. The first Court upon the view that it took of the liabilities of the parties as a matter of law, exonerated defendants Nos. 1 to 8 from liability and passed a decree against defendant No. 9 alone. The plaintiffs were content with that decree, because it did not matter to them whether the decree went against defendants Nos. 1 to 8, or against defendant No. 9, the parties being all equally solvent. The defendant No. 9 being dissatisfied with the decree passed against her, preferred an appeal; and the lower appellate Court having, at the hearing of the appeal, found that the defendants Nos. 1 to 8 who were parties to the suit in the first Court, but who had not been made parties to the decree and were interested in the result of the appeal (in this sense that, whereas they sought to fasten the liability for contribution on defendant No. 9, the appeal was intended to exonerate defendant No. 9 altogether) ought to be made parties, directed that they should be made parties; and they entered appearance in accordance with the order made. The plaintiffs, having obtained a decree against defendant No. 9, and being satisfied with that decree, were not under any necessity for preferring any appeal to make the other defendants liable. But if at the hearing of the appeal, the Court found that the defendant No. 9 was not liable, but the other defendants were liable, we do not think that there was anything wrong in the lower appellate Court's making them respondents and passing a decree against them. We may observe that the exercise of the power is not limited by the provisions of the Limitation Act, see *Manickya Moyee* v. *Boroda Prosad* (2).

The view we take is, to some extent, supported by the decision of the Bombay High Court in the case of *Soiru Padmanabh* [569] *Rangappa* v. *Narayanrao* bin *Vithalrao* (3). The first contention of the appellants must, therefore, fail.

(1) 5 A. 266. (2) 9 C. 355. (3) 18 B. 520.

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Upon the second point, we are of opinion that, although the plaintiffs in their plaint referred to the *ijara* lease and based their claim in part upon the terms of that lease, still that circumstance cannot go to exonerate the defendants Nos. 1 to 8 altogether from liability, if they are otherwise liable under the law. They were made parties as the heirs of Shyamamoyi, and a decree was asked for against all the defendants. It cannot, therefore, be said that, upon the case as made, the defendants Nos. 1 to 8 ought to be exonerated from liability altogether. The liability for contribution attaches to the co-sharer by whom the revenue was payable and for whom it was paid, that is, Shyamamoyi, and after her death to her legal representatives; and the defendants Nos. 1 to 8 are alleged to fill that character.

Upon the third point, we find that although, in the plaint, the defendants Nos. 1 to 8 are represented as the heirs of Shymamoyi, the defendants Nos. 1 to 5 in their written statement denied that they were her heirs, and alleged that they were the heirs of Chandra Bhusan Mukerjee, Shyamamoyi's husband; and there has been no adjudication in either of the Courts below as to whether defendants Nos. 1 to 5 are the heirs to Shyamamoyi's *stridhan*. The question then arises whether, if the defendants Nos. 1 to 5 are not heirs to Shyamamoyi's *stridhan*, they can still be made liable for the plaintiff's claim. The claim is for contribution for the payment of Government revenue, which was payable by Shyamamoy during her lifetime. Now, a claim for contribution, as has been held by a majority of the Judges of a Full Bench of this Court in the case of *Kinu Ram Das* v. *Mozaffer Hosain Shaha* (1) creates only a personal liability against the co-sharer on account of whose share the payment has been made, and does not create a charge on the estate. That being so, the claim must be held to be one for which Shyamamoyi was personally liable, but which the reversionary heirs are not bound to satisfy. It may appear somewhat anomalous that although, if Shyamamoyi had borrowed money for the purpose of paying her share of the Government revenue, mortgaging her husband's estate or even [570] alienating any portion of it by sale, the mortgage or sale would have been binding on the reversioners, yet if she has made default in the payment of revenue and another co-sharer has paid the amount for her, such co-sharer can have no claim against the reversioners.

But one explanation of the anomaly is, we think, to be found in the fact that the widow's alienation for the purpose of paying the revenue becomes binding on the reversioners only when there is necessity made out for the alienation. But where the widow merely neglects to pay the revenue and somebody else pays it for her, it cannot be said that the default on the part of the widow was due to the necessities of the estate. It may be that she had funds in her hands out of which to make payment, and yet she did not make the payment. In such a case the persons who ought to be held properly liable would be, not the reversionary heirs to her husband's estate, but the persons who would inherit her *stridhan*. That being so, it becomes necessary to determine whether the appellants or any of them are the heirs of Shyamamoyi's *stridhan*. As that question has not been determined, the case must go back to the first Court for its determination, and, as the ground upon which we remand the case is common to all the defendants, who have been made liable, the result is that the decree of the lower appellate Court must be set aside,

(1) 14 C. 809.

and the case remanded for determination of the question, whether the defendants Nos. 1 to 8 or any of them are heirs to Shayamamoyi's *stridhan*. If the question is answered in the affirmative, the plaintiffs would be entitled to a decree against such persons as are found to be heirs to Shayamamoyi's *stridhan*. If the question is answered in the negative, as against all the defendants, the plaintiff's suit must fail. The costs of this appeal will abide the result. It will be open to the parties to adduce evidence on the issue for the determination of which the case is sent down.

The decree exonerating the defendant No. 9 from liability will stand, and the defendant No. 9 will recover her costs of this appeal from the appellants; but the costs so recovered will be costs in the cause and will be recoverable by defendants Nos. 1 to 5 from the plaintiffs or not according to the final result of the suit.

S. C. G. *Appeal allowed, case remanded.*

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25 C. 571 = 2 C.W.N. 297.

[571] APPELLATE CIVIL.

Before Sir Francis William Maclean, Kt., Chief Justice, and Mr. Justice Banerjee.

RAI CHARAN GHOSE AND OTHERS (*Principal Defendants*) *v.* KUMUD MOHUN DUTT CHOWDHRY AND ANOTHER (*Plaintiffs*) AND ANOTHER ("*Pro forma*" *Defendant*). *Respondents.** [12th January, 1898.]

Res judicata—*Code of Civil Procedure* (*Act XIV of* 1882), *s.* 13—*Issue decided in a previous suit not subject to second appeal—Same issue raised in a subsequent suit subject to appeal—Landlord and tenant—Suit for rent—Instalment—Bengal Tenancy Act* (*VIII of* 1885), *ss.* 53 *and* 153—*Second appeal.*

The question relating to instalments, though its affects the question of interest on the rent, is not a question of "the amount of rent annually payable" within the meaning of s. 153 of the Bengal Tenancy Act. Therefore no second appeal would lie in a case, where the value of the suit is less than Rs. 100, even if there is a question as to the instalment of rent.

Koylash Chandra v. *Tarak Nath* (1), referred to.

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* Appeal from Appellate Decree No. 695 of 1895 on review and in Rule No. 1604 of 1897, against the decree of Babu Brojo Behari Shome, Subordinate Judge of Jessore, dated the 12th of January 1895, modifying the decree of Babu Ambica Charan Mozoomdar, Munsif of Jessore, dated the 8th of August 1894.

25 C. 571-N = 1 C.W.N. lxiii.

(1) *Before Mr. Justice O'Kinealy and Mr. Justice Hill.*

KOYLASH CHANDRA DE (*Plaintiff*) *v.* TARAK NATH MANDAL (*Defendant*).† [26th January, 1897.]

Landlord and tenant—Suit for rent—Whether interest on rent is rent within the meaning of s. 3, *cl.* (5) *of the Bengal Tenancy Act* (*VIII of* 1888)—*Second Appeal—Bengal Tenancy Act* (*VIII of* 1885), *s.* 153.

Interest on rent is not rent within the meaning of s. 3, cl. (5), of the Bengal Tenancy Act. Therefore no second appeal would lie in a case where the question is only relating to rate of interest, and the value of the subject-matter of the suit is less than Rs. 100.

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† Appeal from Appellate Decree No. 2128 of 1894, against the decree of D. Cameron Esq., Officiating District Judge of 24-Pergunnahs, dated the 30th of August 1894, modifying the decree of Babu Preo Lall Pyne, Munsif of Diamond Harbour, dated the 8th of January 1894.

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[572] In a previous suit for rent valued at less than Rs. 100 by the plaintiff against the defendants, one of the questions raised was, in how many instalments the rent was payable, and it was held that it was not payable in instalments. In a subsequent suit for rent valued at more than Rs. 100 between the same parties, the question of instalment was again raised, as the plaintiffs claimed the rent to be payable in four instalments. The defendants *inter alia* pleaded that the question as to instalment was barred as *res judicata*. The Munsif held that it was so barred. On appeal the Subordinate Judge reversed the decision of the Munsif.

On a second appeal to the High Court:—

Held, that the judgment in the previous suit operated as *res judicata*, notwithstanding that no second appeal was allowed by law in that suit.

Vithilinga Padayachi v. *Vithilinga Mudali* (1) and *Bhola Bhai* v. *Adesang* (2) dissented from.

[573] *Misir Raghobardial* v. *Sheo Baksh Singh* (3). *Edun* v. *Bechun* (4), distinguished.

David v. *Grish Chunder Guha* (5), referred to.

Affirmed, 21 Ind. Cas. 979 (982); **N.F.**, 29 M. 195 (**F.B.**)=16 M.L.J. 41=1 M.L.T. 25; **F.**, 28 C. 78=5 C.W.N. 483; 19 C.L.J. 34 (40); **Rel.**, 2 C.L.J. 508=10 C.W.N. 529; **R.**, 25 B. 625 (629); 35 C. 353=7 C.L.J. 470=12 C.W.N. 359; 5 C.L.J. 69=11 C.W.N. 110; 5 C.L.J. 78-N; **D.**, 9 C.W.N. 656; 57 P.R. 1907=66 P.W.R. 1907.]

THE facts of the case, so far as they are necessary for the purposes of this report and the arguments, appear sufficiently from the judgment of the High Court.

Babu *Taruk Nath Sen*, for the appellants.

Dr. *Ashutosh Mookerjee*, for the respondents.

The judgment of the High Court (MACLEAN, C. J., and BANERJEE, J.) was as follows:—

JUDGMENT.

BANERJEE, J.—This case was heard along with an appeal from appellate decree No. 759 of 1895. One of the grounds upon which the learned

THE plaintiff brought a suit for recovery of arrears of rent for the years 1297 to 1300 B. S. in the Court of the Munsif of Diamond Harbour. The defendant objected as to the rate of interest, and also pleaded that the rent for the first six months of the year 1297 B. S. was barred by [572] s. 43 of the Code of Civil Procedure. The Munsif gave a modified decree, and allowed interest on the rent, at the rate of 25 per cent. per annum. On appeal to the District Judge by the defendant as to the rate of interest, he held that under the law the plaintiff was entitled to interest only at the rate of 12 per cent. per annum. Against this decision the plaintiff appealed to the High Court.

Dr. *Ashutosh Mookerjee*, for the respondent, took a preliminary objection to the hearing of the appeal, on the ground that as the value of the subject-matter of the suit was below Rs. 100, and the question was only relating to interests, no second appeal would lie under s. 153 of the Bengal Tenancy Act.

Babu *Gyanendra Nath Bose*, for the appellant, argued that a second appeal would lie as interest on rent is rent within the meaning of s. 3 (cl. 5) of the Bengal Tenancy Act. He referred to the following cases: *Watson & Co.* v. *Sreekristo Bhumick* (6), *Nobin Chand Nuskar* v. *Bansenath Paramanick* (7) and *Assanulla Khan Bahadur* v. *Tirthabashini* (8).

The judgment of the High Court (O'KINEALY and HILL, JJ.) was as follows:—

JUDGMENT.

At the hearing of this appeal it was objected that there was no second appeal, as the question was merely a question of the rate of interest and not of rent. The pleader for the appellant argued that interest is rent. We are of opinion that it is not.

The appeal is dismissed with costs.

S.C.G. *Appeal dismissed.*

[R., 25 C. 571; 5 C.L.J. 69=11 C.W.N. 110; 14 C.L.J. 489=12 Ind. Cas. 745; D., 9 C.W.N. 656 (661).]

(1) 15 M. 111. (2) 9 B. 78. (3) 9 I.A. 197 (4) 8 W.R. 175.
(5) 9 C. 183. (6) 21 C. 132. (7) 21 C. 722. (8) 21 C. 680.

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vakil for the respondent sought to support the decision of the lower appellate Court that the judgment in a previous rent suit did not operate as *res judicata* was that the matter in dispute in the former suit could not, by reason of its value being below Rs. 100, be taken up to the High Court in second appeal, whereas the matter now in dispute, being in value above that limit, a second appeal was *allowed* in this suit. We considered this ground untenable, holding that, even if the proposition of law, upon the assumed correctness of which it was based, was correct, it did not affect this case, as a second appeal in fact lay in the former suit. This is quite true as regards one af the two cases, namely, the appeal from appellate decree No. 759 of 1895; but it is, as has been shown to us now, not true with reference to the appeal from appellate decree No. 695 of 1895, the decision upon which the plea of *res judicata* is based in this case having been passed in a case in which no second appeal lay.

An application for review of judgment was made in this case on the ground of there being the abovementioned error in our **[574]** decision; the application was granted, and the case was reheard under s. 630 of the Code of Civil Procedure.

The ground upon which the lower appellate Court's judgment is based is untenable, and this is conceded by the learned vakil for the respondent. The only question now raised before us is, whether the decision in the former case upon the matter of instalments can operate as *res judicata* in this, when a second appeal in that case was barred by s. 153 of the Bengal Tenancy Act, whereas in the present case a second appeal is not barred. If this question is answered in the affirmative, the appeal succeeds. If it is answered in the negative, the appeal must fail.

The learned vakil for the appellants contended in the first place that the question did not arise, and that a second appeal was not barred in the previous case by s. 153 of the Bengal Tenancy Act, as the judgment of the first appellate Court, by deciding the question of instalments, determined the interest payable on the arrears of rent, and thus decided a question, relating to rent; and in the second place he contended that, even if the question did arise, it ought to be answered in the affirmative, as the issue relating to instalments now raised was directly and substantially in issue in the former suit between the same parties in a Court of jurisdiction competent to try the present suit, and has been heard and finally decided by such Court; and it was none the less a Court of competent jurisdiction because a second appeal was barred in the case. On the other hand, the learned vakil for the respondents urged in the first place that the question did arise, as a second appeal was barred in the former case, a question relating to interest being different from one relating to "the amount of rent annually payable" within the meaning of s. 153, and in support of this contention, he relied upon the case of *Koylash Chandra De* v. *Tarak Nath Paul* (1): and in the second place he contended that the question should be answered in the negative, as s. 13 of the Code of Civil Procedure required that the former suit, the decision in which was pleaded as *res judicata*, should be triable, not only in the first instance, but also in successive appeals by the same Court by which the second suit is triable; and in support of this contention he cited the cases **[575]** of *Bhola Bhai* v. *Adesang* (2), *Vithilinga Padayachi* v. *Vithilinga Mudali* (3), *Misir Raghobardial* v. *Sheo Baksh Singh* (4) *Edun* v. *Bechun* (5).

(1) 25 C. 571. (2) 9 B. 75. (3) 15 M. 111.
(4) 9 I.A. 197. (5) 8 W.R. 175.

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I am of opinion that in the former case no second appeal lay, as the question relating to instalments, though it affected the question of interest on the rent, was not a question of "the amount of rent annually payable" within the meaning of s. 153 of the Bengal Tenancy Act, and I fully agree in the view taken in the case of *Koylash Chundra De* v. *Tarak Nath Paul* (1) cited for the respondents.

That being so, the question stated above does arise in this case. The question is one of considerable importance and of no small difficulty. The answer to the question must be sought for in the first instance in s. 13 of the Code of Civil Procedure, and if that section leaves the matter in doubt, then in the general principles relating to the doctrine of *res judicata.*

Section 13 enacts (I quote only so much of the section as bears upon the question before us) that "no Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue on a former suit between the same parties in a Court of jurisdiction competent to try such subsequent suit, or the suit in which such issue has been subsequently raised and has been heard and finally decided by such Court.

Now the matter in issue in this suit, namely, whether the rent of the defendant's holding is payable quarterly or annually, was also directly and substantially in issue in the former suit brought in the Munsif's Court which was competent to try the present suit; the issue was decided against the defendants by the Munsif, but on appeal the appellate Court, that is the Court of the Subordinate Judge which was competent to try the first appeal in the present suit, finally decided the issue in favour of **[576]** the defendants. As has been said above, a second appeal was barred in the former suit by reason of its value, but a second appeal is not barred in the present suit. Does this case then come within the rule of *res judicata* enunciated in s. 13 of the Code of Civil Procedure? I think it does. The section applies to two classes of cases, in one of which a subsequent suit is wholly barred by the decision in a former suit by reason of the subject-matter of the two suits being the same, and in the other the trial of an issue in a subsequent suit is barred by the adjudication upon the same issue in a former suit, though the subject-matters of the two suits are different. The present case comes under the latter class, but it is not a simple type of that class. The simplest type is that in which the trial of an issue in a subsequent suit is barred by the adjudication upon it in a former suit by the first Court in which it was brought and which was competent to try the subsequent suit. Here the adjudication relied upon was in the Court of appeal in the former case. But that alone cannot affect the application of the section. It would be most unreasonable to hold that a decision does not operate as *res judicata* merely because it is the decision of the appellate Court in the former suit. It is true that the section speaks of the matter being "heard and finally decided by *such* Court," that is the "Court of jurisdiction competent to try" the subsequent suit; and it is true also that if the Court spoken of in the section can mean the Court of appeal in the previous suit, it may lead to the decision of an appellate Court in a previous suit cognizable in the first instance by the Munsif operating as *res judicata* in a subsequent suit of value exceeding the limit of the Munsif's jurisdiction by reason of such suit being cognizable by the appellate Court—a result evidently not contemplated by the section, as has been held in several

(1) 25 C. 571.

cases: see *Bharasi Lal Chowdhry* v. *Sarat Chunder Dass* (1), *Pathuma* v. *Salimamma* (2), *Run Bahadur* v. *Lucho Koer* (3). But the difficulty is completely removed if we read the words "heard and finally decided by such Court" to mean heard and finally decided by such Court, either **[577]** if no appeal is preferred from its judgment, or if an appeal being preferred has been disposed of and the judgment of the appellate Court which takes the place of its judgment has decided the point. This view is in accordance with expl. IV of the section, and with s. 581, which requires the appellate judgment to be entered in the register of suits in the first Court. Thus understood, the section clearly applies to a case like the present.

It remains now to consider whether the fact of a second appeal being barred in the former suit and not being barred in the present can make any difference. There is nothing in s. 13 to indicate that the judgments in two suits must be open to appeal in the same way in order that the decision upon any issue in the earlier suit can bar the trial of the same issue in the later one.

It was urged by Dr. Ashoutosh Mookerjee, who in his concise but clear argument has placed before us all that could be said in favour of the respondents, that s. 13 is not very clearly worded, that a literal construction of it would lead to many anomalous results, and that a reasonable construction of the section requires that not only should the Court which tried the former suit be of jurisdiction competent to try the subsequent suit, but its judgment in the former suit should be open to appeal in the same way as the judgment in the latter suit is. No doubt it must be conceded that the wording of the section is in some respects faulty, and that a literal construction of the section will lead to many anomalies. This has already been observed with reference to the words "finally decided by such Court." Another and a still greater anomaly was noticed with reference to the words "competent to try such subsequent suit" in the case of *Gopi Nath Chobey* v. *Bhugwat Pershad* (4) and *Raghunath Panjah* v. *Issur Chunder Chowdhry* (5), in which it was held that those words must be taken to mean competent to try the subsequent suit, if it had been brought at the same time that the former suit was brought. It may also be conceded that as an estoppel, to use the language of Sir Barnes Peacock in *Edun* v. *Bechun* (6) "shuts out **[578]** enquiry into the truth," it is necessary to see that the principle of *res judicata* is not unduly enlarged, and that it would be a wholesome restriction to the rule of *res judicata* if it is held that in order that a judgment in a former suit may be conclusive upon any issue arising in a subsequent one, it must have been open to appeal in the same way as a judgment in the subsequent suit is. Indeed one might go further and say that the proper application of the doctrine of *res judicata* should be confined to a subsequent suit relating to the same subject-matter, and that the extension of the doctrine to exclude the trial of an issue in a subsequent suit relating to a different subject-matter, merely because that same issue was tried in a previous suit in a Court of jurisdiction competent to try the subsequent suit, is of doubtful propriety, for this, amongst other reasons, that a suit for a comparatively small amount, say Rs. 100, though triable only in a Subordinate Judge's or a District Judge's Court which is of jurisdiction competent to try a suit for a lakh of rupees.

(1) 23 C. 415. (2) 8 M. 83. (3) 11 C. 301=12 I. A. 23.
(4) 10 C. 697. (5) 11 C. 153. (6) 8 W. R. 175.

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or more, is not likely to be conducted by the parties with the same interest and the same care in the production of evidence as a suit of the latter description. But these are matters for the Legislature and not for the Court to consider. The duty of the Court is to construe the law as it stands, and not to make a new, though it may be a better, law. It is quite true that in interpreting a statute, to meet the obvious intention of the Legislature, "a construction may be put upon it which modifies the meaning of the words and even the structure of the sentence" (see Maxwell on the interpretation of Statues, Chap. IX), but that is allowed only where the Court is coerced to do so to avoid some serious injustice or to prevent a statute from being reduced to a nullity; or for any other similar reason [see *Ex-parte Rashleigh* (1), *Salmon* v. *Duncombe* (2)]. In the present case it cannot be said that any such reason forces us to adopt the strained construction contended for on behalf of the respondents, for which the words used in the section afford no warrant. Moreover, the construction contended **[579]** for will, in cases like the present, be attended with some anomaly, if not also hardship and injustice. For if that construction be accepted, then to undo the effect of a judgment in a previous suit for rent in which a second appeal was barred, either party may wilfully raise a false and unfounded dispute as to the amount of rent in the subsequent suit, to make a second appeal allowable under s. 153 of the Bengal Tenancy Act.

Of the cases cited *Bhola Bhai* v. *Adesang* (3) and *Vithilinga Padayachi* v. *Vithilinga Mudali* (4) are no doubt in point; but for the reasons given above, I must respectfully dissent from them. As for the cases of *Misir Raghobardial* v. *Sheo Baksh Singh* (5) and *Edun* v. *Bechun* (6) they are clearly distinguishable from the present. The question raised in those cases was whether a judgment passed by a Court in a previous suit was conclusive upon any matter raised in a subsequent suit when the Court which tried the former suit was incompetent to try the latter; and that question was answered in the negative. There are no doubt certain observations in the judgments in those two cases which may seem to favour the respondent's contention; but they must be taken in connection with the point which the Court had to determine, and so considered they do not warrant the view which the learned vakil for the respondents asks us to take. I should add that the view I take is supported by the case of *David* v. *Gorish Chunder Guha* (7).

For the foregoing reasons I must hold that the judgment in the previous suit operates as *res judicata* upon the question of instalments. This appeal must consequently be allowed, the decree of the lower appellate Court reversed, and that of the first Court restored with costs in this Court and in the Court below.

MACLEAN, C. J.—I have had the advantage of reading Mr. Justice Banerjee's judgment, and I concur.

S. C. G. *Appeal allowed.*

(1) (1875) L.R. 2 Ch. Div. 9 (13). (2) (1886) L.R. 11 App. Cas. 627. (3) 9 B. 75. (4) 15 M. 111. (5) 9 I.A. 197. (6) 8 W. R. 175. (7) 9 C. 183.

25 C. 580=2 C.W.N. 118.

1897 DEC. 1. — APPELLATE CIVIL. — 25 C. 580= 2 C.W.N. 118.

[580] APPELLATE CIVIL.

Before Sir Francis William Maclean, Kt., Chief Justice, and Mr. Justice Banerjee.

FAZIL HOWLADAR (*Judgment-debtor*) *v.* KRISHNA BUNDHOO ROY (*Decree-holder*).* [1st December, 1897.]

Civil Procedure Code (Act XIV of 1882), s. 230—Decree for payment of money—Decree for sale hypothecated property, which also made the defendant personally liable in case of insufficiency—Mortgage decree.

A decree, which directs the realization of the decretal amount from the hypothecated property, and, if insufficient, makes the defendant remain personally liable, is a mortgage decree, and not a "decree for the payment of money" within the meaning of s. 230 of the Code of Civil Procedure.

Ram Charan Bhagat v. *Sheobarat Rai* (1), followed.
Hart v. *Tara Prasanna Mukherji* (2), distinguished.
Jogemaya Dassi v. *Thackomoni Dassi* (3), referred to.

[N.F., 121 P.L.R. 1908; F., 27 C. 285 (288); R., 31 B. 308=9 Bom. L.R. 409 (415); 26 C. 166; 31 C. 792 (797); 11 C.L.J. 18=5 Ind. Cas. 302; 14 C.L.J. 639=16 C.W.N. 132=12 Ind. Cas. 70; 17 C.W.N. 1039=20 Ind. Cas. 829; L.B.R. (1893—1900) 588; 19 Ind. Cas. 899.]

THE facts of the case, so far as they are necessary for the purposes of this report and the arguments, appear sufficiently from the judgment of the High Court.

Moulvi *Shamsul Huda*, for the appellant.

Babu *Bassant Kumar, Bose*, for the respondent.

The following judgments were delivered by the High Court (MACLEAN, C. J., and BANERJEE, J.) :—

JUDGMENTS.

MACLEAN, C.J.—The first question we have to decide is whether the decree in this case is a mortgage decree. That point has not been very seriously argued by the learned vakil for the appellant, because he virtually admits that he cannot distinguish a recent decision of this Court in the case of *Jogemaya Dasi* v. *Thackomoni Dasi* (3) from the present case upon that point. In my opinion the decree in this case was a mortgage decree.

That being so, the further question arises, whether the plaintiff is now entitled to take any further execution proceedings [581] to obtain the benefit of this decree, the appellant urging that he is debarred from doing so by reason of the third paragraph of s. 230 of the Code of Civil Procedure which says that "No subsequent application to execute the same decree shall be granted after the expiration of twelve years from any of the following dates." The decree referred to in that paragraph of the section is admitted to be a "decree for the payment of money," and we therefore have to decide whether the decree, in this case, is a decree "for payment of money" within the meaning of that paragraph of s. 230. The decree was dated 16th May 1884, and the last execution proceedings were on the 14th May 1896, and the present application for execution is dated 30th November 1896, so admittedly a period of twelve years has

* Appeal from Order No. 332 of 1897, against the order of Babu Debendra Lal Shome, Subordinate Judge of Backergunge, dated the 20th of July 1897, affirming the order of Babu Rajoni Kanto Chatterjee, Munsif of Barisal, dated the 1st of May 1897.

(1) 16 A. 418. (2) 11 C. 718. (3) 24 C. 473.

1897 DEC. 1. — APPELLATE CIVIL. — C. 580 = C.W.N. 118.

expired from the date of the decree. The translation of the decree as handed up to me is in these terms: "It is ordered that the suit be decreed *ex parte* and the sum of Rs. 323 claimed (in the suit) and the costs of this suit Rs. 34-8 as., with interest at 6 per cent. per annum from this day till the date of realization, plaintiff do get from the hypothecated property. If insufficient, defendant to remain personally liable."

This question has been before the Allahabad High Court, and it was there decided in the case of *Ram Charan Bhagat* v. *Sheobarat Rai* (1) "that a decree for sale of hypothecated property made in a suit for sale upon a mortgage bond is not a decree for the payment of money within the meaning of s. 230 of the Code."

Looking to the reasoning upon which that decision is based, and having regard to the various sections of the Code of Civil Procedure to which attention is drawn in that judgment, with the object of showing that under certain sections of the Code the term "decree for payment of money" is used in contradistinction to other decrees, I concur in that decision and in the reasoning by which it is supported. This being so, I scarcely think that it is necessary to go through the various sections which have been referred to in the course of the argument, though I may briefly say that ss. 210 and 322 and 254 of the Code indicate to my [582] mind the distinction to which I have referred, that is to say, the distinction drawn in the Code between a decree for the mere payment of money and a decree with other objects, and giving other relief. Reliance is placed by the appellant upon the case of *Hart* v. *Tara Prasanna Mukherji* (2) decided by this Court, but there, as has been pointed out in the course of the discussion, was a distinct order upon the defendant personally to pay the money. In the present case there is no such order; there is merely that which is tantamount to a declaration that if the property be insufficient, the personal liability is to remain, and I may here remark that in this case as regards any personal liability of the defendants to pay the money, both the Courts below have held that the application is too late, and the execution proceedings decreed are confined to a realisation of the property only.

Reliance was placed by the learned vakil for the appellant upon certain passages in the judgments of Macpherson and Trevelyan, JJ., in the case of *Jogemaya Dassi* v. *Thackomoni Dassi* (3) to which I have already referred, and for the purpose of showing that in that case those learned Judges held that a mortgage decree, such as the present, was a decree for the payment of money within the meaning of s. 230 of the Code. I was a party to that decision, and the reliance I placed upon that section is indicated by my observations at p. 487 of the report. Personally I did not in that case express any opinion upon the point which is the subject of discussion before us now, though no doubt there are passages in the judgments of my learned brothers which do support the appellant's present contention. But speaking from recollection, and seeing that neither the case in the Allahabad High Court nor the case of *Hart* v. *Tara Prasanna Mukherji* (2) were cited, and looking to the head note of the case *Jogemaya Dassi* v. *Thackomoni Dassi* (3) as to the application to that case of s. 230, and to the circumstance that the point was not necessary to the decision, I am not satisfied it was the intention of those learned Judges finally to decide the point. But even if [583] it were, the decision would not avail the appellant here as I notice that in that case

(1) 16 A. 418. (2) 11 C. 718. (3) 24 C. 473.

there was a decree against the defendant personally for payment. For these reasons, and, adopting as I do, the reasoning and conclusion of the learned Judges who decided the case in the Allahabad Court, I think that a decree such as this is not a decree for payment of money within the meaning of paragraph 3 of s. 230 of the Code, and consequently that the order of the Court below was right and must be affirmed.

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BANERJEE, J.—I am of the same opinion. Two questions have been raised before us by the learned vakil for the appellants: *first*, whether the decree in this case is a mortgage decree, that is a decree ordering sale of the mortgaged property, or whether it is simply a money decree, that is, a decree ordering the payment of money by the defendant; and, *second*, whether, even if the decree be held to be a mortgage decree, the present application for execution is not barred by s. 230 of the Code of Civil Procedure.

As to the first question, having regard to the terms of the decree, I am of opinion that it is a mortgage decree, that is, a decree ordering the sale of the mortgaged property coupled with a decree for the realization of the balance of the mortgage debt, if any, left after the sale of the mortgaged property, out of any other property belonging to the judgment-debtor. The terms of the decree in this case come very much nearer to the terms of the decree in the case of *Jogemaya Dassi* v. *Tkakomoni Dassi* (1) than to the terms of the decree which was the subject of discussion in the case of *Chundra Nath Dey* v. *Burroda Shoondury Ghose* (2). The last mentioned case is therefore distinguishable from the present; and following the case of *Jogemaya Dassi* v. *Thakomoni Dassi* (1), I think we must hold that the decree in this case was a mortgage decree.

As to the second contention, the Courts below have already held that so much of the decree as authorizes the decree-holder to realise the judgment-debt out of any property of the judgment-debtor other [584] than the mortgaged property is barred under s. 230 of the Code, and the only question now before us is whether that portion of the decree which directs the realisation of the mortgage debt by sale of the mortgaged property is also barred under s. 230. That question ought, in my opinion, to be answered in the negative. Although the first paragraph of s. 230 relates to a decree generally, the third paragraph which contains the rule of limitation now relied upon speaks of an application to execute "a decree for the payment of money or delivery of other property." Can it be said that the decree that is now sought to be executed is one "for the payment of money," or, more strictly speaking, is that portion of the decree made in the suit which is for the payment of money? No doubt, every mortgage decree directs the mortgagor within a certain time fixed by the Court to pay the mortgage debt; and if such payment is not made, the decree directs the sale of the mortgaged property. The decree in this case did not specify any time within which payment was to be made. But we need not consider the question whether that defect vitiates the decree, because it is too late now to raise that question. What the decree-holder is now seeking to execute is only so much of the decree as directs the sale of the mortgaged property; and an application to execute such a decree is not, in my opinion, within the scope of the third paragraph of s. 230 of the Code. That the Code of Civil Procedure clearly observes a distinction between a simple decree for the payment of money and a decree directing the realization of money by the sale of mortgaged property,

(1) 24 C. 473.

(2) 22 C. 813.

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will be clear from s. 322 of the Code, and will also be borne out by a reference to ss. 254 and 295. The view I take is fully supported by the case of *Ram Charan Bhagat* v. *Sheobarat Rai* (1).

As for the case of *Hart* v. *Tara Prasanna Mukherji* (2) that is clearly distinguishable from the present, because the question that arose there was with reference to the applicability of s. 295 to the decree in that case, and it was held that s. 295 applied, one of the reasons evidently being that the decree in that case not only directed sale of the mortgaged property, [585] but also authorized the realization of the money decreed by sale of property other than the mortgaged property.

As for certain observations of two of the learned Judges in the case of *Jogemaya* v. *Thackomani* (3) referred to, they have been considered in the judgment just delivered by the learned Chief Justice, and I need say nothing more than this, that those observations, though they may be construed as favouring to some extent the construction contended for by the learned vakil for the appellant, are observations that were not necessary for the decision of the case.

S. C. G. *Appeal dismissed.*

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25 C. 585 = 2 C.W.N. 241.

APPELLATE CIVIL.

Before Sir Francis William Maclean Kt., Chief Jutice, Mr. Justice Macpherson, Mr. Justice Trevelyan, Mr. Justice Banerjee and Mr. Justice Stevens.

KANTI CHUNDER GOSWAMI (*Plaintiff*) *v.* BISHESWAR GOSWAMI AND OTHERS (*Defendants*).* [9th February, 1898.]

Lunatic—Act XXXV of 1858—*Uncertificated guardian, Powers of—Manager of Joint Hindu Family, Powers of—Guardian—Sale by* de facto *Guardian of Lunatic's share.*

Act XXXV of 1858 does not affect the general provisions of Hindu law as to guardians who do not avail themselves of the Act, and the managing member of a joint Hindu family, one of the members of which is a lunatic, may, in case of necessity, sell joint family property including the lunatic's share, although he does not hold a certificate under the said Act.

Ram Chunder Chuckerbutty v. *Brojonath Mozoomdar* (4) followed in principle; the *Court of Wards* v. *Kupulmun Singh* (5), disapproved.

[R., 17 Ind. Cas. 497 = 23 M.L.J. 610 = (1912) M.W.N. 1188.]

THIS case was referred to a Full Bench by STEVENS, J., sitting alone to hear appeals not exceeding Rs. 50 in value. A Full [586] Bench consisting of five Judges, MACLEAN, C. J., and MACPHERSON, TREVTLYAN, BANNRJEE and STEVENS, JJ., heard the case on the 1st February, and the appeal was dismissed with costs. The judgments of the Full Bench were subsequently recalled, it appearing in the trial of another appeal referred to the Bench that there could not be a valid reference from a single Judge to a Full Bench. The order was as follows:—

"MACLEAN, C.J.—We directed this case to be put on the Board to-day under these circumstances. In the case heard by the Full Bench yesterday S. A. No. 1517 of 1896, objection was taken that there could

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* Appeal from Appellate Decree No. 287 of 1897, against the decree of Babu Kader Nath Mozumdar, Subordinate Judge of Burdwan, dated 23rd December 1896, affirming the decree of Babu Aughore Nath Biswas, Munsif of Burdwan, dated 24th February 1896.

(1) 16 A. 418. (2) 11 C. 718. (3) 24 C. 473.
(4) 4 C. 929. (5) 10 B.L.R. 364 = 19 W.R. 163.

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not be a valid reference from a single Judge to a Full Bench. That case has been considered by us, and we have arrived at the unanimous conclusion that such a reference cannot be made. In the present case that objection was not taken, but the decision I have referred to applies equally to the present case, which was also a reference by a single Judge. Therefore the reference to the Full Bench was bad, and our judgment which has not been signed, passed and entered, must be recalled. Strictly then our course is to send the case back to Mr. Justice Stevens, but, in order to save the parties expense, and as they consent, the proper steps shall be taken to have the case heard by a specially constituted Court of the same five Judges who heard it on the previous occasion. This will, we consider, get rid of any difficulties, and save the parties expense."

The plaintiff in this case sued for declaration of his title and recovery of possession of $^1/_{12}$ share of a tank after cancellation of a deed of sale, dated the 31st Assar 1291, alleged to have been executed by his brother Hari Madhab. It was stated in the plaint that the plaintiff became of unsound mind while living jointly with Hari Madhab, and that he became of sound mind five or six years before the suit. It was further stated that Hari Madhab and the plaintiff had together an $\frac{1}{6}$ share in the tank, that Hari Madhab wrongfully sold the plaintiff's share to the defendant during the plaintiff's insanity, and that the plaintiff not having been benefited by the sale the sale was not binding upon him.

The defence *inter alia* was that a joint debt of the plaintiff and his brother was paid off by selling the share in question, and that the plaintiff's brother sold it as manager of the family comprising [587] himself and the plaintiff, and that the plaintiff was benefited by the sale.

The lower Court dismissed the plaintiff's claim.

The plaintiff appealed to the High Court.

The question raised in the High Court was thus stated by STEVENS, J., in his order of reference to a Full Bench :—

"The point which arises in this case is, whether a sale by the managing member of a joint Hindu family, which included a lunatic, of a portion of a joint family property, including the interest of the lunatic, is bad so far as the share of the latter is concerned, on the sole ground that the manager, who was the lunatic's brother, did not hold a certificate under Act XXXV of 1858.

It has been found on the facts that the transaction was a prudent one entered into for the benefit of the lunatic, and that the lunatic actually derived benefit from it.

According to the ruling in the case of *Court of Wards* v. *Kupulmun Singh* (1), the sale of the lunatic's interest would appear to be invalid. The principle on which that case seems mainly to have been decided was that in all cases of disqualification the appointment of a guardian to the disqualified person lay according to the Hindu law with the State, and inasmuch as by Act XXXV of 1858 a particular course was marked out for the Court as representing the State, to pursue, in regard to appointing a guardian or manager of a lunatic's estate, no appointment of such guardian or manager could be properly effected after the passing of that Act otherwise than in the special manner prescribed thereby. It was held that any equitable principle that might apply to dealings *bona fide* for valuable consideration with a *de facto* manager who had not obtained a certificate under the Act could not extend to transactions which in the case of a certificated

(1) 10 B.L.R. 364 = 19 W.R. 163.

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manager would have required the previous sanction of the Court under s. 14 of the Act.

Those principles were applied on the authority of that decision [588] among others in the case of *Abhassi Begum* v. *Rajrup Koonwar* (1) which was an analogous case under Act XL of 1858, s. 18 of which corresponds closely to s. 14 of Act XXXV.

The latter case was overruled by a Full Bench of the Court in the case of *Ram Chunder Chuckerbutty* v. *Brojo Nath Mozumdar* (2). The case in 19 Weekly Reporter, 163, was referred to in the argument, but was not mentioned in the judgment of the Full Bench, which moreover proceeded on the construction of Act XL of 1858 itself and on the history of previous legislation on the subject. Although, therefore, the principles, on which the case in 19 Weekly Reporter, 163, was decided, were not followed by the Full Bench, and so far the decision may be said to have been dissented from by implication, it was not expressly overruled.

I think that, though all the considerations noticed in the judgment of the Full Bench are not applicable to Act XXXV of 1858, there does not appear to be any substantial difference of principle between that Act and Act XL of 1858, so as to render correct the application of s. 14 of the former Act in circumstances analogous to those in which the application of s. 18 of Act XL of 1858 has been held by the Full Bench to be incorrect. I, therefore, venture to differ from the decision in the case of *Court of Wards* v. *Kupulmun Singh* (3), and I accordingly refer the matter for the decision of a Full Bench."

Babu *Digambar Chatterjee* appeared for the appellant, and contended that on a proper construction of the deed of sale, the interest of the lunatic did not pass thereby, but only an $^1/_{12}$ share, and that of the brother who executed this deed was meant to be sold. He further contended that the brother had no authority to sell the interest of the lunatic without a certificate under Act XXXV of 1858, and cited *Court of Wards* v. *Kupulmun Singh* (3) and *Goureenath* v. *Collector of Monghyr* (4).

Babu *Nilmadhab Bose* (Babu *Shib Chandra Palit* with him) [589] on behalf of the respondent argued that the principle of Hanuman Prasad's case should be applied; it appeared from the pleadings that it was understood that the plaintiff's share was sold, and the facts found were that full value was paid for the entire $\frac{1}{6}$ share, and that the plaintiff benefited by the sale. The case cited from 7 W. R., 5, supported the defendant, and that from 19 W. R., only proceeds on the view that the unauthorized guardian should not possess more power than the authorized. That case is considerably weakened by the subsequent case in I.L.R., 4, Calcutta Series. The two Acts XXXV and XL of 1858 were passed at the same time and are similar in their scheme, and should be construed to be on the same principles. See s. 14 of the Lunatics' Act and s. 18 of the Minor's Act. The principle of the Full Bench ruling in I.L.R., 4 Calcutta Series, should be extended to the case of a lunatic.

Babu *Digambar Chatterjee* in reply.

The judgments of the High Court (MACLEAN, C.J., MACPHERSON, TREVELYAN, BANERJEE and STEVENS, JJ.) were as follows:—

JUDGMENTS.

MACLEAN, C. J.—The question we have to decide is whether a sale by the managing member of a joint Hindu family, which includes a lunatic,

(1) 4 C. 33. (2) 4 C. 929.
(3) 10 B.L.R. 364 = 19 W.R. 167. (4) 7 W. R. 5.

1898 FEB. 9. — APPELLATE CIVIL. — 25 C. 585 = 2 C.W.N. 241.

of a portion of a joint family property, including the interest of the lunatic, is bad so far as the share of the latter is concerned, on the ground that the manager, who was the lunatic's brother, did not hold a certificate under Act XXXV of 1858. It must be taken that the sale in this case was effected by Hari Madhab, brother of the lunatic, to pay off a debt of the joint family, and that there was necessity for the sale. I entertained during the course of the argument some doubt as to how this question should be answered; but on the whole I have come to the conclusion that it must be answered in the negative, in other words, I think the sale is good and binding.

Two points have been urged before us on behalf of the plaintiff, appellant, and the first point is upon the construction of the *kobala* in question. It is contended for the appellant that on the construction of the deed Hari Madhab only sold his own interest **[590]** in it and not the interest of his then lunatic brother, the present plaintiff.

If the document stood alone and the question were one merely of the construction of the document as it stands, there might be some difficulty in saying that it passed anything more than the interest of Hari Madhab. But the authorities cited appear to me to establish that in a case of this class, the Court may take into consideration not only the language of the deed itself, but may look into all the surrounding circumstances in order to ascertain what the true intention of the parties was. This being so, it is not an unfair inference from the findings of the Court below that the purchaser intended to buy, and that Hari Madhab intended to sell, not only the share of Hari Madhab in the tank in question, but also the share of his lunatic brother. Taking then the deed in connection with the surrounding circumstances, the right conclusion is I think, that the sale included, and was intended to include, both the shares.

Upon the second point, the decision of this Court in the case of *Court of Wards* v. *Kupulmun Singh*(1) where it was held—I am now reading from the head note—"That all dealings with a lunatic's property must be made by the hands of a guardian or manager to be appointed by the supreme civil power; the legality of the guardianship depending on such appointment," is an authority in the plaintiff's favour. But in a later case decided by a Full Bench of this Court—*Ram Chunder Chuckerbutty* v. *Brojo Nath Mozumdar* (2) it was held that it was not the intention of Act XL of 1858, which was no doubt an Act applicable to infants and not to lunatics—"to alter or affect any provision of Hindu or Mahomedan law as to guardians who do not avail themselves of the Act. The scope of the enactment is merely to remove legislative prohibitions to confer expressly a certain jurisdiction, and to define exactly the position of those who avail themselves of, or are brought under, the Act, leaving persons to whom any existing rules of law apply unaffected."

[591] That case no doubt applies to the case of an infant and not to that of a lunatic, but the statute realting to lunatics (Act XXXV of 1858) was passed in the same year as that relating to infants, and the provisions of the two Acts, *qua* the present point, are substantially, if not absolutely, analogous. Although, as I said before, I, in the first instance, entertained some doubt on the point—a doubt which was fostered by the circumstance that there is no express provision in the Mitakshara for the case of a lunatic, though there is for the case of a minor—I think the reasoning upon which the judgment in the later Full Bench case is based applies

(1) 10 B. L. R. 364=19 W. R. 163. (2) 4 C. 929.

1898 FEB. 9. — APPELLATE CIVIL. — 25 C. 585 = 2 C.W.N. 241.

with equal force to the case of a lunatic as to the case of an infant. It is difficult to see any real distinction in principle between the two cases, having regard to the wide and somewhat general powers of the manager of Hindu joint family property, and which prevail according to Hindu law. The necessity for the sale must of course be shown.

Upon these short grounds I am of opinion that the sale in question is good, and that it binds the share of the lunatic.

The appeal therefore fails, and must be dismissed with costs, but there will be no costs of the reference by Mr. Justice Stevens, which proved to be abortive.

MACPHERSON, J.—I think that on the facts found, the plaintiff's brother had power to dispose of the plaintiffs interest in the tank in question, the plaintiff being a lunatic at the time of the sale. The tank was the joint property of the two brothers, and the plaintiff's brother was in the position of the manager. Act XXXV of 1858 does not make the appointment of a guardian or manager compulsory in the case of every lunatic, nor does it deprive the managing member of a Hindu family, one of the members of which is a lunatic, of the powers of dealing with the family property in case of necessity. The authority of the case of *Court of Wards* v. *Kupulmun Singh* (1) has, I think, been greatly shaken by the case of *Ram Chunder Chukerbutty* v. *Brojo Nath Mazumdar* (2) decided by a Full Bench of this Court. Reasons which led the Full Bench to hold [592] that a *de facto* guardian of a minor has authority in case of necessity to deal with the infant's property, apply, in my opinion, equally to the case of a Hindu family, one member of which is a lunatic.

On the other point as to whether the sale did actually pass the interest of the plaintiff, I agree in the view expressed by the learned Chief Justice.

TREVELYAN, J.—I also agree in the view taken by the learned Chief Justice on both the questions. As regards the first question, I think that it is always to be determined in these cases, from the terms of the deed and surrounding circumstances, what the parties intended should pass, whether they intended that the share of the minor, or the lunatic, as the case may be, should pass, or whether they only intended that the person who was acting for such a minor or a lunatic, should be considered as dealing with his own property. In this case one-twelfth share of the property did actually belong to the manager himself and one-twelfth belonged to the lunatic. Looking at the deed itself and having regard specially to the decision of the late Sir Barnes Peacock, Chief Justice and Mr. Justice Dwarka Nath Mitter in *Judoonath Chuckerbutty* v. *James Tweedie* (3) I am bound to say that the property of the lunatic passed by the sale in question. In that case, as in the present case, the manager had, apparently, a share of his own, besides the share with which he was dealing. The learned Chief Justice there said: "In this case it appears to be clear that the vendors intended to pass the whole property and not merely the share which they passed in their own right, *first*—because they professed to sell the whole, and, *secondly*, because in the deed they recite a necessity which it would have been wholly unnecessary for them to have done if they were selling in their own right." In the present case, also, the manager professed to sell the whole one-sixth. In this case, also, he professed to sell such property in order to pay off a debt which is admitted to be a joint family debt. It is described in the

(1) 10 B.L.R. 364 = 19 W.R. 163. (2) 4 C. 929. (3) 11 W. R. 20.

plaint as a joint family debt, and throughout it has been treated as such. It seems to me, therefore, that there is [593] absolutely no distinction whatever between the case of *Judoonath Chuckerbutty* v. *James Tweedie* (1) and the present case. I, therefore, hold that the parties must have intended that the whole one sixth should pass.

I also agree in the view that the decision in *Ram Chunder Chuckerbutty* v. *Brojo Nath Mozumdar* (2) practically concludes this case on the point referred to us.

BANERJEE, J.—I am of the same opinion. Upon the first of the two points raised, namely, that relating to the construction of the conveyance, I do not think it necessary to add anything to what has been said in the judgments of the learned Chief Justice and Mr. Justice Trevelyan.

Upon the second point, which is the one that has given rise to this reference, I wish only to add a few words in answer to the contention raised by the learned vakil for the appellant, that the case of a lunatic is distinguishable from that of a minor. The distinction which is sought to be drawn is this: Whereas the case of a minor is expressly provided for by Hindu law, and it was this express provision of Hindu law that was made the basis of the decision of the Full Bench in the case of *Ram Chunder Chukerbutty* v. *Brojo Nath Mozumdar* (2), there is no such provision relating to the case of a lunatic. And there being no such provision relating to the case of a lunatic, it is argued that the only authority dealing with his property must be that derived from Act XXXV of 1858.

The answer to this argument, in my opinion, is this: Though the passage of the Mitakshara which is referred to, namely, Mitakshara, chap. I, s. I, para. 29, relates only to the case of minors, the text of Brihaspati upon which that passage is a comment, and which is quoted in the preceding paragraph, is quite general in its terms, and would include the case of a lunatic, or other disqualified person, just as much as that of a minor; and if that is so, it cannot be said that the case of a lunatic is absolutely unprovided for in Hindu law. The view I take is [594] supported by a decision of this Court in the case of *Gouree Nath* v. *Collector of Monghyr* (3). That being so, I do not think that there can be any reason for distinguishing the case of a lunatic from that of a minor, in regard to whom it has already been settled by the decision of this Court in the case of *Ram Chunder Chuckerbutty* v. *Brojo Nath Mozumdar* (2), that a *de facto* guardian or manager has the power of dealing with his property in case of necessity. I think the rule of law which requires a purchaser in such a case to prove necessity in order to sustain the alienation in his favour, is a sufficient safeguard against the interest of the lunatic being sacrificed.

STEVENS, J.—I agree.

S. C. C. *Appeal dismissed.*

(1) 11. W. R. 20. (2) 4 C. 929. (3) 7 W.R. 5.

1898 JAN. 25

FULL BENCH.

25 C. 594 (F.B.) = 2 C.W.N. 556.

25 C. 594 (F. B.) = 2 C.W.N. 556.

FULL BENCH REFERENCE.

Before Sir Francis William Maclean, Kt., Chief Justice, Mr. Justice Macpherson, Mr. Justice Trevelyan, Mr. Justice Banerjee and Mr. Justice Jenkins.

GOPAL CHUNDER MANNA AND OTHERS (*Judgment-debtors*) *v.* GOSAIN DAS KALAY (*Decree-holder*).* [25th January, 1898.]

Limitation Act (*XV of* 1877), *sch. II, art.* 179, *cls.* (4) *and* (2)—*Execution of decree, not materially defective, Application for—Application returned for amendment—Code of Civil Procedure* (*Act XIV of* 1882), *ss.* 235 *and* 248—*Decree against joint defendants—Appeal by one of several defendants against part of the decree.*

The plaintiff obtained a joint decree against defendants for possession of immoveable property and damages on 21st May 1886. Against that decree all the defendants except defendant No. 1 appealed, and on 2nd July 1887 so much of the decree was reversed as made the appealing defendants liable for damages but was affirmed in all other respects. A second appeal by the plaintiff from the decree of the appellate Court was dismissed by the High Court on 9th July 1888. An application for execution of the decree was made by the plaintiff on 7th July 1891 within three years from the date of the final decree, dated 9th July 1888.

[595] The prayer was for issue of notice on the judgment-debtor for delivery of possession, for attachment and sale of certain immoveable properties, for realization of costs and damages decreed. Notice under s. 248 of the Code of Civil Procedure was issued on the judgment-debtors on 8th September 1891. The judgment-debtors, except defendant No. 1, objected that as the application did not contain the right number of suit and date of decree it was not in accordance with law, and as no other application had been made within three years from date of decree, the execution was barred by limitation. Defendant No. 1 objected that limitation as against him would run from 21st May 1886, there being no appeal by or against him from the decree of that date.

Held, that material defects only could vitiate an application, and as the defects in the present application for execution were not material, it was not barred by limitation. *Asgar Ali* v. *Troilokya Nath Ghose* (1) and *Gopal Shah* v. *Janki Koer* (2), distinguished.

Held, also, that even if such application was defective as an application for execution of decree it was still an application to take some step in aid of execution, namely, to issue a notice under s. 248, which was necessary, the decree having been passed more than a year before, and such notice having been issued, it kept the decree alive.

Behari Lal v. *Salik Ram* (3) and *Dhonkal* v. *Phakkar* (4), referred to.

Held, further, that limitation against defendant No. 1 would run from date of the decree in appeal, therefore the application for execution was not barred by limitation. *Gunga Mooye* v. *Shib Sunker* (5), followed. *Moshiat-un-nissa* v. *Rani* (6), distinguished.

[F., 23 A. 162 = 21 A.W.N. 31; 23 B. 60 (67); 4 Ind. Cas. 1154 = 3 S.L.R. 171; 18 M.L. J. 14; 22 P.R. 1905 = 57 P.L.R. 1905; 32 P.R. 1907 = 8 P.L.R. 1908; 116 P.R. 1907; R., 34 C. 874 = 7 C.L.J. 305; 26 M. 91 (F. B.); 36 M. 104 = 10 Ind. Cas. 552 = 21 M.L.J. 546 = 10 M.L.T. 69 = (1911) 2 M.W.N. 93; 14 C.W.N. 481 = 5 Ind. Cas. 579; 10 Ind. Cas. 411; 5 O.C. 217 (219); 5 N.L.R. 8 = 1 Ind. Cas. 240; 22 Ind. Cas. 685.]

THIS case was referred to a Full Bench by MACLEAN, C.J., and BANERJEE, J., on the 9th August 1897. The order of reference was as follows :—

ORDER OF REFERENCE TO FULL BENCH.

BANERJEE, J.—This appeal arises out of an application for execution of a decree for possession of certain immoveable property and for damages. The first Court, on the 21st May 1886, gave the plaintiff a decree for

* Reference to the Full Bench in Appeal from Order No. 88 of 1896.

(1) 17 C. 631. (2) 23 C. 217. (3) 1 A. 675.
(4) 15 A. 84. (5) 3 C.L.R. 430. (6) 13 A. 1.

1898 JAN. 25. — FULL BENCH. — 25 C. 594 (F.B.) = 2 C.W.N. 556.

possession and for damages against all the defendants. Against that decree all the defendants, except No. 1, preferred an appeal, and the appellate Court, on the 2nd July 1887, reversed so much of the decree as made the appealing defendants liable for damages, but it affirmed the [596] decree in every other respect. And a second appeal from the decree of the appellate Court was dismissed by the High Court on the 9th of July 1888.

The first application for execution was made in the Court of the first Munsif of Howrah on the 7th of July 1891; it was returned by the first Munsif on the 21st of August following for want of jurisdiction; and it was presented on the same day to the proper Court. The application asked for issue of notice on the judgment-debtor for delivery of possession and for attachment and sale of certain immoveable properties for realization of the costs and damages decreed. Notice under s. 248 of the Code was issued on the judgment-debtors on the 8th September 1891, and on their objection that the particulars required by s. 235 were incorrectly stated, the application was, by an order of the Court, dated the 11th January 1892, allowed to be amended. This last-mentioned order was reversed by the appellate Court, and the Munsif was directed to deal with the application for execution as originally made; and the execution case was dismissed by the Munsif, on the 13th July 1892, for want of prosecution. A second application for execution made on the 15th August 1893 was rejected on the 4th April 1894 for incorrectness in the statement of necessary particulars, and then the present application was made on the 19th of June 1894. The judgment-debtors urged that it was barred by limitation; the first Court gave effect to this objection, but the lower appellate Court has reversed the decision of the first Court, and ordered execution to proceed; and hence this appeal by the judgment-debtors.

Two contentions have been raised in this appeal:—

First.—That execution is barred against all the defendants, as the application of the 7th of July 1891 was not one according to law; and as there was no other application within three years even from the date of the decree of the High Court; and

Second.—That even if the application of the 7th of July 1891 be held to be one according to law, still execution is barred against defendant No. 1, as time runs in his case, not from the [597] date of the decree of the High Court, but from the date of the decree of the first Court, that is, the 21st of May 1886, there having been no appeal by or against him from that decree.

In support of the first contention, it is argued by the learned vakil for the appellants that many of the particulars required by s. 235 of the Code were incorrectly stated in the application of the 7th of July 1891, and that it cannot therefore be regarded as an application made according to law within the meaning of art. 179, cl. 4 of sch. II of the Limitation Act; and the cases of *Asgar Ali* v. *Troilokya Nath Ghose* (1) and *Gopal Sah* v. *Janki Koer* (2) are relied upon. It was conceded, however, and very properly conceded that the decree-holder was entitled under s. 14 of the Limitation Act to exclude from computation the time from the 7th July to the 21st August 1891.

That being so, and the decree-holder being admittedly entitled to reckon time as against at least some of the judgment debtors from the date

(1) 17 C. 631. (2) 23 C. 217.

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of the final decree in appeal, that is, the 9th of July 1888, execution is not barred against them, if the application of the 7th July 1891 is one within the meaning of cl. 4 of art. 179, that is, if it is an application according to law within the meaning of that clause.

Now the question whether an application for execution or for taking some step-in-aid of execution is one according to law within the meaning of art. 179, cl. (4), has to be determined with reference to the circumstances of each case ; and while on the one hand an application must be in substantial compliance with the law in order that it may be regarded as one coming within the meaning of cl. 4, on the other hand, it is not every informality that would vitiate an application and take it out of that clause. Were it otherwise, *bona fide* applications for execution would fail to save limitation owing to trivial defects of form,—a result which I do not think the Legislature could have intended. The view I take is amply supported by the authority of decided cases, **[598]** of which I need only refer to *Bal Kishen* v. *Bedmati* (1) and *Rama* v. *Varada* (2).

The two cases cited by the learned vakil for the appellants are clearly distinguishable from the present. In *Asgar Ali* v. *Troilokya Nath Ghose* (3), while the decree-holder, as I gather from the judgment of Prinsep, J., asked for the sale of the immoveable property of the judgment-debtor "as per list," no list was attached to the application, so that the application did not comply with s. 237 of the Code, and no execution could be taken out thereon owing to this material defect. So also in *Gopal Sah* v. *Janki Koer*(4) the application, which was considered to be one not according to law, was found to be materially defective in not complying with ss. 235 to 238. Mr. Justice Prinsep in his judgment in this last mentioned case observes: "One of the errors committed by the decree-holder was in mis-stating the amount of his decree in a lesser sum than he was given, and the Subordinate Judge has consequently limited the execution to that smaller sum. If that had been the only defect the decree would have been capable of being executed for the smaller sum. But in other respects, which it is unnecessary to mention, the application failed to comply with the requirements of ss. 235, 236, 237 and 238 applicable to the case." These observations go to some extent to support the view I take, that it is only material defects that can vitiate an application. In the present case, the defects in the application of the 7th of July 1891, as the lower appellate Court has shown, were not of a material character. The application asked for delivery of possession of the property covered by the decree, and the decree could well have been executed so far as this part of the prayer was concerned. It is admitted again that the application contained a list of the immoveable property sought to be attached and sold for the realization of the money decreed, so that there was no want of compliance with the provisions of **[599]** s. 237 of the Code here. Moreover, though the amendment allowed by the first Court was set aside on appeal, the appellate Court did not treat the application as one not made according to law, but remanded the case to the first Court to deal with the application as originally made—a course which it could not have taken if the application had been considered as not made according to law. Lastly, granting that the application of the 7th of July 1891 was informal and defective as an application for execution of decree, it was at any rate, as pointed out by the learned vakil for the respondent, an application to take some step-in-aid of execution,

(1) 20 C. 388. (2) 16 M. 142. (3) 17 C. 631. (4) 23 C. 217.

that is to say, to issue a notice under s. 248 of the Code which was here necessary, the decree having been passed more than one year before. A notice was issued according to the prayer made in this application, and the application and the notice were sufficient to keep the decree alive. See *Behari Lal* v. *Salik Ram* (1) and *Dhonkal* v. *Phakkar* (2). **1898** JAN. 25. — FULL BENCH. — 25 C. 594 (F.B.) = 2 C.W.N. 556.

The first contention of the appellants must therefore fail.

In support of the second contention that time runs as regards defendant No. 1 from the date of the decree of the first Court, the cases of *Hur Proshad* v. *Enayet Hossein* (3) and *Raghu Nath* v. *Abdul Hye* (4) are relied upon. These cases are in conflict with that of *Gunga Moyee* v. *Shib Sunker* (5) which I am inclined to follow, as the decision in this last mentioned case appears to be more in conformity with the language of the law than that in the two cases cited for the appellants. Moreover, expl. I to art. 179 of sch. II of the Limitation Act makes a distinction between a joint decree against several defendants and a decree in which separate reliefs are granted against different defendants, with reference to cl. 4, while no such distinction is made with reference to cl. 2; and this to my mind is a clear indication that the **[600]** Legislature intended that time should run from the date of the final decree of the appellate Court where there has been an appeal irrespective of the question whether the appeal related to the whole decree or not.

In this conflict of decisions in this Court, a reference to a Full Bench becomes necessary, and as this is an appeal from an appellate order having the force of a decree, the whole case must be referred to a Full Bench.

MACLEAN, C. J.—I agree that this case should be referred to a Full Bench, reserving my opinion upon the question raised."

Babu *Prosonno Gopal Roy*, for the appellant.

Babu *Nil Madhub Bose* and Babu *Shib Chunder Palit*, for the respondent.

Babu *Prosonno Gopal Roy.*—The application for execution is barred by limitation. It is a defective application, as it does not give the right number of the suit, the date, and the amount of the decree. That being so, the application is not one made in accordance with law. See s. 235 of the Code of Civil Procedure, and the cases of *Gopal Sah* v. *Janki Koer* (6) and *Chowdhry Paroosh Ram Das* v. *Kali Puddo Banerjee* (7). If it is an application not made in accordance with law, the issue of a notice under s. 248 of the Code of Civil Procedure would not save limitation. Application in aid of execution must be made according to law, in furtherance of the execution proceedings under a decree. See *Sujan Singh* v. *Hira Singh* (8) and *Dalichand* v. *Bai Shivkor* (9). The execution as against defendant No. 1, at least, has been barred by limitation. Limitation as against him would run either from the date of the decree of the first Court, or of the appellate Court, as there was no appeal by or against him. See the cases of *Hur Proshaud Roy* v. *Enayet* **[601]** *Hossein* (3), *Harkant Sen* v. *Biraj Mohan Roy* (10), *Mashiat-unnissa* v. *Rani* (11), *Muthu* v. *Chellappa* (12), *Raghu Nath Singh* v. *Pareshram Mahata* (13), *Mullick Ahmed Zumma* v. *Mahomed Syed* (14).

Babu *Nil Madhub Bose*, for the respondent, was not called upon.

The opinion of the FULL BENCH was delivered by MACLEAN, C. J., (MACPHERSON, TREVELYAN, BANERJEE, and JENKINS, JJ., concurring.)

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(1) 1 A. 675. (2) 15 A. 84. (3) 2 C.L.R. 471. (4) 14 C. 26.
(5) 3 C.L.R. 430. (6) 23 C. 217 (223). (7) 17 C. 53. (8) 12 A. 399 (402).
(9) 15 B. 242. (10) 23 C. 876. (11) 13 A. 1. (12) 12 M. 479.
(13) 9 C. 635. (14) 6 C. 194.

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OPINION.

MACLEAN, C.J.—Although in the reference I have reserved my opinion on the point referred to the Full Bench, I had the advantage of hearing the arguments addressed to Mr. Justice Banerjee and myself in the Court below, and of discussing the matter with him, and I am in entire agreement with the opinion he has expressed upon the question of whether the application for execution of the 7th July 1891 was or was not one according to law. I concur both in the reasoning and in the conclusion expressed by Mr. Justice Banerjee; and as regards the point which has been referred to the Full Bench, namely whether the time from which the period is to begin to run is, as regards the defendant No. 1, the date of the decree pronounced on the appeal or the date of the decree of the first Court, I am of opinion that it begins to run from the date of the decree on appeal. I only propose to add one or two brief remarks to what Mr. Justice Banerjee has said. With respect to the case decided in the Allahabad High Court, the case of *Mashiat-un-nissa* v. *Rani* (1) the first comment I make is that in that case there was a marked difference of opinion amongst the Judges who heard and decided it, and, in the next place, the facts were clearly distinguishable from those of the present case, inasmuch as here the decree was a joint one, whilst in the Allahabad case the decrees were **[602]** separate, or any way tantamount to separate decrees against each of the defendants. There is no doubt a dictum of C.J. Edge which supports the present appellant's view, but it was *obiter* and not necessary for the purposes of that particular decision. I allude to the passage as to the application of cl. 2, art. 179 on p. 13. For myself I prefer the reasoning and the conclusion of the two learned Judges who were in the minority in that case, and to read the language of sub-s. 2 of art. 179 of the second schedule to the Limitation Act according to the ordinary signification of the words used. That article says that, where there has been an appeal, the date of the final decree or order of the appellate Court shall be taken to be the time from which the period is to begin to run. There is no such qualification in the article as is suggested by the majority of the Judges in the Allahabad case, and which must be read into the article in order to support their view, nor is there anything to lead me to suppose that any such qualification or modification was intended by the Legislature. The language of the article is reasonably clear, and in my opinion the safer course is to construe it according to the ordinary meaning of the words used. Again, upon the question of convenience, the convenience seems to me to be all in favour of the view which I take. In my opinion, the answer to the question submitted to us should be, that the time runs, as against the defendant No. 1, from the date of the final order of the appellate Court, which was that of the High Court, dated the 9th July 1888 ; and that being so, the application for execution of the 7th July 1891 was not out of time. The appeal fails and must be dismissed with costs, including the costs of this reference.

MACPHERSON, J.—I agree with the Chief Justice on both points.

TREVELYAN, J.—I also agree.

BANERJEE, J.—I am of the same opinion.

JENKINS, J.—I am of the same opinion.

S. C. G. *Appeal dismissed.*

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(1) 13 A. 1.

25 C. 603 (F.B.) = 2 C.W.N. 562.

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[603] FULL BENCH REFERENCE.

Before Sir Francis William Maclean, Kt., Chief Justice, Mr. Justice Macpherson, Mr. Justice Trevelyan, Mr. Justice Banerjee, and Mr. Justice Jenkins.

PREONATH SHAHA (*Defendant No.* 1) *v.* MADHU SUDAN BHUIYA (*Plaintiff.*)* [1st February, 1898.]

Evidence Act (I of 1872), s. 92—Mortgage sale—Conduct of parties—Oral evidence when admissible to prove that an apparent sale is a mortgage—Admissibility of parol evidence to vary a written contract.

Oral evidence of the acts and conduct of parties, such as oral evidence that possession remained with the vendor notwithstanding the execution of a deed of out-and-out sale, is admissible to prove that the deed was intended to operate only as a mortgage.

[Diss., 3 N.L.R. 19; F., 26 C. 160 (163); 28 C. 256 = 5 C. W. N. 351; 28 C. 289 = 5 C. W.N. 326; R., 12 C.L.J. 439 = 8 Ind. Cas. 790; 13 C.L.J. 284 = 8 Ind. Cas. 47; 9 C.W.N. 178 (183); 13 Ind. Cas. 449; 3 L.B.R. 100 (106); 72 P.R. 1901 = 114 P.L.R. 1901; D., 6 C.W.N. 60 (61).]

THIS case was referred to a Full Bench by BANERJEE and WILKINS, JJ., on the 24th November 1897, with the following opinion:—

"This appeal arises out of a suit brought by the plaintiff-respondent, for declaration of his title to, and confirmation of his possession of, an 8 annas share in certain plots of land on the allegation that the said share belonged to two brothers, Panchcowri Maity and Bonomali Maity; that Panchcowri, without the knowledge and consent of his brother, mortgaged the entire 8 annas share to Bama Sundari Dassi, wife of Khetra Mohun Shaha, by a deed appearing on the face of it to be a deed of out-and-out sale, but both Panchcowri and Bonomali continued to be in possession of the land as before; that the shares of the two brothers having passed by inheritance to Mohendra Nath Maity, son of Panchcowri, he redeemed the mortgage to Bama Sundari; that on his death his mother Puti Dasi, having inherited the said property, sold it to the plaintiff in 1297, and the plaintiff has since been in possession of the same; that Hari Churn Maity, defendant No. 2, having fraudulently obtained possession of the *kobala* or mortgage deed [604] in favour of Bama Sundari, and having, in collusion with defendant No. 1, Preonath Shaha, who claims to be the heir of Khetra Mohun Shaha, suffered a fraudulent decree for arrears of rent to be obtained against himself by Preonath, induced Preonath to cause the property in dispute to be advertised for sale; and that hence the plaintiff is obliged to institute this suit.

"The defence, so far as it is necessary to be referred to for the purposes of this appeal, was that the alleged mortgage to Bama Sundari Dasi was really an out-and-out sale to her husband Khetra Mohan Shaha by Panchcowri and Bonomali under a registered deed of sale, dated the 8th Falgun 1269; that the plaintiff's vendors did not hold adverse possession of the property in dispute for twelve years; and that the decree obtained by defendant No. 1, who was the heir of Khetra Mohun Shaha, against defendant No. 2, and the proceedings taken in execution thereof, were not fraudulent and collusive, but were *bona fide* and valid.

"The first Court found for the defendant No. 1 and dismissed the suit. On appeal by the plaintiff the lower appellate Court has reversed

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* Reference to the Full Bench in appeal from Appellate Decree, No. 205 of 1896.

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the first Court's decision and given the plaintiff a decree, holding that the deed of the 8th of Falgun 1269, though executed by both Panchcowri and Bonomali, was one of mortgage and not of sale, and that the plaintiff and his predecessors-in-title had been in possession of the property in dispute for more than twelve years.

"Against that decree of the lower appellate Court defendant No. 1 has preferred this appeal, and it is contended on his behalf.—

"*First.*—That the lower appellate Court is wrong in admitting parol evidence to contradict the terms of the deed of the 8th Falgun 1269; and

"*Second.*—That even if the deed be held to be a mortgage deed, the lower appellate Court is wrong in giving the plaintiff a decree without finding that the mortgage was either satisfied or extinguished.

"In support of the first contention, s. 92 of the Evidence Act is relied upon for the appellant, while the learned [605] vakil for the respondents in answer cites the cases of *Baksu Lakshman* v. *Govinda Kanji* (1), and *Hem Chunder Soor* v. *Kally Churn Dass* (2), as showing that s. 92 of the Evidence Act is no bar to the admission of evidence of acts and conduct upon which the lower appellate Court has held the deed in question to be one of mortgage and not of sale.

"There is some conflict of authority upon the point, and some little difficulty in reconciling those cases which favour the respondent's view with the provisions of s. 92 of the Evidence Act.

"In the case of *Kashee Nath Chatterjee* v. *Chundy Churn Banerjee* (3) decided before the Evidence Act was passed, the majority of a Full Bench of this Court held that evidence of an oral agreement was not admissible to prove that a deed of sale was intended to operate only as a mortgage, but that evidence of the acts and conduct of parties, as for instance evidence of possession having been allowed to remain with the vendor, was admissible for that purpose.

"In *Daimoddee Paik* v. *Kaim Taridar* (4) which was decided by this Court after the Evidence Act had come into force, it was held that s. 92 of that Act had altered the law and was a bar to the admission of evidence of the kind which was considered admissible in the Full Bench case just referred to, and it was pointed out that there was "some difficulty in comprehending the distinction between the admissibility of evidence of a verbal contract to vary a written instrument and the admissibility of evidence showing the acts of the parties, which after all are only indications of such unexpressed, unwritten agreement between the parties." And somewhat to the same effect is the case of *Ram Doyal Bajpie* v. *Heera Lall Paray* (5).

"On the other hand it has been held by the Bombay High Court [606] in *Baksu Lakshman* v. *Govinda Kanji* (1) by the Madras High Court in *Venkatratnam* v. *Reddiah* (6) and by this Court in *Hem Chunder Soor* v. *Kally Churn Das* (2) and *Kasi Nath Das* v. *Hurrihur Mookerjee*(7) that s. 92 of the Evidence Act does not alter the rule laid down in *Kashee Nath Chatterjee* v. *Chundy Churn Banerjee* (3), and that the ground upon which the evidence of acts and conduct is admitted, is that the Court should not permit the perpetration of fraud. But as has been well pointed out in a work of which the learned vakil for the respondent is the author (see R. B. Ghose's Mortgage, second edition, p. 66), the fraud referred to in proviso (1) of s. 92, which would warrant the admission of

(1) 4 B. 594. (2) 9 C. 528. (3) 5 W. R. 68. (4) 5 C. 300.
(5) 3 C.L.R. 386. (6) 13 M. 494. (7) 9 C. 898.

oral evidence to vary a written instrument, must be contemporaneous and not subsequent fraud, that is fraud which prevented the insertion of the alleged agreement in the deed and not fraud which consists in a false denial of the agreement; for, if fraud of this latter description were to be allowed to make oral evidence admissible to contradict a document, it would render the section nugatory, the object of the section evidently being to avoid falsehood and perjury in the great majority of cases, even at the risk of allowing fraud to go undetected in a few instances.

"The case of *Kader Moideen* v. *Nepean* (1), to which our attention was called by the learned vakil for the respondents, does not in our opinion touch the point now raised, the ground upon which their Lordships of the Privy Council based their judgment in that case having reference more to the construction of the written instruments than to the effect of oral evidence to vary them.

"The ground upon which the admissibility of the evidence of acts and conduct of parties to contradict a written instrument, in cases in which there is no contemporaneous fraud, may be **[607]** based, notwithstanding the provision of s. 92 of the Evidence Act, is we think this : that s. 92 of the Evidence Act, with a view to prevent falsehood and perjury, excludes evidence of "any oral agreement or statement" as to which perjury is easy, for the purposes of varying a written instrument ; but neither the letter nor the spirit of the section excludes oral evidence which seeks to vary a written instrument, not by proving *a mere verbal agreement or statement* as to which perjury may be easy, but by proving *acts and conduct* of the parties as to which perjury is not equally easy, and which would be inconsistent with the view that the instrument was intended to operate in the form in which it appears.

"Having regard to these considerations, and to the fact that the balance of authority is in favour of the admissibility of the evidence upon which the lower appellate Court has held the deed in this case to be one of mortgage, we are inclined to hold that the first contention of the appellant should be disallowed. But as there is a clear conflict between the decisions of this Court in the cases of *Daimoddee Paik* v. *Kaim Taridar* (2) and *Hem Chunder Soor* v. *Kally Churn Das* (3) which are both in point, the question whether oral evidence of the acts and conduct of parties is admissible to condradict the deed in this case must, under Rule I of chap. V of the Rules of this Court, be referred for decision to a Full Bench. And as the question arises on an appeal from an appellate decree, the whole case must be so referred under Rule II, the point upon which we differ from the decision of this Court in *Daimoddee* v. *Kaim Taridar* (2) being whether oral evidence of the acts and conduct of parties, such as oral evidence that possession remained with the vendor notwithstanding the execution of a deed of out-and-cut sale, is admissible to prove that the deed was intended to operate only as a mortgage.

"We may add that in our opinion the second contention of the learned vakil for the appellant ought to succeed, and the case ought to go back to the lower appellate Court, as the learned **[608]** Subordinate Judge has not determined the question whether the mortgage had been extinguished or satisfied, nor has he even stated that as one of the questions requiring determination. The finding as to possession cannot help the plaintiff, because if the plaintiff's predecessors in title were mortgagors of the property, their possession could not bar the right of the mortgagee."

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(1) 21 C. 882. (2) 5 C. 300. (3) 9 C. 528.

1898 FEB. 1. — FULL BENCH. — 25 C. 603 (F.B.) = 2 C.W.N. 562.

Babu *Umakali Mookerjee*, for the appellant.

Dr. *Rash Behary Ghosh* and Babu *Digambar Chatterjee*, for the respondent.

The judgment of the Full Bench (MACLEAN, C. J., and MACPHERSON, TREVELYAN, BANERJEE and JENKINS, JJ.) was as follows :—

JUDGMENT.

MACLEAN, C. J.—In regard to the question of law, which was the main ground for this reference, namely, whether oral evidence as to the acts and conduct of the parties was admissible to prove that the deed in this case was intended to operate as a mortgage and not as an out-and-out sale, the learned vakil who appeared for the appellant stated that, having regard to the authorities, he could not successfully contend that such evidence was not admissible. We think the authorities establish that in such a case, evidence directed to the acts and conduct of the parties would be admissible. Upon the main question submitted to us on this reference, the appellant consequently fails.

Upon the other point, whether the case ought to go back to the lower appellate Court, upon the ground that the Subordinate Judge has not determined the question whether the mortgage has been extinguished or satisfied, we see no reason to differ from the conclusion of the two learned Judges who heard the case in the Division Bench.

The case must go back for the determination of the question, but to be decided upon the evidence as it now stands.

With reference to the costs of the appeal, and of the reference as regards the appeal as there has been a partial success on each side, the costs of the appeal must abide the result of the remand, but as regards the costs of the reference the appellant must pay them.

S. C. G. *Appeal allowed, case remanded.*

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25 C. 609.

[609] APPELLATE CIVIL.

Before Mr. Justice Ghose and Mr. Justice Ameer Ali.

MAKBOOL AHMED CHOWDHRY (*Decree-holder*) *v.* BAZLE SABHAN CHOWDHRY (*Judgment-debtor*).* [5th January, 1898.]

Civil Procedure Code (Act XIV of 1882), s. 310A—Civil Procedure Code Amendment Act (V of 1894)—Amount payable incorrectly calculated by an officer of the Court.

The judgment-debtor within thirty days from the date of sale deposited in Court, under s. 310A of the Code of Civil Procedure, the amount calculated in the office of the Munsif as payable under the section. The Munsif set aside the sale. On appeal to the High Court by the auction-purchaser on the ground that the amount deposited by the judgment-debtor was not in compliance with s. 310A, and that before the sale could be set aside it was necessary for the judgment-debtor to pay, in addition to what he deposited, a sum equal to five per cent. of the purchase money :

Held, that when the amount payable by the judgment-debtor under s. 310A of the Code of Civil Procedure has been calculated by an officer of the Court, and has been deposited, an order setting aside the sale must be made by the Court as

* Appeal from Order, No. 195 of 1897, against the order of C. P. Caspersz, Esq., District Judge of Chittagong, dated the 8th of February, 1897, affirming the order of Babu Romesh Chunder Bose, Munsif of Sitakund, dated the 30th of September 1896.

a matter of right; the Munsif therefore was justified in setting aside the sale. *Ugrah Lall* v. *Radha Pershad Singh* (1) referred to.

1898 JAN. 5. — APPELLATE CIVIL. — 25 C. 609.

[Appr., 22 M. 286 (288); R., 4 Bur. L.T. 28=9 Ind. Cas. 472; 1 O.C. 193 (196); D., 26 C. 449=3 C.W.N. 283.]

THE facts of the case, so far as they are necessary for the purposes of this report, are sufficiently stated in the judgment of the High Court.

Sir *Griffith Evans*, Babu *Sreenath Das* and Moulvi *Abdul Jawad*, for the appellant.

The Advocate-General (Sir *Charles Paul*) and Moulvi *Serajul Islam*, for the respondent.

The judgment of the High Court (GHOSE and AMEER ALI, JJ.) was as follows:—

JUDGMENT.

GHOSE, J.—This is an appeal by the decree-holder, who is also the purchaser at the sale held in execution of the decree, [610] against an order setting aside a sale under s. 310A of the Code of Civil Procedure. It appears that after the sale had taken place, the judgment-debtor applied to the office of the Munsif for the purpose of ascertaining the exact sum that he had to pay in satisfaction of the decree in accordance with the provisions of s. 310A; and an account was prepared by the execution mohurir shewing the amount payable by the judgment-debtor, and that account was signed by the Munsif. The judgment-debtor paid in the amount which was shewn in the account, and the Munsif subsequently set aside the sale in accordance with s. 310A.

It has been contended, however, by the learned Counsel for the appellant that the amount that was deposited by the judgment-debtor was not in compliance with the requirements of s. 310A, and he has argued that it was necessary, before the sale could be set aside, that the judgment-debtor should pay, in addition to what he deposited, a sum equal to five per centum of the purchase-money to the purchaser. It is not necessary in this case to decide the question whether, in a case like this where the purchaser is decree-holder, and not a third party, a sum equal to five per centum on the purchase-money should be deposited by the judgment-debtor for the purpose of obtaining relief under s. 310A. It is sufficient to say that the judgment-debtor in this case paid in the exact sum of money which, upon calculation by the Court, was found to be due, and payable by him in accordance with the requirements of s. 310A.

In the case of *Ugrah Lall* v. *Radha Pershad Singh* (1) decided by this Court and reported, and which has, as we understand, been recently followed in another case (unreported) decided by Macpherson and Ameer Ali, JJ., this Court, under circumstances somewhat similar to this, held that the sale should be set aside. Sir Comer Petheram, in delivering the judgment of the Court in the case of *Ugrah Lall* v. *Radha Pershad Singh* (1) observed as follows: Section 174 provides no [611] machinery by which the amount payable under the section is to be ascertained, but apparently from what has taken place in the case, the amount is in practice calculated in the office after notice to the decree-holder, and when that has been done, we think the amount so calculated and settled by the officer of the Court, has been settled as the amount payable under the section, and that when the amount has been paid into

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(1) 18 C. 255.

1898 JAN. 5. — APPELLATE CIVIL. — 25 C. 609.

Court, an order to set aside the sale must be made by the Court as a matter of right. That was a case under s. 174 of the Bengal Tenancy Act, the wording of which is very similar to s. 310A of the Civil Procedure Code with which we are concerned in the present case; and the principle which underlies that case is equally applicable here.

We think that in the circumstances of this case the Munsif was justified in setting aside the sale which had taken place. The appeal will accordingly be dismissed and the application No. 1467 refused with costs.

AMEER ALI, J.—I concur.

S. C. G. *Appeal dismissed.*

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25 C. 611=2 C.W.N. 336.

ORIGINAL CIVIL.

Before Mr. Justice Sale.

GIRENDRO COOMAR DUTT *v.* KUMUD KUMARI DASI AND OTHERS.*
[11th March, 1898.]

Mortgage—Further advances—Equitable mortgage on title-deeds already deposited under previous mortgage.

The defendants had executed a mortgage in favour of the plaintiff, and handed him the title-deeds of the mortgaged property. Subsequently the plaintiff advanced a further sum to the defendants, who agreed that the plaintiff should retain the title-deeds already held by him as a security for the repayment of the further advances. There was no fresh deposit of the deeds.

Held, that the plaintiff was entitled to be declared an equitable mortgagee in respect of such further advance.

Ex parte Kensington (1), applied. *In re Beetham* (2), referred to.

[612] THE facts of this case are fully stated in the judgment of SALE, J., below.

Mr. *Sinha* and Mr. *J. G. Woodroffe*, for the plaintiff.

Mr. *Henderson* and Mr. *Swinhoe*, for the defendant Kumud Kumari Dasi.

Mr. *Avetoom*, for the defendant Johurry Lall Pal.

Mr. *Chuckerbutty*, for the remaining defendant.

JUDGMENT.

SALE, J.—The main question which arises for determination in this case is whether the plaintiff is entitled to a further charge for Rs. 8,000 by way of equitable mortgage in respect of certain property which admittedly was mortgaged to him The facts are of a very simple character, and are in my opinion very clear, though as regards one point a question arises as to what is the proper inference to be drawn from them. The defendant Johurry Lall Pal carried on a piece goods business in Calcutta, and for the purposes of his business from time to time borrowed certain sums of money from Rajender Dutt, the father of the plaintiff. The transactions between Rajender Dutt and Johurry Lall Pal commenced by a loan from Rajender Dutt to Johurry Lall Pal of a sum of Rs. 10,000 as security, for which Johurry Lall Pal deposited title-deeds of the property in suit with Rajender Dutt, intending thereby to create an equitable charge as security for the loan in favour of Rajender Dutt.

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* Original Civil Suit No. 795 of 1896.

(1) (1813) 2 V. & B. 79. (2) (1887) 18 Q.B.D. 380.

Subsequently Johurry Lall Pal, purporting to act for himself and for his wife Sreemutty Kumud Kumari Dasi, negotiated with Rajender Dutt for a mortgage of Rs. 60,000, which included the original sum of Rs. 10,000 obtained from him, and on the 18th January 1890 a mortgage for Rs. 60,000 was executed in favour of Rajender Dutt by Sreemutty Kumud Kumari Dasi. It appears that the title-deeds which were deposited with Rajender Dutt previous to the execution of the mortgage stood in the name of Sreemutty Kumud Kumari Dasi, and that Johurry Lall Pal, after the title-deeds had been so deposited, purported to act under the terms of a *muktearnamah* which he stated was executed in his favour by Sreemutty Kumud Kumari Dasi. Subsequently to the execution of the mortgage of the 18th of January 1890, Johurry Lall Pal was in want of further sums of money and he borrowed **[613]** sums amounting to Rs. 21,000 on three different occasions, and on each occasion executed a promissory note in favour of Rajender Dutt. It was agreed between Rajender Dutt and Johurry Lall Pal that the title-deeds already in the possession of Rajender Dutt should be regarded as a deposit to secure these further advances. At the same time Johurry Lall Pal, professing to act both for himself and for his wife, agreed that a regular legal mortgage should be executed by himself and his wife to secure these further advances. On the 25th August 1890 that mortgage, which is the mortgage in suit, was executed. In the year 1893 Johurry Lall Pal required a further advance for the purpose of his business, and acting, as the evidence shews, in precisely the same way as when the former advances were obtained by him, he requested the plaintiff to lend him Rs. 16,000, agreeing that the title-deeds then in the possession of the plaintiff should be held by him as security for this further advance. The plaintiff, however, agreed to lend only a sum of Rs. 8,000. The question is whether under the circumstances there is evidence of authority on the part of Johurry Lall Pal to bind his wife, and, if so, whether the plaintiff is entitled to rank as an equitable mortgagee in respect of this further advance of Rs. 8,000. So far as the evidence of authority goes, it appears to me that there is abundant evidence to shew that Kumud Kumari was holding out to Rajender Dutt and to the plaintiff her husband as authorized on her behalf to borrow monies for her, and for that purpose to deal with the title-deeds so as to secure the monies borrowed. It is I think quite clear, both from the recitals which appear in the mortgage of the 25th August 1890, and also from the allegations contained in the written statement, both of Johurry Lall Pal and Kumud Kumari Dasi, that Kumud Kumari Dasi knew that her husband was acting as her agent for the purposes of his business, and that she authorized him so to do. That being so, the evidence is, it seems to me, sufficient to raise the implication of authority on the part of the husband to bind the wife in respect of the further sum of Rs. 8,000 which was borrowed by the husband under the circumstances I have already stated. The defendant Kumud Kumari Dasi in her written statement denies knowledge or authority in respect of this loan **[614]** of Rs. 8,000. Neither she nor her husband has been called for the purpose of supporting the defence which she sets up.

1898 MARCH 11. — ORIGINAL CIVIL. — 25 C. 611 = 2 C.W.N. 356.

The next question is, whether upon the facts the plaintiff is entitled to be regarded as an equitable mortgagee in respect of this further sum of Rs. 8,000. It is said there was no further or fresh deposit of title-deeds to secure the advance, and further that the title-deeds were held, not under an agreement to deposit, but under an agreement and a conveyance.

1898 MARCH 11. — ORIGINAL CIVIL. — 25 C. 611 = 2 C.W.N. 356.

Authority has been referred to, from which it would appear that the Court of Chancery refused to extend the doctrine of the deposit of title-deeds creating an equitable mortgage to a case where the title-deeds were already held by the creditor under a mortgage in the nature of a conveyance. The authority referred to is an old case, and it would appear from the more recent case of *In re Beetham* (1) that the Courts in England would recognize an agreement that the title-deeds already held under a mortgage should be held as a security for a further advance, if such agreement satisfied the conditions of the Statute of Frauds.

Moreover, it is to be remembered that in the present case the title-deeds in suit were originally held under an agreement to deposit, and that the defendants Johury Lall Pal and Sreemutty Kumud Kumari Dasi from time to time regarded these title-deeds as deposited so as to secure fresh advances. I, therefore, see no reason why the contention of the plaintiff in respect of the fresh advance of Rs. 8,000 should not be given effect to. It has been pointed out that title-deeds already deposited as security for a previous loan are not required to be redelivered or redeposited to secure a subsequent advance when the parties by a subsequent arrangement intended that they should be held as security for a subsequent advance. In the case of *ex parte Kensington* (2) Lord Chancellor Eldon says at p. 83: "In the cases alluded to I went to the length of stating that, where the deposit originally was for a particular purpose, that purpose may be enlarged by a subsequent parol agreement; and this distinction appeared to me to be too thin, that you should not [615] have the benefit of such an agreement, unless you added to the terms of that agreement the fact that the deeds were put back into the hands of the owner and a redelivery of them required, on which fact there is no doubt that the deposit would amount to an equitable lien within the principle of these cases." That case is referred to as an existing authority in the 10th edition of Snell's Principles of Equity at p. 404, where the learned author says: "In *Russel* v. *Russel* (3) it was decided that the deeds were a security for the sum advanced at the time of the deposit, and only for that sum. But it is now held that such deposit will cover future advances, if such was the agreement when the first advance was made, or if it can be proved that a subsequent advance was made on an agreement, express or implied, that the deeds were to be or to remain a security for it as well."

I think, therefore, that the plaintiff is entitled to the usual mortgage decree, both in respect of the mortgage of the 25th August 1890 and of the further advance of Rs. 8,000. No relief is claimed as against the defendant Johurry Lall Pal who has been adjudicated an insolvent. A question was raised as to who should pay the costs of the brothers of the plaintiff who were not made plaintiffs in this suit, but were afterwards added as defendants on the ground that they as well as the plaintiff are entitled to the benefit of the mortgage of 25th August 1890. The defendant Kumud Kumari Dasi raised the question as to the title of the plaintiff to institute the present suit by himself, and asked that his brothers should be added as defendants. I think that the proper order to make with reference to the costs of these defendants, who only appeared on the first day of the hearing, is that their costs should be provided for in the same way as the plaintiff's costs from the proceeds of the mortgaged property. It is not necessary to make any order with reference to the costs of Johurry Lall Pal, inasmuch as no relief is sought against him,

(1) (1887) 18 Q.B.D. 380. (2) (1813) 2 V. & B. 83. (3) 1 Wh. & Tud. L C. 7th ed. 76.

and he need not have appeared. The decree as against Kumud Kumari Dasi will be in the form of an ordinary mortgage decree. 1898 MARCH 11.

Attorney for the plaintiff: Mr. *Rutter*.

[616] Attorneys for the defendant Kumud Kumari Dasi: Messrs. *Swinhoe & Co.* ORIGINAL CIVIL.

Attorney for the defendant Johurry Lall Pal: Babu *Sarat Chunder Dutt*. 25 C. 611 = 2 C.W.N. 356.

Attorneys for the remaining defendant: Messrs. *Bonnerjee & Haldar*.

H. W.

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25 C. 616 = 2 C.W.N. 330.

ORIGINAL CIVIL.

Before Mr. Justice Jenkins.

DHURMO DASS GHOSE *v.* BRAHMO DUTT.* [7th February, 1898.]

Minor—Mortgage by minor—Voidable mortgage—Estoppel—Evidence Act (*I of* 1872), s. 115—*Fraud—Contract Act* (*IX of* 1872), s. 64—*Restoration of benefit by minor.*

The general law of estoppel as enacted by s. 115 of the Evidence Act (I of 1872) will not apply to an infant unless he has practised fraud operating to deceive.

A Court administering equitable principles will deprive a fraudulent minor of the benefit of a plea of infancy; but he who invokes the aid of the Court must come with clean hands and must establish, not only that a fraud was practised on him by the minor, but that he was deceived into action by the fraud. *Ganesh Lalu* v. *Bapu* (1), dissented from. *Sarat Chunder* v. *Gopal Chunder Laha* (2), *Mill* v. *Fox* (3), *Wright* v. *Snow* (4), and *Nelson* v. *Stocker* (5), discussed.

If money advanced to an infant on a mortgage declared void is spent by him, then there is no benefit which he is bound to restore under the provisions of s. 64 of the Contract Act (IX of 1872).

[**Affir.**, 26 C. 381 = 3 C.W.N. 468; **F.**, 13 C.L.J. 228 = 15 C.W.N. 239 = 9 Ind. Cas. 110; **R.**, 9 Ind. Cas. 124 = 4 S.L.R. 250; 16 C.L.J. 185 = 17 C.W.N. 10 = 16 Ind. Cas. 825.]

THE facts of the case appear sufficiently from the judgment.

Mr. *Pugh*, Mr. *Chakravarti* and Mr. *S. C. Mookerji*, for the plaintiff.

Mr. *O'Kinealy* and Mr. *J. G. Woodroffe*, for the defendant.

JUDGMENT.

JENKINS, J.—On the 20th of July 1895 the plaintiff executed in favour of the defendant a mortgage over premises in Calcutta known as No. 15, Boloram Ghosh's Street and 133, Cornwallis Street, to secure Rs. 20,000, and the present suit is brought to have [617] the deed cancelled on the ground that at the time of its execution the plaintiff was an infant. On the evidence before me I have no hesitation in finding that the plaintiff was under the age of twenty-one on the 20th of July 1895, and as at that time his mother Jogendra Nandini Dasi was guardian of his person and property under an order of Court to that effect, it follows that at the date of the mortgage the plaintiff was under such incapacity as arises from infancy. By way of answer to this incapacity the defendant in the first place contends that the loan was induced by a fraudulent misrepresentation made by the plaintiff to the defendant's attorney Kedar

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* Original Civil Suit No. 630 of 1895.

(1) 21 B. 198. (2) 20 C. 296. (3) (1887) L.R. 37 Ch. D. 153.
(4) (1848) 2 De Gex & S 321. (5) (1859) 4 De Gex & J. 458.

1898 FEB. 7. — ORIGINAL CIVIL. — 25 C. 616 = 2 C.W.N. 330.

Nath Mitter, to the effect that the plaintiff was of age, and that Kedar Nath Mitter was deceived by the misrepresentation, so that it is necessary to examine the facts relevant to this contention.

The plaintiff, who seems to have been a young man of extravagant and profligate habits came to Kedar Nath Mitter, an attorney of this Court, some time in the month of May 1895, with a request for a loan of Rs. 20,000 on mortgage of the property to which I have already referred. The upshot of the matter was that Dedraj, the local manager in Calcutta of the defendant, an up-country money-lender, expressed his willingness to advance the money on being satisfied as to the security. In the course of investigation of the plaintiff's title there came into Kedar Nath Mitter's hands a decree in a partition suit and an order for possession in which the present plaintiff was described as a minor, and thereupon Kedar Nath Mitter, according to his account of what occurred, asked the plaintiff to produce satisfactory evidence of his majority, with the result that the latter produced copies of two petitions presented by his mother, one praying for a grant of letters of administration, and the other for her appointment as guardian of the person and property of the plaintiff. In the former of these the plaintiff was described as being under the age of seven years, from which Kedar Nath says that he drew an inference which would place the plaintiff's birthday in July. Kedar Nath Mitter claims to have based this inference on what he calls a calculation; but if the mental process he describes ever had an existence, then I can only say it had no justification in fact or in reason.

[618] Kedar Nath Mitter further has sworn that the plaintiff was constantly asserting that he was born on the 4th Asser (the 17th June), bnt his testimony on this point is uncorroborated by any of the defendant's witnesses, and is absolutely contradicted by the plaintiff.

The next thing, according to Kedar Nath Mitter, is that as he still wanted evidence of the precise date of the plaintiff's birth, the astrologer Kalidas Acharji and Nando Lal Ghosh were produced, and made the declarations which form part of the evidence in the case. In addition to this Kedar Nath Mitter got from the plaintiff, as he says, "for greater security in the interests of his client" the declaration affirmed by the plaintiff on the 20th of July, the day of the execution of the mortgage. These are the facts on which the defendant relies in support of his plea of fraudulent misrepresentations. The plaintiff, on the other hand, contends that Kedar Nath Mitter was not in fact deceived by the misrepresentations contained in the declarations, and to establish that he relies on his conduct in the matter and also on a letter of the 15th of July 1895. This letter was written by Babu Bhupendranath Bose, who at that time was the plaintiff's mother's attorney, and was in these terms:—

July 15th, 1895.

Babu KEDAR NATH MITTER.

Dear Sir,

I am instructed by Srimati Jogendra Nandini Dasi, the mother and guardian appointed by the High Court under its Letters Patent of the person and property of Babu Dharamdas Ghose, that a mortgage of the properties of the said Dharamdas Ghose is being prepared from your office. I am instructed to give you notice which I hereby do that the said Dharamdas Ghose is still an infant under the age of twenty-one and any one lending money to him will do so at his own risk and peril.

Yours faithfully,
BHUPENDRA NATH BOSE.

This letter was on the same day handed to the witness, Lal Mahomed, Pressman, to be taken by him to Kedar Nath Mitter's office. Lal Mahomed swears that he took the letter to Kedar Nath Mitter's office, and there went into a room where Kedar Nath Mitter and another Babu were seated. He says that he handed the letter to this Babu who opened it, read it and then handed [619] it to Kedar Nath Mitter, who in turn read its contents. The Babu, it is said, then signed the peon book, which was brought back by the messenger. No reply was sent to this letter, and on the 24th of July Bhupendra Nath again wrote to Kedar Nath Mitter as follows:—

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ORIGINAL CIVIL.

25 C. 616 = 2 C.W.N. 330.

July 24th, 1895.

Babu KEDAR NATH MITTER.

Dear Sir,

Re *Dharamdas Ghose.*

I warned you on the 15th of July instant that Dharamdas Ghose was and still is an infant, and that his mother my client Srimati Jogendra Nandini Dasi is his guardian. I understand that yesterday, notwithstanding the warning one of your clients Jamnadas Brahmadutt through you got the said Dharamdas Ghose to execute a mortgage of his properties in Calcutta in favour of the said Babu Jamnadas Brahmadutt for Rs. 20,000 of which he did not pay Rs. 8,700, the remainder being distributed between the unhappy victim and the confederates of your client. I am instructed to call upon your client through you to cancel the said mortgage at once as otherwise my instructions are to take legal proceedings without further reference.

Yours faithfully,
BHUPENDRA NATH BOSE.

To this letter Kedar Nath Mitter replied denying the receipt of the letter of 15th July, and this led to a further letter from Babu Bhupendra Nath Bose.

July 26th, 1895.

Babu KEDAR NATH MITTER.

Re *Dharamdas Ghose.*

Dear Sir,

Your letter of the 25th, I am surprised on hearing from you that you did not get any writing from me on the 15th. I find from my peon book that my letter of the 15th was delivered to you, and the receipt is signed by one of your clerks whose name, as far as I can make out, is Nishi Kanta Ganguly.

As regards the rest of your letter it requires no reply.

Yours faithfully,
BHUPENDRA NATH BOSE.

On the 27th July 1895 Kedar Nath Mitter sent a reply in which he simply states that there was no clerk of the name of Nishi Kanta Ganguly. On that Babu Bhupendra Nath Bose sent to Kedar Nath Mitter the peon book in which there is the name which certainly appears to be Radica Nath Gooly [620] or Gangooli; and I am further satisfied that there was a clerk of that name at the time in Kedar Nath Mitter's office and (notwithstanding Kedar Nath Mitter's denial) that it was his practice to sit downstairs.

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It will here be convenient to refer to a letter written on the 20th July 1895 by Nanda Lal Ghose to Kedar Nath Mitter in which he says:—

"As requested I have been to Babu Wooma Nath Ghose, the uterine brother of Hurry Das Ghose, and enquired of him whether he recollected the precise date of the birth of Dharamdas Ghose."

It further appears that there is an entry in Kedar Nath Mitter's day book, dated Tuesday, the 23rd July 1895.

"Attending yesterday at No. 2, Badur Bagan's Lane, accompanied by Babu Nanda Lal Ghose, Behary Lal Mitter and Nitto Gopal Ghose, having an interview with Babu Wooma Nath Ghose, the uterine brother of Hurry Das Ghose, the deceased father of Dharama Ghose and enquiring of him about the age of Dharamdas Ghose."

Now Nando Lall Ghose's evidence was that their visits were in consequence of a letter received by Kedar Nath Mitter from Bhupendra Nath Bose, though no doubt on learning the dates he receded from this position. In the same way Kedar Nath Mitter gives the following evidence in reference to his visit: "I wanted further enquiry because of the letter of Bhupendra Nath Bose. That made me curious to know what the other members said. I am sure of that." Then when the date is shewn him he says: "There must be a mistake in the date in the day book." The importance of all this is that prior to these visits the only letter Babu Bhupendra Nath Bose had written was that of July 15th, the receipt of which Kedar Nath Mitter had denied, so that the position is this. It is sworn by the pressman that he delivered the letter: the peon book contains a signature which is the name of one of Kedar Nath Mitter's clerks, and he is a clerk whose practice it was to sit in Kedar Nath Mitter's room and was one of the attesting witnesses of the mortgage, Kedar Nath Mitter himself being the other. Radika Nath Ganguly, though still a clerk in Kedar Nath Mitter's employ, is for some reason, which has not been explained before me, not called to testify on this point; and both Kedar Nath Mitter and Nanda Gopal Ghose explain their [621] conduct by reference to a letter which on the dates can only have been that of the 15th of July.

Against this positive testimony and weight of probability I simply have the evidence of Kedar Nath Mitter, a witness, whose evidence I am forced with regret to describe as unsatisfactory.

I here pass to a consideration of Kedar Nath Mitter's conduct in this matter.

The plaintiff is brought to him by Nitto Gopal Ghose who certainly does not answer the description Kedar Nath Mitter attributed to him of a "well-to-do broker," but does seem to have had close relations with Kedar Nath Mitter and actually to have resided with him for four or five years. It is further clear that Kedar Nath Mitter dealt with the plaintiff, arranged for the loan, and secured a promise for payment to himself of Rs. 800 for his services at a time, when even, according to Kedar Nath Mitter's own case, he knew the plaintiff was an infant and that his mother was his guardian.

Then, when a question arose as to the plaintiff's age, does Kedar Nath Mitter make any inquiry of the plaintiff's mother or of her attorney Bhupendra Nath Bose or any member of the family with whom the plaintiff was brought up? That, apparently, is the last thing he would do, and instead he says that he consulted the witness Nando Gopal Ghose, an uncle, it is true, of the plaintiff, but a man who had been in hostile litigation with the plaintiff and his mother, who had employed Kedar

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Nath Mitter as his attorney in that litigation, and as to whom Kedar Nath Mitter is forced to admit he inferred that there must be bad feeling still existing between him and the plaintiff's mother.

The other person that he consults is apparently Kali Das Acharji, the astrologer. This man did not attend on his subpœna, and I therefore have had no opportunity of forming an opinion as to what passed between him and Kedar Nath Mitter. Then, I come to the statutory declaration which Kedar Nath Mitter got this young man to affirm, a declaration which contained more than one allegation that Kedar Nath Mitter must have known was beyond the plaintiff's knowledge. I do not intend to criticize [622] this declaration in detail, suffice it for me to say that it was in my opinion a most improper one for Kedar Nath Mitter to have prepared, if the object was to obtain a clear statement from the plaintiff as to his age.

It must further be borne in mind that Kedar Nath Mitter actually conducted this matter in the way I have indicated, though he was acting as the defendant's attorney. Let me say here that I absolve the defendant from all personal responsibility for this, for it all was clearly done without his knowledge; still at the same time, as he seeks to rely on a fraud alleged to have been practised on Kedar Nath Mitter, his claim must necessarily be tested by reference to Kedar Nath Mitter's conduct. It is unquestionably within the power of the Court administering equitable principles to deprive a fraudulent minor of the benefits flowing from the plea of infancy, but one who invokes the aid of that power must come to the Court with clean hands, and must further establish to the satisfaction of the Court that a fraud was practised on him by the minor, and that he was deceived into action by that fraud. I can only say that in this case it has not been established to my satisfaction that these requirements exist.

Kedar Nath Mitter's conduct has not been such as to predispose me in favour of the defendant's case, and a consideration of the circumstances to which I have referred does not lead me to the conclusion that Kedar Nath Mitter was deceived, and I accordingly hold that the circumstances of the case are not such as to nullify the plea of infancy.

It is right that I should here notice the argument that fraud and deceit are not necessary to the success of the defendant's plea.

This contention is based on s. 115 of the Evidence Act as interpreted by *Ganesh Lala* v. *Bapu* (1), in which it is no doubt said that, having regard to that section, proof of fraud on the part of the infant is not essential. The learned Judge in that case relies on the fact that in *Sarat Chunder* v. *Gopal Chunder* (2) [623] and in *Mills* v. *Fox* (3) no suggestion is made of the exception of an infant from the doctrine of estoppel. Now in the first of these cases the individuals sought to be affected were not infants, and at the bottom of p. 306 the following passage appears in the judgment of the Privy Council: "The District Judge has held it to be proved that they had both reached majority at the date of the mortgage * * * Accordingly it must be taken that they were of age to consent to the mortgage being granted or by their acts or representations to bar themselves from challenging it." It seems to me with all respect that this passage shows that the case is no authority for the proposition it is supposed to justify, but inferentially negatives it.

The case of *Mills* v. *Fox*, on the other hand, turned on special circumstances which do not allow of its being an authority for the broad

(1) 21 B. 198. (2) 20 C. 296. (3) (1887) 37 Ch. D. 153.

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principle laid down by the Bombay Court. Then it is further said by the learned Judge that *Wright* v. *Snow* (1) establishes this proposition. The headnote to that case appears to me to go beyond what was actually decided, for the learned Judge, V. C. Knight Bruce, finds that it was not proved that plaintiff was a minor at the time of the transaction, while his remarks in the course of the argument point to the view that fraud is necessary though what amounts to fraud must depend on the circumstances.

That V. C. Knight Bruce did not regard fraud as unessential is, I think, made further apparent by the case of *Nelson* v. *Stocker* (2) in which, being then Lord Justice Knight Bruce, he says: "It appears to me, however, upon the whole of the evidence that the defendant's deceased wife is not shown to have been defrauded or deceived by the defendant in any respect before their marriage. I believe that at the time of the marriage and previously to it before the instrument of settlement in question was signed by either of them and before it was prepared, she was aware of his minority, and the case stands substantially on the same footing, so far as the parties to the present record are concerned, as **[624]** if the fact of his infancy had been stated on the face of the settlement." Nor does the matter rest there, for in the same case is to be found the clear statement of that most eminent Judge Lord Justice Turner that fraud is an essential element. It is enough for me to refer to that portion of his judgment which is contained on pages 465 and 466 of the report.

It appears to me, therefore, that the cases do not justify the proposition that fraud on the part of an infant is not essential. I think fraud operating to deceive must be found as a fact, and whether in any particular case there is such fraud must depend on its own particular circumstances.

This brings me to the plea of ratification which is based on the allegations contained in the defendant's further written statement.

It is a matter of surprise and regret to me that an attorney of this Court should have seen fit to act as Kedar Nath Mitter did in connection with this matter.

The draft purports to have been approved by one Nanda Gopal Roy, an attorney of this Court, but how he came to act for the plaintiff does not appear, nor has he been called by the defendant to explain his connection with the matter. In fact the further charge never was carried through, and I cannot regard the draft as being itself a ratification. At most the matter does not seem to me to have been more than an engagement to ratify in case the further advance was made. I therefore hold that this plea too has failed. Next I have to notice the contention based on s. 64 of the Contract Act which prescribes the consequences to arise from rescission of a voidable contract, it being common ground that I am bound by authority to regard the mortgage of an infant as voidable. The section provides that the party rescinding a voidable contract shall, if he have received any benefit thereunder from another party to such contract, restore such benefit so far as may be to the person from whom it was received. Now it is contended by Mr. Woodroffe that this provision entitles him to repayment of the money advanced even though it is not ear marked and cannot now be followed.

[625] It is obvious that if this were the result of the section then the protection of infancy would practically be at an end. The money

(1) (1848) 2 De G. & S. 321.

(2) (1859) 4 De G. & J. 458.

advanced has been spent, probably in useless or even vicious extravagance, and there is no benefit which the plaintiff is able or is bound to restore. Nor do I think that this is a case in which justice requires that the plaintiff should make compensation in accordance with the provisions of the Specific Relief Act, s. 38. The result is that there must be a declaration that the mortgage of the 20th July 1895 is void and inoperative, and it must be delivered up to be cancelled.

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Though I should have been glad to relieve the defendant of the costs of the action I do not see how I can with propriety do so; they must, therefore, be paid by him on scale No. 2.

Attorney for the plaintiff: Babu *Bhupendra Nath Basu.*

Attorney for the defendant: Babu *Kedar Nath Mitter.*

S. C. B.

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25 C. 625 = 2 C.W.N 289.

CRIMINAL REVISION.

Before Mr. Justice Banerjee and Mr. Justice Stevens.

ABHOY CHARAN DASS AND ANOTHER (*Petitioners*) v. MUNICIPAL WARD INSPECTOR (*Opposite Party*).* [10th February, 1898.]

Calcutta Municipal Consolidation Act (II of 1888, B.C.), ss. 307, 335, 336. sch. II, Rule 6 —Liability for keeping animals without license—Penalty, to whom attached—Owner —Lessee.

The petitioners, as owners, let out a stable on hire, where *ticca gharries* and horses were kept by the lessee without taking out a license from the Municipal Commissioners. The petitioners were convicted under ss. 307 and 336 of the Calcutta Municipal Act (II of 1888, B.C.) for having permitted offensive matters, &c., and animals to be kept on the premises in contravention of the provisions of s. 335 of the Act:

Held, that the convictions were bad, the lessee alone being answerable in such a case for disregarding the provisions of the Act.

The penalty, under s. 336 of the Calcutta Municipal Act of 1888, attaches to the owner of any land for permitting any animals to be kept thereon, when he has direct possession of the land, and not when he has leased it out to another.

[R., 2 C.L.J. 524 (529).]

[626] THE facts are shortly these: The petitioner Abhoy Charan Dass and his son, being the proprietors of a tiled hut, let it out on hire to one Chunder Coomer Roy, under a registered agreement, for a period of six months for keeping horses and carriages. Chunder Coomer took possession of the premises and kept some horses and carriages therein without taking out a license from the Municipal Commissioners. The Municipal authorities thereupon prosecuted the petitioners under s. 307 of the Calcutta Municipal Act (II of 1888, B. C.), for having kept or suffered to be kept offensive matters otherwise than in a proper receptacle, &c., and also under s. 336 of the same Act for having permitted animals to be kept for profit, &c., in contravention of the provisions of s. 335 of the Act. The lower Court convicted the petitioners under both the aforesaid sections, and sentenced them to pay a fine. Against this conviction and sentence the petitioners moved the High Court and obtained this Rule.

Mr. *A. P. Sen* with Babu *Joy Gopal Ghose*, for the petitioners.

No one appeared to show cause.

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* Criminal Revision No. 858 of 1897, against the order of N. K. Banerjee, Esq., Deputy Magistrate of Alipur, dated the 14th of October 1897.

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The judgment of the High Court (BANERJEE and STEVENS, JJ.) was as follows:—

JUDGMENT.

This is a rule calling upon the Magistrate of the District to show cause why the convictions and sentences in this case should not be set aside on the ground that as regards the offence under s. 307 of Act II (B. C.) of 1888, it has not been found that the accused were occupiers of the premises in question, and that as regards the offence under s. 336, it has not been found that the accused permitted any animals to be kept in the said premises in contravention of the provisions of s. 335 within the meaning of the law.

No one appears to show cause, but a written explanation has been submitted by the Magistrate which goes to supplement the judgment. We do not think that effect can be given to the explanation as supplementing the judgment.

Turning now to the judgment, we find that there is nothing to show that the accused are the occupiers of the premises in [627] question, and so the conviction under s. 307 of Act II (B.C.) of 1888 must be set aside.

Then as regards the conviction under s. 336 of the above Act, this is how the finding is stated: "The Court believes the evidence of the Inspector and the peons that the accused Abhoy Moira and his son have let out a stable on hire where *ticca gharries* are kept."

If that is so, can it be said that the accused have permitted animals to be kept on the premises in contravention of the provisions of s. 335 as required by s. 336 to constitute the offence of which they have been convicted?

Section 335 enacts that "no person shall keep any animal for profit within Calcutta except in a place licensed by the Commissioners." And on referring to sch. 2, rule 6, we find it laid down that "when the owner or lessee of any place is liable to take out a license, the license should be taken out by the lessee if there is any lessee; if not, by the owner." Now, the finding is that these premises are let out on hire; therefore, the provisions of s. 335 have been contravened by the lessee. Then can it be said that, notwithstanding that that was so, the accused who are the owners of the premises must, nevertheless, be held to have permitted the animals to be kept on the premises in contravention of s. 335, because the person bound to take out a license had failed to take out the same? To hold that, would be to hold that the accused are liable for the acts of their lessee, over which they have no control.

If a person grants a lease of his land or house, he can have no direct possession of, or control over, the same; and if the lessee thereafter, without taking any license, keeps any animals on the premises for which he is required by law to take out a license, the penalty for doing so ought in reason and justice to attach to the lessee and the lessee alone. The words of s. 336, though apparently general, must be read with this limitation, namely, that the penalty under the section attaches to the owner for permitting any animals to be kept thereon when he has direct possession of the land in question, but not when he has leased the same out to another.

[628] That being so, the conviction under s. 336 of Act II (B. C.) of 1888 must also be set aside, and the fines, if realized, refunded.

The order imposing a daily fine is also set aside.

B. D. B. *Conviction set aside.*

25 C. 628=3 C.W.N. 18.

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25 C. 628=3 C.W.N. 18.

CRIMINAL REVISION.

Before Mr. Justice Banerjee and Mr. Justice Hill.

SUBAL CHUNDER DEY (*Defendant, Petitioner*) v. RAM KANAI SANYASI (*Complainant, Opposite Party*).* [14th December, 1897.]

Recognizance to keep peace—Criminal Procedure Code (Act X of 1882), *s.* 106—*Security to keep the peace on conviction—Breach of the peace—Penal Code (Act XLV of* 1860), s. 448—*House-trespass.*

An order under s. 106 of the Criminal Procedure Code (Act X of 1882) binding down the accused to keep the peace, upon conviction for "house-trespass" under s. 448 of the Indian Penal Code, cannot stand where the intention of the accused for committing the trespass was to have illicit intercourse with the complainant's wife.

The Queen v. *Gendoo Khan* (1) and *The Queen* v. *Jhapoo* (2), distinguished.

It is necessary before an order under s. 106 of the Criminal Procedure Code can be made that the accused should have an opportunity of answering to an accusation for an offence of the kind, upon a conviction for which such an order can be made.

[R., 8 C.W.N. 517 (518); D., 7 C.W.N. 25 (26).]

IT appears that the petitioner actually entered into the complainant's house with the object of having illicit intercourse with the wife of the complainant who seized him inside the house. Thereupon the petitioner threatened to beat the complainant. The lower Court, on these findings, convicted the petitioner for "house trespass" only and sentenced him to twelve days' rigorous imprisonment, and also ordered the petitioner, under s. 106 of the Criminal Procedure Code, to execute a bond to keep the peace towards the complainant for one year.

Against this conviction and sentence, and the order to keep the peace, the petitioner moved the High Court; but a rule to show cause why the latter order only, *viz.*, the order under [629] s. 106 of the Criminal Procedure Code should not be set aside was granted.

Mr. *P. L. Roy*, for the Crown.—An order under s. 106 of the Criminal Procedure may legally follow a conviction for "house trespass": see *The Queen* v. *Gendoo Khan* (1) and *The Queen* v. *Jhapoo* (2). And upon the finding of the lower Court the petitioner is likely to commit a breach of the peace, inasmuch as he threatened to beat the complainant; and, therefore, the order binding the petitioner down to keep the peace is in accordance with law.

Mr. *C. R. Das*, for the petitioner.—The cases cited by Mr. Roy are clearly distinguishable. In those cases the intention of the accused was to commit breach of the peace, and in carrying out that intention trespass was committed. Here the intention to commit adultery negatives any intention to commit breach of the peace; and the alleged breach of the peace was the result of the attempt by the accused to free himself from the clutches of the husband of the woman. That being so, the order under s. 106 of the Criminal Procedure Code is bad in law.

The judgment of the High Court (BANERJEE and HILL, JJ.) was as follows:—

JUDGMENT.

This is a rule calling upon the Magistrate of the district to show cause why the order made in this case under s. 106 of the Code of Criminal

* Criminal Revision No. 768 of 1897, against the order of F. Karim, Esq., Deputy Magistrate of Munshigunge, dated the 2nd of November 1897.

(1) 7 W.R. Cr. 14.

(2) 20 W.R. Cr. 37.

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Procedure should not be set aside upon the ground that there has been no conviction for any of the offences upon a conviction for which such an order could have been made.

The accused has been convicted of the offence of house trespass punishable under s. 448 of the Indian Penal Code, and the intention for committing the trespass, as found in the judgments of the Courts below, was to have illicit intercourse with the complainant's wife. That being so, can it be said that the accused was convicted of any of the offences contemplated by s. 106 of the Code of Criminal Procedure? We are of opinion that the question must be answered in the negative.

Mr. *P.L. Roy*, who appears for the Crown to show cause, **[630]** contends that a conviction for house trespass may sustain an order under s. 106 of the Code of Criminal Procedure; and in support of this contention he cites the cases of *Queen* v. *Gendoo Khan* (1) and *Queen* v. *Jhapoo* (2). Those two cases are, however, clearly distinguishable from the present. In both these cases this Court found that the intention of the accused for committing the trespass was to commit a breach of the peace; the trespass, as the facts of the cases showed, having been committed openly by a number of men. Those cases, therefore, well come within the provisions of the law, authorizing security being taken for keeping the peace. In the present case, as we have already observed, the intention of the accused, as found by the Courts below, was only to have illicit intercourse with the complainant's wife.

Mr. *Roy* next contended that the judgment went to show that it was proved that the defendant threatened to beat the complainant, but then there has been no conviction for any offence of assault or criminal intimidation. In the absence of any such conviction, we do not think that any order under s. 106 of the Code of Criminal Procedure can stand. It is necessary, before an order under s. 106 of the Code of Criminal Procedure can be made, that the party should have an opportunity of answering to an accusation for an offence of the kind, upon a conviction for which such an order can be made. That requirement not having been complied with, the order under s. 106 of the Code of Criminal Procedure cannot stand and must be set aside.

B. D. B. *Order set aside.*

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25 C. 630 = 2 C.W.N. 225.

CRIMINAL REVISION.

Before Mr. Justice Hill and Mr. Justice Wilkins.

RAM CHANDRA MISTRY (*Petitioner*) *v.* NOBIN MIRDHA AND OTHERS (*Opposite Party*).* [3rd January, 1898.]

Appeal in criminal case—Criminal Procedure Code (Act X of 1882), ss. 404, 520, 522—*Order as to restoration of immoveable property—Jurisdiction of appellate Court to reverse such an order.*

[631] There is no appeal from an order restoring possession of immoveable property under s. 522 of the Criminal Procedure Code (Act X of 1882), nor can such an order be regarded as an integral part of the judgment appealed from, so as to stand or fall according as the judgment is upheld or reversed.

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* Criminal Revision No. 717 of 1897, made against the order of B. L. Gupta, Esq., Sessions Judge of Backergunge, dated the 23rd of September 1897.

(1) 7 W.R. Cr. 14. (2) 20 W.R. Cr. 37.

Basudeb Surma Gossain v. *Naziruddin* (1); *Queen-Empress* v. *Fattah Chand* (2); *In re Annapurna Bai* (3), and *Rodger* v. *Comptoir D'Escompte de Paris* (4), referred to.

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[**Disappr.**, 14 Cr. L.J. 172=19 Ind. Cas. 172; **R.**, 36 C. 44=13 C.W.N. 77=1 Ind. Cas. 202; **D**, 27 A. 415=2 A.L.J. 64 (66)=A.W.N. (1905) 19; 29 C. 724 (725).]

THE facts of the case appear sufficiently from the judgment of the High Court.

Mr. *Jackson* (with him Mr. *P. L. Roy* and Babu *Baikant Nath Dass*), for the petitioner.—The order of the Deputy Magistrate of Ferozepore directing the opposite party to be restored to possession is *ultra vires*. The petitioner's complaint was enquired into by the Deputy Magistrate who believed it, and convicted the opposite party who appealed, and their appeal was dismissed. The High Court in revision remanded the case for a rehearing of the appeal, and this appeal was heard by another Sessions Judge who acquitted them. By the original order of conviction the Deputy Magistrate decided that the petitioner should be restored to possession under s. 522 of the Criminal Procedure Code, and he has retained possession of the property ever since. There is no provision of law by which he can now be ousted from possession: See *Basudeb Surma Gossain* v. *Naziruddin* (1), *Queen-Empress* v. *Fattah Chand* (2); *In re Annapurna Bai* (3). There is no appeal from an order under s. 522, so the Sessions Judge had no jurisdiction to set that order aside. See s. 404 of the Criminal Procedure Code.

Sir *Griffith Evans* and Babu *Dwarka Nath Chakravarti*, for the opposite party.—Although there may be no procedure laid down as to how a person may be restored to possession, yet there can be no doubt that an appellate Court has an inherent **[632]** power to deal with such matters; and if in the exercise of its judicial discretion it thinks fit to revise the order of the lower Court and to direct a person to be restored to possession, the executive authorities are bound to carry out that order. See *Rodger* v. *Comptoir D'Escompte de Paris* (4).

In the present case the Sessions Judge had found that my clients were in possession, and the petitioner has been wrongfully put into possession; and it is idle to contend that effect cannot be given to the findings of the Sessions Judge by restoring them to the possession of the property which is lawfully their own. See *Ambler* v. *Pushong* (5).

The judgment of the High Court (HILL and WILKINS, JJ.) was as follows:—

JUDGMENT.

The material facts of this case are as follows:—

In October 1896 Ram Chandra Mistry, the petitioner in this matter, charged four persons, Nobin Mirdha, Mohesh Mondal, Rajkishore Manbhi and Latim Shil (the opposite party), before the Deputy Magistrate of Ferozepore with offences under ss. 147, 148 and 326 of the Penal Code, alleging *inter alia* that they with some fifty or sixty armed men had forcibly deprived him of possession of certain land held by him as the tenant of one Lokenath. On the 21st December 1896, the Deputy Magistrate found two of the four accused persons guilty of the offence of rioting under s. 147, the other two of the offence of rioting being armed with a deadly weapon under s. 148, and Nobin Mirdha he further found guilty of an offence under s. 326; and he sentenced them accordingly to various terms

(1) 14 C. 834. (2) 24 C. 499. (3) 1 B. 630.
(4) (1871) L.R. 3 P.C. 465 (475). (5) 11 C. 365.

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of imprisonment. He at the same time made an order under s. 522 of the Code of Criminal Procedure for the restoration of the petitioner to possession of the disputed land. This order was carried into effect during the same month.

The opposite party then appealed to the Court of Session, which, in the first instance, upheld the decision of the Deputy [633] Magistrate. They afterwards, however, petitioned this Court with the result that the case was remitted to the Court of Session for retrial. Among other matters indicated for the guidance of the Court of Session the learned Judges pointed out that it was necessary under the circumstances of the case to come to a finding as to which of the two contending parties was in actual possession of the disputed land when the occurrence complained of took place. Upon the retrial the learned Sessions Judge came to the conclusion that the opposite party were at that time in actual possession, and, in respect of any violence they had used, he also held that, with the exception of Nobin Mirdha, they had acted within the right of defence of their property. He accordingly set aside the convictions and sentences under the rioting sections of the Code. In the case of Nobin Mirdha he held that the right of private defence had been exceeded, and therefore maintained his conviction under s. 326. He, however, reduced his sentence to one of six months' imprisonment, and as that period had then expired, ordered his release. The learned Judge further set aside the order passed by the Deputy Magistrate under s. 522 of the Code of Criminal Procedure. An application was then made to the Deputy Magistrate by Nobin Mirdha and his party to be restored to possession of the disputed land, but this was refused, the Deputy Magistrate being of opinion that it did not appear from the order of the Court of Session that Ram Chandra was to be turned out of possession for the purpose of replacing the other side in possession. Thereupon Nobin Mirdha applied to the Court of Session for relief in the matter, and that Court, on the 23rd of September 1897, passed the following order on the application :—

"I can give no further orders than what I have done. I have cancelled the Deputy Magistrate's order under s. 522, and all proceedings under that section are necessarily rendered null and void. I can give no orders to the police, but it is the duty of the Deputy Magistrate to give effect to the order of the appellate Court, and also to maintain order and peace."

This was followed by another application by Nobin Mirdha and his party to the Deputy Magistrate for restoration of possession, and on the 27th September the Deputy Magistrate passed an order for the issue of a *perwanna* to the Police directing [634] them "to give effect to the orders of the Sessions Judge at once."

It is to this order of the Deputy Magistrate, as being "vague and misleading," that the rule in this case is in terms confined, but at the hearing, the question which was, with our permission, chiefly discussed, was the legality of the order made by the Court of Session reversing the order passed by the Deputy Magistrate on the 21st December 1896, under s. 522 of the Code as well as of the order of the 23rd September 1897, by which the Court of Session in effect directed the Deputy Magistrate to carry out the order of reversal. It was contended on the part of the petitioner that both these orders were made without jurisdiction, and reliance was placed on the circumstance that no procedure is laid down by the Code effecting restitution of possession when a person has been ousted in pursuance of an order made under s. 522. On the part of the opposite

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party it was contended that when an appellate Court comes to a conclusion different from that of a Subordinate Court upon the question of possession it must, upon principle, possess the power of undoing that which has been unlawfully done by the latter Court; that otherwise the action of the Courts might lead to grave injustice, and that as for the absence from the Code of any prescribed procedure for restoring to possession a person who has been wrongfully dispossessed it did not advance the argument for the other side, since the Code was likewise silent as to the procedure to be followed for giving effect to such an order when properly made. In the one case, as in the other, it was said it lies with the executive to carry out the orders of the Court. The learned counsel for the petitioner in support of his contention cited the cases of *Basudeb Surma Gossain* v. *Naziruddin* (1) and *Queen-Empress* v. *Fattah Chand* (2). In the former case the learned Judges, while setting aside an order made by a Magistrate under s. 517 of the Code, stated expressly that they were unable to order restitution of the property. In the latter also the Court set aside an order made under that section, but it was considered that the **[635]** question of the restitution of the property was not before the Court, and the learned Judges, therefore, expressed no opinion upon it. It can hardly therefore be claimed as an authority in support of the petitioner's contention. It was, however, argued on the authority of Basudeb Sarma's case (1) that if, notwithstanding the provisions of s. 520 of the Code, a superior Court has not authority to direct the restoration of property affected by an order made under s. 517 of the Code, the same must be the case with respect to property affected by an order under s. 522. We are not prepared, on the authority of this case, to commit ourselves to such a position. It may, indeed, be that the consideration which weighed with the learned Judges, who decided the case was, as the learned counsel contended, that the Code does not provide any procedure for effecting restitution when possession has changed under an order made under s. 517, and if this was in fact their reason the case might perhaps be applied by way of analogy to the present case. But their reasons are not disclosed. They merely say that in this respect they follow the case of *In re Annapurna Bai* (3) in which likewise the reasons by which the learned Judges were guided are not stated. We think too, we may add, that it would be unsafe to conclude merely because the Legislature has not provided a remedy by way of restitution for a person, who has been improperly deprived of the possession of property of the kind to which s. 517 relates, that it, therefore, intended that a person improperly deprived of the possession of immoveable property in pursuance of an order made under s. 522 should be without a remedy of that nature.

On behalf of the opposite party Sir Griffith Evans referred us to a passage from the case of *Rodger* v. *Comptoir D'Escompte de Paris* (4) in which the Judicial Committee of the Privy Council refer to the duty of all Courts to take care that the act of the Court does no injury to any of the suitors. His contention was that since it was shown by the finding of the Court of Session on the question of possession remitted to it by this Court that his clients had been injuriously affected by the action of the Magistrate, **[636]** by which the petitioner had been placed in possession, the power must be inherent in the Courts and ought to be exercised of redressing this wrong by restoring to them the possession of which they had been

(1) 14 C. 834.
(2) 24 C. 499.
(3) 1 B. 630.
(4) L.R. 3 P.C. 465 (475).

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wrongfully deprived. We need not say that in a case which we considered to be a fit one in all respects for its application we should not hesitate to enforce the principle referred to. The question, however, now before us is not whether we should ourselves exercise the power, if we possess it, of ordering the persons previously in possession to be restored to possession, but is confined to the legality of the reversal by the Court of Session of the Magistrate's order under s. 522 and of the subsequent measure taken to give effect to its reversal. And if under the law as it stands the Magistrate's order was not open to review in the Court of Session, we think our proper course is to apply the law as we find it. We might, it is true, if satisfied that the ends of justice would be best served thereby, refuse to exercise the revisional powers of the Court in favour of the petitioner, but on the whole we think that more harm than good might now result from the adoption of that course. In our view of the law, the Court of Session, dealing as it did in the present case as a Court of appeal with the judgment of the Deputy Magistrate convicting the accused, exceeded its jurisdiction in setting aside the order made under s. 522. Our primary reason for this opinion is that an order passed under that section must be subject to the general rule laid down by s. 404 of the Code ; that no appeal shall lie from any order of a Criminal Court except as provided for by the Code ; while there is, so far as we are aware, no provision made by the Code for an appeal from an order under s. 522. Nor can such an order be regarded as an integral part of the judgment appealed from, so as to stand or fall, according as the judgment is upheld or reversed. If that were so, the Legislature would no doubt have so provided. But it seems to have been intended, and the reasons for this are not difficult to conceive, that an order giving possession under the section being once made should, in so far as the Criminal Courts are concerned, have finality. We are strengthened in this view by the consideration that in the case of orders made under s. 517, which falls within the same chapter of the Code, very precise provisions are laid down **[637]** by s. 520 in respect of the powers which may be exercised by superior Courts.

We should add that Sir *Griffith Evans* relied also on *Ambler* v. *Pushang* (1), but in the view which we take of the case we do not think that it is in point.

We make the rule absolute and set aside the order of the learned Sessions Judge, reversing the order made by the Deputy Magistrate under s. 522, as well as his order of the 23rd September 1897, and also the order of the Deputy Magistrate passed on the 27th September.

B. D. B. *Rule made absolute.*

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(1) 11 C. 365.

25 C. 637.

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CRIMINAL REVISION.

Before Mr. Justice Hill and Mr. Justice Stevens.

LAL MOHAN CHOWBEY (*Complainant*) *Petitioner v.* HARI CHARAN DAS BAIRAGI (*Defendant*), *Opposite Party.**
[13th January, 1898.]

Act XIII of 1859, *ss.* 1, 4—*Breach of contract—Jurisdiction of Presidency Magistrates —" Magistrate of Police"—Criminal Procedure Code* (*Act X of* 1882), *s.* 3.

A Presidency Magistrate of Calcutta may lawfully take cognizance, under s. 1 of Act XIII of 1859 of a complaint in respect of a contract made in Calcutta, the breach of which has been committed beyond the local jurisdiction of his Court.

The expression " Magistrate of Police" in s. 1, Act XIII of 1859 means " Presidency Magistrate."

[D., 11 Cr.L.J. 380=6 Ind. Cas. 618=12 P.R. 1910 (Cr.)=185 P.L.R. 1910=13 P.W. R. 1910 Cr.]

IT appears that the defendant entered into a contract with the petitioner at Calcutta to manufacture tin canisters at Sikohabad in the District of Mainpuri in the N.-W. Provinces, and received an advance of Rs. 61 from the petitioner. After working for a month at Sikohabad, the defendant ran away to Calcutta without finishing the specified work contracted for. Thereupon the petitioner lodged a complaint against the defendant in the Court of the Presidency Magistrate of Calcutta for non-performance of the contract. The Honorary Presidency Magistrate, to whom the case was made over for trial, dismissed the complaint [638] on the preliminary ground that he had no jurisdiction to entertain the complaint, inasmuch as the breach of the contract constituting the offence took place admittedly beyond the local limits of the jurisdiction of his Court.

Against this order of dismissal the petitoner moved the High Court.

Babu *Atulya Charan Bose*, for the petitioner.

No one appeared to show cause.

The judgment of the High Court (HILL and STEVENS, JJ.) was as follows :—

JUDGMENT.

In this case a complaint was made to an Honorary Presidency Magistrate of Calcutta under s. 1 of Act XIII of 1859, in respect of a contract which was made in Calcutta, but the breach of which is said to have taken place in a portion of the N. W. P., to which the Magistrate states the provisions of the Act had not been extended. The Magistrate considered that he had no jurisdiction to entertain the complaint, inasmuch as the breach of the contract had taken place beyond the local jurisdiction of his Court, at a place outside the limits of the Town of Calcutta. The complainant has applied for a revision of the order made by the Honorary Presidency Magistrate dismissing his complaint. Section 1 of Act XIII of 1859 provides that in the case of a breach of contract to which that Act applies a complaint may be made to a Magistrate of Police. We think that the terms of the section do not imply that the complaint is to be made to the Magistrate of Police in the place where the breach has taken place,

* Criminal Revision, No. 796 of 1897, against the order passed by Babu N. C. Bural, an Honorary Presidency Magistrate of Calcutta, dated 7th of September 1897.

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and, moreover, s. 3 to the Code of Criminal Procedure provides that in every enactment passed before that Act came into force, the expression "Magistrate of Police" shall be deemed to mean Presidency Magistrate. We, therefore, think that the Presidency Magistrate had jurisdiction to entertain this complaint.

We therefore set aside his order of the 7th of September 1897 dismissing the complaint, and direct that he do proceed to dispose of the complaint which he may lawfully take cognizance of in accordance with law.

B. D. B. *Order set aside, and case remanded for trial.*

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25 C. 639 = 2 C.W.N. 450.

[639] CRIMINAL REVISION.

Before Mr. Justice Banerjee and Mr. Justice Wilkins.

YUSUF MAHOMED ABARUTH (*Petitioner*) *v.* BANSIDHUR SIRAOGI (*Opposite Party*).* [16th February, 1898.]

Jurisdiction to try offence under s. 486 *of the Penal Code* (*XLV of* 1860)—*Goods with counterfeit trademark not intended to be sold within jurisdiction.*

A Magistrate has jurisdiction to try an offence under s. 486 of the Penal Code if the accused be shown to be in possession of goods with a counterfeit trade mark for sale or any purpose of trade or manufacture, though the sale or the trade or the manufacture for the purpose of which the accused has the goods in his possession be not intended to take place within the jurisdiction of the Court in which the complaint is lodged.

THE facts of the case, sufficient for the purpose of this report, appear from the judgment.

Mr. *Jackson*, on behalf of the petitioner.—In order to give the Court jurisdiction the offence must be committed within its jurisdiction, in the trial of an offence under s. 486 of the Penal Code not only must it be shown that the accused has in his possession for sale or any purpose of trade or manufacture goods with a counterfeit trademark, but also that the sale, &c., is intended to take place within the jurisdiction of the Court in which the trial is to be held.

No one appeared on behalf of the opposite party.

The judgment of the High Court (BANERJEE and WILKINS, JJ.) is as follows:—

JUDGMENT.

This is an application under s. 439 of the Code of Criminal Procedure, asking us to set aside an order of the District Magistrate of Howrah directing the Deputy Magistrate to proceed with the trial of a case in which the accused has been charged with an offence punishable under s. 486 of the Indian Penal Code, and which the Deputy Magistrate had dismissed for want of jurisdiction.

The ground upon which the Deputy Magistrate held that he had no jurisdiction to try the case is given in his judgment in the following words: After referring to s. 486 of the [640] Penal Code, the learned Deputy Magistrate says: "Now, as I understand and interpret this section, I think this Court has no jurisdiction to try this case. The section says: "Whoever

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* Criminal Revision, No. 120 of 1898, made against the order of F. W. Duke, Esq., District Magistrate of Howrah, dated the 2nd of February 1898.

sells or exposes or has in possession for sale or any purpose of trade or manufacture any goods, &c." Now, looking to the evidence adduced, admittedly the tins of ghee were on transit from Etawah to Rangoon, and they were not intended for sale or any purpose of trade in Howrah or any place within its jurisdiction. Sale is one of the principal ingredients, as I think, to constitute an offence under this section. If those tins of ghee are intended for one's own consumption or as presents to others, then, I think, the accused can hardly be amenable. Taking this view of the law, I determine that this Court has no jurisdiction to try this case which is accordingly dismissed and the accused discharged under s. 253 of the Criminal Procedure Code."

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Thereupon an application was made to the District Magistrate, who has directed a further inquiry under s. 435 of the Code of Criminal Procedure, but his order must be taken to have been made under s. 43, though he refers to s. 435. And the view taken by the District Magistrate is that the Howrah Court has jurisdiction, because within the jurisdiction of the Howrah Court, the accused had the goods in his possession for the purposes of sale, though the sale was intended to take place, not in Howrah, but in Rangoon.

The contention urged by the learned counsel for the petitioner before us is, that in order to give the Court jurisdiction to entertain the case, the offence must be committed within its jurisdiction, and when the offence is constituted by the accused having in possession for sale any particular goods, not only must his having the goods in his possession occur within the jurisdiction of the Court in which the case is brought, but the possession must be for sale, which also must be intended to take place within the jurisdiction of the Court.

We are not prepared to accept this contention as correct. It is quite true that before the possession of goods with a counterfeit trade-mark can be held to constitute an offence under s. 486, it must be shown that such possession was for sale or any [641] purpose of trade or manufacture. But there is nothing in the law to show that the sale, for the purpose of which the accused has the goods in his possession, must be intended to take place within the jurisdiction of the Court in which the complaint is lodged. It may be that the goods are found in possession of the accused within a particular jurisdiction, and the accused has them in his possession for sale in a different jurisdiction; and in such a case it cannot be said that, before the goods reach the place where they are intended to be sold, the possession of the goods by the accused does not constitute any offence.

It was urged that, if this view was correct, it would give any number of Courts exercising jurisdiction at any distances from the place where the goods are ultimately intended to be sold, jurisdiction to try the case.

Though that may be so, we do not see how that supports the view contended for by the learned counsel. We may observe that the provisions of s. 182 of the Code of Criminal Procedure go to show that the policy of our law is to authorize more Courts than one to try an offence to this kind.

If the view taken by the learned Deputy Magistrate was correct, that would go, not so much to show that the Magistrate had no jurisdiction to try the case, as to show that no offence was committed until the goods in question reached the jurisdiction within which they were intended to be sold. That view cannot, in our opinion, be correct.

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We are asked to determine, and we must for the present determine the case upon the view of the facts as disclosed in the orders of the Courts below; and upon that view we must hold that the Howrah Court has jurisdiction to try the case.

In making these observations we wish it to be understood that we do not determine any question of fact in the case. For the foregoing reasons we refuse this application.

S. C. B. *Application refused.*

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[642] ORIGINAL CIVIL.

Before Mr. Justice P. O'Kinealy.

WILLIAM ROBERT FINK *v.* MOHARAJ BAHADUR SINGH.*
[19th and 30th April, 1898.]

Practice—Receiver—Power to sue in his own name—Code of Civil Procedure (*Act XIV of* 1882), s. 503—*Trust-deed to liquidate debts—Non-communication of trust-deed to creditors —Limitation—Limitation Act* (*XV of* 1877), s. 10.

The Court has authority, under s. 503 of the Civil Procedure Code, to confer on a receiver the power to sue in his own name: and if the order appointing the receiver gives him liberty, he may do so.

D. S. executed a trust-deed, whereby he made over his property to trustees to manage his affairs and liquidate his debts in manner therein directed. The deed contained this provision: "In order to prepare a list of my debts, the trustees shall ascertain the same by looking into my books of accounts; and they shall not admit any debt without *rokur*, *hath chitta*, or *hundi* bearing the signature of myself or my *monib gomostas*, or without decree."

Held, in the absence of evidence that this deed was communicated to the creditors, that it did not create a trust in favour of the creditors, but enured only for the benefit of the executant; that therefore the plaintiff, a creditor, was not entitled to rank as a beneficiary under it; and that it did not create a trust in his favour so as to take out of the operation of the Limitation Act a claim that otherwise fell within it.

[Rel., 34 C. 305 = 5 C.L.J. 270; R., 56 P.R. 1913 = 247 P.L.R. 1913]

THE following statement of the facts of this case is taken from the judgment of O'KINEALY, J.:—

This was a suit to recover the amount of three *hundis*, all, dated the 30th of May 1893, drawn by Rai Dhunput Singh upon himself in the name of his firm at Calcutta, and payable to one Sew Bux Sureeka.

One of these *hundis* is for the sum of Rs. 1,200 payable 180 days after date, and the other two are for the sum of Rs. 2,500 and Rs 383-11, respectively, each payable 360 days after date.

Sew Bux Sureeka died some time in the year 1896, and a suit for the administration of his estate was instituted in this Court. By an order made in that suit on the 28th of January 1897, the plaintiff was appointed receiver of the moveable property, and of the [643] rents, issues and profits of the immoveable property belonging to the estate of Sew Bux Sureeka, with power to get in and collect the outstanding debts and claims due to the estate, and with all the powers provided for in s. 503, cl. (*d*) of the Code of Civil Procedure with certain exceptions which are not material for the questions which arise in this suit; and the order further provided that the receiver should have power to bring and defend suits in his own

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* Original Civil Suit No. 352 of 1897.

name. By a further order, dated the 6th of May 1897, the plaintiff was given liberty to institute a suit in this Court in respect of the three *hundis* above mentioned, and in pursuance of this order the present suit was brought.

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In the month of February 1893, before the *hundis* were drawn, Rai Dhunput Singh was adjudicated an insolvent at the instance of one of his creditors under the provisions of the Act for the relief of insolvent debtors at Calcutta; but this adjudication was afterwards set aside on the ground that Rai Dhunput Singh had not committed any act of insolvency. On the 19th of July 1896, he executed a deed of trust by which he conveyed all his property to the defendants Gopi Chund Bathra, Surji Kumar Adhicary and Kirut Chund Srimal, as trustees, upon certain terms and conditions contained in the deed. On the 21st day of September 1896, Rai Dhunput Singh died, leaving him surviving the defendant Moharaj Bahadur Singh his sole heir under the Hindu law.

In the plaint as originally drafted the plaintiff set forth the above circumstances and prayed for judgment for the amount due upon the *hundis* and the costs of the suit. When the case was opened before me the plaintiffs' counsel, being pressed with the question of limitation as regards the amount of the *hundi* for Rs. 1,200, contended that that question did not arise as the defendants, the trustees, were constituted express trustees for him and the other creditors of Rai Dhunput Singh under the provisions of the deed of trust, and were bound to pay him the amounts due upon all the *hundis*. It was objected by the counsel for the defendants that this claim was not put forward in the written statement, and that he was taken by surprise owing to its being brought forward at the time it was. I thought the objection a reasonable one, and allowed the suit to be adjourned for the purpose **[644]** of having the plaint formally amended so as to raise the contention.

That has been done, and now in answer to the plaintiff's suit the defendants say:—

(1) That the plaintiff cannot sue in his own name; (2) that under the trust-deed, the trustees are not trustees for the plaintiff or the other creditors of Rai Dhunput Singh; and (3) that the claim on the *hundi* for Rs. 1,200 is barred by art. 69 of the second schedule to the Limitation Act, 1877. It was also contended that no relief could be granted to the plaintiff under the deed of trust in this suit as framed; but I do not think it is necessary to consider a defence which, if successful, would involve a further amendment of the plaint, or the dismissal of the suit on what may be called a technical ground, as I am of opinion that the second ground of defence taken by the defendants is a sound one.

Mr. *R. N. Mitter* and Mr. *J. N. Banerjee* for the plaintiff.—The claim on the *hundi* for Rs. 1,200 is not barred; the trust-deed saves limitation. Before these claims were brought, Dhunput Singh made over his property to the trustees. The plaintiff is entitled to look to the trustees for payment just as he would to Dhunput Singh, but for the trust-deed. He was not a party to the deed; but he was informed of it, and he forbore to sue in consequence, but that forbearance does not entitle the defendant to plead limitation.

Next, as to the frame of the suit: as a general rule, no doubt, a receiver may not sue in his own name only—*Wilkinson* v. *Gangadhar Sirkar* (1); but in the present case, the order appointing the receiver

(1) 6 B.L.R. 486.

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expressly gave him power to sue in his own name or in the names of the parties to the suit, and the defendant must be bound by that order.

Mr. *J. G. Woodroffe* for the defendant.—The question is, what is the meaning of the order? It means that the receiver may bring the suit, but must do so in the names of the parties. The order giving leave to sue may be binding, and yet objections [645] may be taken to the form of the suit when brought. [O'KINEALY, J.—Appeals constantly come up to the High Court from the Mofussil Courts where a receiver has sued in his own name.] No doubt. There may be cases where the receiver could be the only proper person to sue. But in England the rule is that a receiver cannot sue in his own name.—*In re Sacker* (1) [O'KINEALY, J.—It is such a convenience to suitors for the receiver to sue in his own name. Some of the parties may be dead; and if the receiver is to use the names of the parties, he would have to get the suit revived. But if he sues in his own name, no such difficulties arise.] No doubt; but the authorities are against it. In one case Phear, J., held that the meaning of an order empowering the receiver to sue was that he may bring the suit, but must use the names of the parties. I submit he must do so, because a receiver has no proprietary or other interest in the property.

But there is another difficulty in the way of this creditor; and that is, that according to the rule in the case of *Garrard* v. *Lord Lauderdale*(2), this deed does not create a trust that he could enforce. The deed is merely a direction charging the estate with payment of debts; it was executed solely for Dhunput Singh's own benefit; and there is not a word in it to indicate that it was for the benefit of anybody else.

Section 10 of the Limitation Act applies only to a suit to follow property. This is really a suit for the administration of a trust; it cannot be a suit to follow trust property in the hands of the receiver, because the plaintiff has no interest to recover. [Mr. *Mitter*—We also rely on *Suddasook Kootary* v. *Ram Chunder* (3).] In this case there has been no charge of any specific property for the discharge of any specific debt. The question is, what is a debt? Did Dhunput Singh direct the trustees to pay all debts, whether barred by limitation or not? Can he be said to have created by this deed a greater liability than existed before its execution? There is nothing to indicate any such intention.

Mr. *J. N. Bannerjee* in reply.

JUDGMENT.

[646] O'KINEALY, J. (after stating the facts as above set forth) continued as follows:—

The first question I have to consider is whether the plaintiff can maintain this suit in his own name; and I am of opinion that he can. The orders by which he was granted liberty to institute this suit gave that power to him in express terms, and the authority to give that power is, in my opinion, conferred on the Court by the provisions of s. 503 of the Code of Civil Procedure. By that section the Court has power to grant to the receiver "all such powers as to bringing and defending suits and for the realisation, management, protection, preservation and improvement of the property, the collection of the rents and profits thereof, the application and disposal of such rents and profits, and the execution of instruments in

(1) (1889) 23 Q.B.D. 179. (2) (1830) 3 Sim. 1. (3) 17 C. 620.

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writing as the owner himself has ;" and I read that as meaning that power is conferred upon the Court to substitute the receiver for the owner for those purposes, always supposing that the ownership of the property is completely represented in the suit in which the receiver is appointed. I am not disposed to put a narrow construction on this part of s. 503, as it is often a great saving of time and trouble, so far as the receiver is concerned, and of expense to the estate in his hands, that he should have the power of bringing and maintaining suits in his own name. That the Court can give such a power is treated as clear by Mr. Justice Wilson in the case of *The Oriental Bank* v. *Gobind Lall Seal* (1).

The next question is, taking the plaintiff to be a creditor of Rai Dhunput Singh in respect of a debt existing at the time the deed of trust was executed, can he claim that he and the other creditors are beneficiaries under that deed, and can he call upon the Court to have the trusts contained in it administered for their benefit? I am of opinion that he cannot. This is a question depending upon the construction of the deed and the conduct of Rai Dhunput Singh and his creditors upon and after its execution.

In that document Dhunput Singh gives his reasons for [647] executing it. He says: "I was adjudicated an insolvent by an order of the Hon'ble High Court, Original Side, at Calcutta in its Insolvent Jurisdiction, dated the 16th day of February, year 1893, in consequence of which I became heavily involved in debts. I have managed to pay off many of the debts by sale and mortgage of properties; but there is still left a large amount of debts, and in order to pay off those debts to the best of my ability it is necessary for me to make some arrangement. Being myself troubled in body and mind, I am unable to manage (my) affairs properly any longer, and most of my creditors are desirous that I should make over the estate into the hands of trustees with a view to liquidation of my debts. For these reasons I make over all my moveable and immoveable properties, that is to say, whatever properties I am at present possessed of, to Srijoot Gopi Chund Bathra, son of the late Fakir Chund Bathra of Asimgunj, by caste Aswal, by occupation service holder, and Srijoot Kerut Chund Srimal, son of the late Mungni Ram Srimal and Srijoot Surji Kumar Adhicary, son of the late Bhogoban Chunder Adhicary, at present of Baloochur, by caste Brahmin, by occupation service holder, by appointing them trustees." That is to say, ill-health and mental anxiety having unfitted him for carrying out the works of paying off all his debts —a work which he himself had carried on up to that time—and his creditors being desirous that that should be carried on by the trustees, he appoints the trustees to carry on that work to completion. In other words, they are put in the place of Dhunput Singh himself so far as he could do so, and occupy the same position towards the creditors, and that position was certainly not that of a trustee. The deed then directs the manner in which the trustees are to proceed for the purpose of liquidating his debts and recovering his outstandings, and declares that neither himself nor his heirs shall have power to interfere with the acts of the trustees, until all his debts shall have been paid. This last clause was strongly relied on by the plaintiff as showing an intention to create a trust for the creditors. It is equally consistent with the case for the defendant. It is, I think, nothing more than a clause confirming the trustees in the powers given to them by the deed. Then there is this provision: "In order to

1) 10 C. 710 (733).

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prepare a list of my debts, the trustees shall ascertain the same [648] by looking into my books of accounts; and they shall not admit any debt without *roka*, *hatchitta* or *hundi*, bearing the signature of myself or my *monib gomastas*, or without decree." This shows that the creditors were to be ascertained on a future investigation to be made by the trustees in accordance with certain tests laid down by which they were to be guided. It seems to me that this provision is against the plaintiff's contention, for it shows that every person who claimed to be a creditor of Rai Dhunput Singh at the date of the deed was not intended to be provided for by it, but only those whose debts should have been ascertained in the manner of investigation pointed out in the deed. There is no evidence before me that any such investigation has ever been undertaken. I think that the true way to look at this provision is, to take it as indicating the course of proceeding which the trustees were to take, not for the purpose of finding out their beneficiaries but for the purpose of liquidating the debts on behalf of Rai Dhunput Singh their real and only beneficiary. The remaining provisions of the deed point in the same direction. I do not see any indication that these trustees were intended by Rai Dhunput Singh to be trustees for his creditors; in my opinion they were and were intended to be (so far as I can gather his intention from the construction of the deed) trustees for himself for the purpose of carrying out the provisions of the deed of trust, and that he was, and his heir is, the only person who under the terms of that deed could call the trustees to account as trustees. There is no evidence before me to show that the deed of trust was communicated to the creditors, or that any of them accepted the position of beneficiaries under it. The evidence given by Heera Lall, the *gomasta* of Shew Bux Sureeka, is too shadowy to be relied upon as establishing the existence of any trust for the creditors or for Shew Bux Sureeka. This case is one of a class the best known example of which is *Garrard* v. *Lord Luaderdale* (1).

According to the view I have taken of this case the plaintiff cannot claim to rank as a beneficiary under the deed of the 19th of July 1896, and he is, therefore, not entitled to say that his [649] claim on the *hundi* for Rs. 1,200 is not subject to the ordinary law of limitation.

The result is that the plaintiff's suit fails as regards the *hundi* for Rs. 1,200, but he is entitled to a decree for the amount of the other two *hundis*, with interest at 6 per cent. per annum down to the filing of the plaint, together with the costs of the suit and interest on decree. The decree will be against the defendant Moharaj Bahadur Singh as the legal representative of Rai Dhunput Singh for the amount indicated above to be paid out of the property of Rai Dhunput Singh. I shall make no order as to the costs of the trustees. They did not sever in their defence from the infant, and there is no doubt that the estate of Dhunput Singh has benefited by the amount of the *hundi* for Rs. 1,200 being barred by limitation.

It must be understood that, although I give no relief to the plaintiff as against the trustees, I do so on the ground that the deed did not constitute them trustees for him, but trustees for Rai Dhunput Singh of the property included in the trust-deed. I decide nothing further as between the plaintiff and the trustees, and all questions which may arise between

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(1) (1830) 3 Sim. 1.

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25 C. 642 = 2 C.W.N. 469.

them regarding the execution of the decree in the suit remain untouched by me.

Attorneys for the plaintiff : Messrs. *Kally Nath Mitter* and *Sarbadhicarry.*

Attorney for the defendant: Babu *B. N. Bose.*

H. W.

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25 C. 649.

ORIGINAL CIVIL.

Before Mr. Justice P. O'Kineally.

FOOLCOOMARY DASI *v.* WOODOY CHUNDER BISWAS.*
[22nd April and 4th May, 1898.]

Practice—Consent decree, Setting aside—Motion.

A consent decree cannot be set aside on motion on the ground that it was obtained by fraud and misrepresentation. A separate suit must be brought for that purpose. Charges of fraud cannot properly be tried upon affidavits.

Gilbert v. *Endean* (1); *Huddersfield Banking Company, Limited* v. *Henry Lister & Son, Limited* (2); and *Ainsworth* v. *Wilding* (3) applied.

[R., 3 C.L.J. 119; 13 C.W.N. 1197 = 10 C.L.J. 420 = 2 Ind. Cas. 129.]

[650] THE facts of this case were stated by O'Kinealy, J., as follows :—

This is a suit which arose out of the will of one Kedar Nath Ghose, who died in Calcutta, on the 15th of June 1893. By his will, which was made on the 14th of May 1893, he appointed his wife, the plaintiff, Foolmoni Dassee, and his cousin, the defendant, Woodoy Chunder Biswas, executrix and executor; dedicated all his properties to the worship of a *Thakoor* established by himself; directed that a sum of Rs. 6,500 which he had borrowed on mortgage of his dwelling house should be paid off; appointed the plaintiff and the defendant to be *shebaits* of the *Thakoor*; directed that his wife should have suitable residence, and an allowance of Rs. 15 a month; granted allowances to the defendant as *shebait*, and to others mentioned in the will; directed that his executrix and executor should consult his friends Baboo Bhupendra Nath Bose and Baboo Okhoy Koomar Bose in case of a difference of opinion between them; and gave power to these gentlemen to control the *shebaits* in the management of the debutter estate.

On the 11th of January 1894 the plaintiff and the defendant obtained probate of the will; but shortly afterwards disputes arose between them, and this dispute led to the institution of this suit on the 22nd of August 1895. In her plaint, the plaintiff brought various charges of misconduct against the defendant, and prayed for the construction of the will, administration of the estate, an injunction and a receiver, and other relief which it is unnecessary to specify. On the 6th of September 1895, Mr. Belchambers was appointed receiver of the estate of the testator Kedar Nath Ghose. Nothing further seems to have been done in the suit till the 8th of September 1896, when a petition signed and verified by the plaintiff was presented to this Court on her behalf praying that a decree might be made in this suit on the terms stated in the petition, and that the receiver

* Original Civil Suit No. 519 of 1895.

(1) (1878) L.R. 9 Ch.D. 259. (2) (1895) 11 Ch. 273. (3) (1896) 1 Ch. 673.

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might be discharged and directed to hand over possession of the estate to one Poshupati Nath Bose. The prayer of the petition was consented to by the defendant's attorney, and Poshupati Nath Bose also signed a statement made at the foot of the petition consenting to act as the trustee of the estate of Kedar Nath Ghose. No order was entered on the [651] petition itself, but on the same day a decree was made with the consent of the attorneys for the plaintiff, and of the defendant, and of Poshupati Nath Gose in person, on the terms contained in a schedule annexed to the decree, those being the terms set out in the plaintiff's petition.

It is unnecessary to refer to those terms at any length. They follow to a certain extent the scheme of the testator's will. The distinguishing feature of the arrangement is that the receiver is to be discharged and the entire management of the testator's estate placed in the hands of Poshupati Nath Bose, who is to provide for payment of the debts and legacies, and the cost of this suit. The plaintiff's and the defendant's respective turns of worship as *shebaits* are also arranged for, and they are made responsible to the trustee for negligence in performing their duties as *shebaits*.

On the 1st of March last the plaintiff presented a petition to this Court, in which she prayed that the decree of the 8th September should be set aside, and the estate of the testator retained in the hands of the receiver appointed by the Court, and that her attorney in the suit, Babu Preo Nath Sen, should be prohibited from further acting for her. In this petition she alleges that she did not come to know of the decree of the 8th of September 1896 until recently, that her signature to the petition of the 8th of September was obtained by fraud and misrepresentation on the part of Poshupati Nath Bose and the defendant Woodoy Chunder Biswas, and she charges that her own attorney conspired with those persons for the purpose of defrauding her.

The plaintiff appeared in person.

Mr. *R. N. Mittra* appeared on behalf of the defendant.

Mr. *Jackson* and Mr. *Allen* for Poshupati Nath Bose, and Mr. *Pugh* on behalf of Preo Nath Sen.

Mr. *Mittra.*—This consent decree is said to have been obtained by fraud and misrepresentation; it was made on the 8th September 1896, and yet, during the whole of 1897, no steps were taken to impugn it. There is no definite statement as to when the plaintiff discovered the alleged fraud. But even if the decree was obtained by fraud and misrepresentation, it cannot be [652] set aside on a motion; a separate suit must be brought—*Huddersfield Banking Company, Limited* v. *Henry Lister & Son, Limited* (1); *Ainsworth* v. *Wilding* (2).

C.A.V.

ORDER.

O'KINEALY, J. (after stating the facts as above set forth).—The matter came before me once or twice with reference to an application by the plaintiff to be allowed to appear through an attorney other than Babu Preo Nath Sen, her attorney in this suit. That application I granted; and at my suggestion that the nature of the application was such, (involving as it did the professional conduct of an officer of the Court), that it should be disposed of without delay, the parties agreed that the matter should come on before me on Saturday, the 16th April. On that day there was not sufficient time to deal with it completely; and I directed

(1) (1895) 11 Ch. 273 (276). (2) (1896) 1 Ch. 673.

it to be placed on the ordinary cause list without prejudice to the right of the defendant Woodoy Chunder Biswas to raise the contention that the application was not one that I could entertain.

Babu Preo Nath Sen, Poshupati Nath Bose, and the defendant Woodoy Chunder Biswas all filed affidavits in answer to the charges brought against them in the plaintiff's petition, and when the matter came on for hearing Mr. Mittra, who appeared for the defendant Woodoy Chunder Biswas, contended that I could not go into charges of this nature or set aside the decree, in a proceeding of this kind, and that the plaintiff's only remedy is to file a regular suit to have the decree set aside on the ground of fraud. I am of opinion that that contention is correct.

I do not think it is a proper mode of procedure to try charges of fraud and misrepresentation on affidavits in an application of this kind. I think the only satisfactory method of dealing with them is in a regular suit brought for the purpose, and that is the course which, it is laid down, should be followed in such cases in the High Court of Judicature in England under the Judicature Acts. In *Gilbert* v. *Endean* (1), **[653]** it was the opinion of the Master of the Rolls, Sir George Jessel, that a dispute as to whether a compromise ought to be set aside on the ground of misrepresentation or concealment of material facts ought to be decided in a new action. In a debenture-holder's action against Henry Lister & Son, Limited, a consent order was sought to be set aside on motion by one of the parties to the order on the ground of mistake as to material facts; but Mr. Justice Vaughan Williams refused to deal with the matter on motion, and an action had to be brought to have the order set aside—*Huddersfield Banking Company* v. *Henry Lister & Son* (2). In *Ainsworth* v. *Wilding* (3), which was a suit by a second mortgagee against a first mortgagee and other defendants, a decree for an account was made by consent; and the first mortgagee afterwards moved to set aside that decree on the ground that the consent of the parties thereto was given by mistake. Mr. Justice Romer refused the application with costs, on the ground that the proper remedy of the applicant was to bring a fresh action. These cases are stronger than the one I am dealing with, which is based on charges of fraud and misrepresentation of the gravest character. I therefore refuse the application with costs.

Mr. Pugh, who appeared for Babu Preo Nath Sen, asked me to decide upon the affidavits before me, whether there was any ground for the charges which the plaintiff has brought against his client. I think I had better express no opinion on that question, for if I should come to the conclusion that the charges made against Babu Preo Nath Sen are frivolous, and express that opinion, that might hamper the plaintiff in taking further proceedings should she be advised to do so.

Attorney for the plaintiff (on this application): Babu *Bepin Behary Bonnerjee.*

Attorney for the defendant: Babu *O. C. Gangooly.*

Attorney for Poshupati Nath Bose: Babu *S. C. Mitter.*

Application refused with costs.

H. W.

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(1) (1878) L.R. 9 Ch. D. 259. (2) (1895) 11 Ch. 273 (276). (3) (1896) 1 Ch. 673.

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25 C. 654 = 2 C.W.N. 423.

25 C. 654=2 C.W.N. 423.

[654] SMALL CAUSE COURT REFERENCE.

Before Sir Francis William Maclean, Kt, Chief Justice, Mr. Justice Macpherson and Mr. Justice Trevelyan.

CUTLER PALMER & CO. *v.* THE BRITISH INDIA STEAM NAVIGATION CO., LD.* [16th March, 1898.]

Bill of Lading—Shipping Company, Liability of.

A Shipping Company is *prima facie* bound to deliver goods in good order and condition, but this obligation is subject expressly to the conditions inserted in the Bill of Lading. Where a cask of brandy was shipped at Madras in good order and condition, but on arrival at Calcutta was found to be empty.

Held, that the Company were protected by the special words inserted in the Bill of Lading "Hogshead brandy covered with gunny, not responsible for condition and contents."

THE facts of this case appear sufficiently from the case stated for the opinion of the High Court by E. W. Ormond, Officiating Chief Judge of the Small Cause Court, dated 3rd June 1897 :—

"The plaintiffs sue for damages for the non-delivery of a hogs-head of brandy shipped by them on one of the defendants' steamers from Madras to Calcutta under the Bill of Lading, which is hereto annexed.

The cask of brandy was put on board at Madras in good order and condition, but on arrival at Calcutta the cask was found to be *empty* with one stave broken across.

The question which I have the honour to submit for your Lordships' opinion is whether, upon a proper construction of the manuscript clause at the foot of the Bill of Lading, "hogshead brandy covered with gunny, not responsible for condition and *contents*," the defendants are exempted from all liability in respect of this cask of brandy or not.

The defendants are admittedly not governed by the Indian Carriers' Act, and can, therefore, contract themselves out of anything. I held that they were protected under the manuscript [655] clause, but not otherwise. Mr. *Graham*, for the plaintiffs, argued that this clause, in effect, meant no more than the ordinary clause "condition and contents unknown," or that the defendants did not hold themselves responsible for the then actual condition and contents of the cask, but I think some weight should be attached to the word "responsible," and to construe the clause as exempting the defendants from responsibility for the then actual condition and contents of the cask only would be giving no legal effect to the clause, for the defendant's responsibility could only begin from that time, *i.e.*, when the cask was taken on board, whereas the whole tenor of the Bill of Lading is to specify the defendants' responsibility as at the time of delivery to the consignee. Moreover, in the previous portion of this clause (the "casks in bad condition" were some casks of beer shipped with this hogshead of brandy) the words "not responsible for leakage" would naturally refer to leakage which might occur whilst the casks were in defendants' charge and were probably meant to emphasise the condition in small print "The company is not to be responsible for............leakage," which, from the context, is clearly not limited to leakage which might have occurred before the casks were put on board. For these reasons I held that the words "not responsible for condition and contents" absolved the defendants from all liability for the condition and contents of this cask

* Small Cause Court Reference No. 2 of 1897.

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of brandy so long as it remained in their charge. I dismissed the suit accordingly, but at the request of plaintiffs' counsel I made my judgment contingent upon the opinion of the High Court as to the construction to be placed upon the above manuscript clause.

If your Lordships are of opinion that the meaning of the said clause was to exempt the defendants from liability for the condition and contents of this cask of brandy, whilst it remained in their charge, the suit will stand dismissed; otherwise there will be a decree for Rs. 500.

The Bill of Lading was as follows:—

British India Steam Navigation Company, Limited.

Shipped, in good order and well conditioned, by Messrs. Cutler Palmer & Co., in the Steam Ship *Kerbela* Commander, or [656] whoever else may be placed in command for this present voyage, and now lying in Madras, and bound for Calcutta and intermediate ports—

C.P. & Co. — 1 H. hd. Brandy, covered with gunny.

Do.—3 Casks Ale, Roping.

Calcutta.

4 Four only.

being marked and numbered as in the margin, and are to be carried and delivered subject to the conditions aftermentioned including those at the foot of this Bill of Lading in the like good order and well conditioned, at the port of Calcutta.

The act of God, the Queen's enemies, restraint of princes or rulers, pirates or robbers by sea or land, accidents, loss and damage from vermin, barratry, jettison, collision, fire, accidents to, or defects latent or otherwise in hull, tackle, boilers, or machinery or their appurtenances, steam, and all the perils, dangers, and accidents, of the sea, rivers, land, carriage, and steam navigation of whatsoever nature and kind; and accidents, loss or damage from any act, neglect or default whatsoever of the pilot, master or mariners or other servants of the Company, or from any deviation, excepted; with liberty to sail with or without pilots, and tow and assist vessels in all situations and circumstances; and the Company are to be at liberty to carry the said goods to their ports of destination by the above or other steamer or steamers, ship or ships either belonging to the Company or to other persons, proceeding either directly or indirectly to such port; and in so doing to carry the goods beyond their port of destination, and to tranship or land and store the goods either on shore or afloat, and re-ship and forward the same at the Company's expense, but at merchant's risk; and with liberty also, at the like risk, to deviate for any purpose from above voyage, and to call and stay at any ports or places whether in or out of the usual course of the voyage, and in any order, and for any purpose or at any time whatsoever unto Cutler Palmer & Co., or to his or their assigns. Freight for the said goods at the rate of has been paid in Madras by the shippers as per margin, steam ship lost or not lost.

[657] In witness whereof the Commander or Agents of the said Steam Ship have affirmed to one Bill of Lading.

Dated at Madras on 18th August 1896.

N. B.—The goods are shipped and this Bill of Lading granted subject to the following express conditions:—Any claim for short delivery of or damage done to goods, and all other claims whatsoever, to be made at port

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of discharge, or at ports of Calcutta or Bombay, and at no other port; payment of claims to be made at port of shipment or discharge at Company's option.

No claim for damage will be admitted unless notified in writing before the goods are removed.

No claim for short delivery will be entertained unless made within one month after the delivery of any portion of the goods entered in this Bill of Lading.

This Bill of Lading is issued subject to the following conditions :—

Weight, contents, and value when shipped unknown. The Company is not to be responsible for damage, evaporation, of effects of climate or heat of holds, leakage or breakage, or other consequences arising from the insufficiency of the address or package: or for the condition or contents of re-exported package.

The Company reserves the right of charging freight by weight, measurement, or value, and of re-measuring or re-weighing the same, and charging freight accordingly before delivery. Freight on dates, fruit, and perishable produce to be paid on the weight shipped; and no allowance will be made for wastage on the voyage.

The Company does not guarantee that the Steamers shall have room at ports of transhipment, or that there shall be no delay there.

Packages weighing more than 3 cwt. (excepting bales and boxes of manufactured goods) are only carried at advanced rates of freight and by special agreement.

The Company shall have a lien for freight unpaid on these goods, or upon any portion of the goods covered by the Shipping order granted in respect thereof, which may not have been **[658]** shipped, and for any charges herein stipulated to be borne or customarily borne by owners of goods.

Should all or any part of the within goods not be found, or if from bad weather or other cause the goods cannot be landed during the steamer's stay at port of destination, the Company reserves the right to convey same to the next or the final port of the voyage, to be returned thence at the Company's expense but at the merchant's risk; and should necessity arise for detaining and storing the goods, it shall also be done at the Company's expense, and the merchant's risk; and the Company shall not be answerable for any delay occasioned, or for loss of market.

The Company will not be accountable for gold, silver, bullion, specie, jewellery, precious stones, platedware, or other valuables, or beyond the amount of five hundred rupees for any one package, or relatively for any portion thereof, unless a declaration of the value of such goods has been made prior to shipment, and special shipping orders granted for same, with which the Bill of Lading shall correspond. A wrong description of contents or false declaration of value shall release the Company from all responsibility in case of loss, seizure or detention, and the goods shall be charged double freight on the real value; which freight shall be paid previous to delivery. If medicinal fluids or any other goods of an explosive, inflammable, damaging or dangerous nature are shipped without being previously declared and arranged for, they are liable, upon discovery, to be thrown overboard, and the loss will fall upon shippers or owners of such fluids or goods. The shippers will not only be liable to the penalties imposed by statute, but also for all damage sustained in consequence of such shipment.

The goods are to be distinctly marked with the marks, numbers and port of destination, or the company is not to be responsible for detention or wrong delivery. 1898 MARCH 16.

Bill of Lading must be presented and delivered up cancelled before delivery of goods can be granted.

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The Company to have the option of delivering these goods into receiving ship or landing them at consignee's risk and [659] expense, as per scale of charges to be seen at the Agent's offices, the company having a lien on all or any part of the goods, against expenses incurred on the whole shipment. The company's liability shall cease as soon as the packages are free of the ship's tackle, after which they shall not be responsible for any loss or damage, however caused. If stored in receiving ship godown or upon any wharf, all risks of fire, dacoity, vermin or otherwise, shall lie with the merchant, and the usual charges shall be paid before delivery of the goods. Fire Insurance will be covered by the company's agents on application.

25 C. 654 = 2 C.W.N. 423.

Specie, gold, silver, bullion, jewellery, precious stones, platedware, or other valuables will not be landed by the company. They can only be delivered on presentation of Bills of Lading on board, and will be carried on at consignee's risk, if delivery is not taken during the steamer's stay in port

In case of quarantine, goods may be discharged at risk of the owners of the goods into quarantine depôt, lighter, barge, hulk, or other vessel, as required for the ships despatch; quarantine expenses upon the goods of whatever nature or kind shall be borne by the owners of the goods.

Delivery by the company of packages externally in good condition as received shall be conclusive evidence of delivery of full weight and contents.

Shippers are requested to note particularly the terms and conditions of this Bill of Lading with reference to the validity of their insurance upon their goods.

Receipt does not state mark; casks in bad condition, not responsible for leakage. Hogshead Brandy covered with gunny, not responsible for condition and contents.

W. STUART,
For Agents.

(*On back.*)

Received in part (2) two casks Ale in good order and condition.

N. N. ROY.

Received in full (2) two casks Beer and Whisky, condition as per certificate granted.

22-9-96.

NOGENDRANAUTH ROY.

[660] Mr. *O'Kinealy*, for the plaintiffs.—The shipping company say we will not be responsible for what the cask contains, but whatever it contains they must deliver it. They say we will not be responsible for the contents, but whatever we get from you we will deliver. *Grenon* v. *Luchmeenarain Augurwallah* (1), *The Peler der Grosse* (2). They say in the Bill of Lading why they are not to be responsible for the condition and contents, but the Judge cannot read the clause as if it were "non-delivery" or "short delivery." Here nothing was delivered: the contents had all escaped. All the ship owner says is I don't know what is in this parcel. I am not to be bound by saying it is a hogshead of brandy in 1st

(1) 23 I.A. 119, (125). (2) (1875) L.R. 1 P.D. 414.

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part of the Bill of Lading, because I have not examined it: but I engage to carry it safely to its destination whatever it is. I shall deliver it to you as I got it. If the shipowners were contracting themselves out of all responsibility they would use appropriate words. Here the words "not responsible for condition and contents" does not free the shipowners from all responsibility if the contents are lost on the voyage or while in their charge.

Mr. *Henderson*, for the defendants —The words in the Bill of Lading are as general as possible. They may have put in these words because the hogshead was covered with gunny. A carrier is entitled to exempt himself in any way provided the Bill of Lading is accepted. The words mean that the company will not be responsible whatever happens to the cask, and is not confined only to the state of the cask and its contents at the beginning of the voyage.

The judgment of the High Court (MACLEAN, C.J., and MACPHERSON and TREVELYAN, JJ.) was as follows :—

JUDGMENT.

MACLEAN, C.J.—This case raises a short point, but one not altogether free from difficulty. The question we have to decide appears from the reference made by the Judge of the Small Cause Court and I need not recapitulate the facts. The question really turns upon what meaning we are to attribute to the words, inserted by the defendants in writing in the Bill of Lading, "Hogshead brandy covered with gunny, not responsible for condition and contents." **[661]** I agree with the contention of the plaintiffs that, *prima facie*, the defendants were bound to deliver the goods in good order and so forth. But this obligation is subject expressly to the conditions in the Bill of Lading, one of which is that which I have read. As appears from the finding of fact in the reference, the cask of brandy was shipped at Madras in good order and condition, but on arrival at Calcutta was found to be empty. The question is are the defendants liable for the loss of the brandy? They repudiate such liability, and rely on the condition I have specially referred to.

We must give some effect to these words, which are an essential part of the contract, and it is difficult to see why we should not place their ordinary meaning upon them. If so, it appears to me that the defendants were not to be responsible for the contents of the cask. This special condition was possibly suggested to the defendants by reason of the circumstance that the cask was covered with gunny, and the defendants, the contents being unknown, wished to guard themselves against responsibility for such contents. It is urged that other parts of the Bill of Lading indicate that when the defendants are to be absolved from their *prima facie* obligation to deliver, the Bill of Lading expressly so states, as in cl. 7. Taking that to be so I do not think that any inference to be drawn from such provisions in the Bill of Lading is sufficiently strong to warrant us in not giving effect to the clause I have quoted, reading the language of that clause according to the natural meaning of the words used. In my opinion the Judge of the Small Cause Court was right in the view he took. The defendants must have their costs according to the fixed scale.

MACPHERSON, J.—I agree.

TREVELYAN, J.—I also agree.

Attorneys for the plaintiffs: Messrs. *Dignam & Co.*

Attorneys for the defendants : Messrs. *Orr, Robertson & Burton.*

C. E. G.

25 C. 662=2 C.W.N. 389.

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APPEAL FROM ORIGINAL CIVIL.
25 C. 662=2 C.W.N. 389.

[662] APPEAL FROM ORIGINAL CIVIL.

Before Sir Francis William Maclean, Kt., Chief Justice, Mr. Justice Macpherson and Mr. Justice Trevelyan.

AMRITO LALL DUTT *v.* SURNOMONI DASI AND OTHERS.*
[5th April, 1898.]

Hindu Law—Adoption—Widow—Direction to accumulate—Second adoption.

Where a power to adopt was given by a testator to his widow, who was also the executrix of his Will and to two other executors conjointly:—

Held, that such power was bad. Under Hindu law power to adopt can be given to a widow only, and she has no capacity to adopt save under the express permission of her husband given in his life-time.

Per TREVELYAN, J.—A Hindu testator cannot direct the accumulation of the income of his estate for an indefinite period, if there is no beneficial interest created in the property, in order to render the gift whether under the will or *inter vivos* valid.

By a second adoption a widow divests herself of the mother's estate in the same way that she divests herself of her widow's estate on the first adoption.

[**Affir.**, 27 C. 996 (**P.C.**)=27 I.A. 128; **R.**, 26 B. 449 (470)=3 Bom.L.R. 857; 34 C. 5=11 C.W.N. 65; 15 C.L.J. 97=15 C.W.N. 524=7 Ind. Cas. 427; 16 C.L.J. 304=17 C.W.N. 319=16 Ind. Cas. 817; 9 C.W.N. 1033 (1042); **Cons.**, 13 C.L.J. 85=15 C.W.N. 66=7 Ind. Cas. 921; **D.**, 150 P.R. 1908.]

THIS was a suit for the construction of a will and administration. The testator, Hurry Das Dutt, a wealthy Hindu of the Sudra caste and resident in Calcutta, died in October 1875, leaving a sole widow, the defendant Sreemutty Surnomoni Dasi, and two married daughters, the defendant Sreemutty Premmoni Dasi and Sreemutty Ranimoni Dasi. The first named of these daughters at the time of her father's death had three sons, the defendants Radha Prosad Mullick, and Kassi Prosad Mullick and one since deceased. She also had had two sons born since her father's death, the defendants Peari Lall Mullick and Behary Lall Mullick. The other daughter had no children.

On the 30th of October 1875, the day of his death, Hurry Das Dutt executed his last will. By it he appointed his wife, his father Babu Modusudan Dutt, and his uncle Dwarka Nath Dutt to be his executrix and executors, and of these the testator's wife and uncle alone proved the will. The father apparently never performed any executorial duties or **[663]** intermeddled in the management of the estate, but at the same time he never expressly renounced probate.

On the 9th of August the widow, with the consent of Dwarka Nath Dutt, purported to take a boy of five named Jotipersaud Mullick in adoption as the son of the testator in pursuance of a power in the will mentioned hereafter, but this adopted son died on the 29th of January 1881, when he was only ten years old.

On the 1st of April 1877 the testator's father died and on the 9th of February 1881 the plaintiff's natural father purported to give and the testator's widow purported to take the plaintiff, then a boy of eight, in adoption as the son of the testator, the executor Dwarka Nath Dutt being present on the occasion and consenting. This adoption like the former was intended to be in execution of the power contained in the testator's will, and it was admitted that prior to this action the legality of the adoption had never been called in question, on the contrary the plaintiff had

* Appeal from Original Civil No. 13 of 1897, in suit No. 535 of 1894.

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throughout been brought up and treated as the duly adopted son of the testator. It will here be convenient to refer to those portions of the will especially relevant to the points raised in the case. They are as follows :—

In cl. 2 the testator said :—

"I appoint my wife Sreemutty Surnomoni Dasi, the executrix, and my father Babu Modhusudan Dutt of Mullick's Street aforesaid, and my uncle Babu Dwarka Nath Dutt of Thontoneah, in Calcutta, aforesaid the executors and trustees of this my will."

Clause 8 provides as follows :—

"Whereas having no son born to me of my body I am desirous of adopting one in my lifetime, but in case I depart this life before carrying such my desire into effect I hereby authorize and empower my wife and executrix Sreemutty Surnomoni Dasi, and my executors and trustees to whom I give full permission and liberty to adopt after my decease a son, and in case of his death during his minority or on attaining his full age, and without leaving male issue to adopt a second son, and in case of his death during minority or on attaining such age and without leaving male issue to adopt a third son and no more. In any of the above cases of adoption should the adopted son die, leaving a son or sons, the power of adoption shall cease or remain in abeyance during the life or lives time of such son or sons of such adopted son, but shall revive on the death of such son or sons during minority."

[664] Clause 9 is as follows :—

"I direct my executors and executrix and trustees to pay out of the income and interest of my estate and effects monthly all necessary household expenses as well as for the worship of our family idol Sree Sree Radhagobindjee, and to pay my wife monthly during her natural life for her sole and separate use the sum of Rs. 200 (two hundred) and also the sum of Rs. 50 (fifty) monthly to such adopted son, who shall live and attain his full age of eighteen years; after his so attaining such age of eighteen years during the lifetime of my said wife, provided he remains under her control and bears a good character, and if my said executrix and executors and trustees think fit and are satisfied with his conduct and behaviour and for the purposes of such monthly expenditure my executrix, executors and trustees shall set apart and retain out of the interest and income of my estate a sum sufficient to meet such expenditure for six months and invest the rest and residue of such income and interest in Government securities in their joint names, but in no case shall such adopted son have or exercise any control or dominion over my estate and effects until the death of my wife, after which event I direct my said executors and trustees to make over the whole of my estate and effects both real and personal or immoveable whatsoever and wheresoever and of what nature or quality soever to such adopted son, who shall survive my wife if he shall have attained his age of eighteen years during the lifetime of my wife, or on his so attaining such age after her decease to whom and his heirs I give, devise and bequeath the same. But in case none of such adopted sons survive my said wife, or in case of either surviving my said wife and dying under the said age without leaving a son or sons, I desire and direct my executors after the death of my said wife or the death of such son after her, but under such age of eighteen years without leaving a son or sons to make over and divide the whole of my estate both real and personal unto and between my daughters in equal shares to whom and their respective sons I give, devise and bequeath the same, but should either of my said

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daughters die without leaving any male issue surviving but leaving my other daughter her surviving, then in such case the surviving daughter and her sons shall be entitled to the share of the deceased daughter, or in case of the death of either daughter leaving sons, the share of such daughter is to be paid to such her son or sons, share and share alike."

The 13th clause is in the following terms:—

"I authorise and empower my said executrix, executors and trustees and the survivor of them, and the trustee for the time being of this my will to appoint any other person or persons to succeed them or him in the execution of the trusts of this my will."

Clause 14th appears to have been added as an after-thought, and by it the testator provided as follows:—

"In case of any accident arising to cause my wife to depart her natural **[665]** life before adoption of a male child my surviving executors are empowered to act with my full consent and direction to adopt a male issue."

It will be seen from these provisions that until the death of the widow the surplus income of the testator's residue after providing for certain monthly payments was directed to be accumulated.

It was contended before the first Court that as the adoptive son, and consequently the heir of his father, the plaintiff had an absolute interest in his estate subject only to be divested in certain events, and that as a result he was now entitled to have the whole estate transferred from the trustees to him subject only to adequate provision being made for certain periodical payments and expenses authorized by the will; and it was next contended that in any case he was entitled to the enjoyment of the surplus income of the estate until the widow's death. This contention was opposed on the part of the defendants and the grounds of opposition were; *First*, that there had been no valid adoption of the plaintiff; *secondly*, that the provision for accumulation was valid; and, *thirdly*, that even if there were any interest in the estate which had not been disposed of then in the events which have happened it was on the widow as heiress of the deceased adopted son, and not on the plaintiff, that it had devolved.

For the purpose of disposing of these points the following issues were agreed to:—

First.—Whether the power of adoption is valid at all in law?

Secondly.—If so, was it validly exercised?

Thirdly.—If so, is the plaintiff on the true construction of the will and as the adopted son of the testator entitled—

(*a*) To the surplus income of the property until the death of his adoptive mother;

(*b*) To the absolute interest in the property subject only to the payments mentioned in the will.

His Lordship, Mr. JUSTICE JENKINS, in the lower Court dealt with these issues as follows:—

1. Whether the power of adoption is valid at all at law?

[666] The clauses of the will particularly bearing on this point are 8th and the 14th, both of which I have already read, and the argument urged against the validity of the power is shortly this: It is said that, though a husband can delegate to his widow a power to adopt, still he can delegate it to no one else; consequently it is argued the present power to adopt is bad, because though it is delegated to the widow still it is not to her alone but to her in association with others. Now it is admitted, on the part of the defendants, indeed it is a part of their argument, that

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though the widow's discretion under a delegated power is absolute in the sense that she cannot be compelled to act upon it unless or until she so chooses, still any condition or clog can be imposed upon the exercise by her of this delegated power, and it therefore appears to me that, so far as the association of the two executors was a fetter on the absolute discretion and choice which might otherwise have existed, it cannot have vitiated the power. It may be that the widow alone is capable of performing the actual ceremony of adoption, that her hand alone can receive the child, but I do not find in the phraseology used by the testator any direction requiring or even justifying the inference that he desired or intended that the executors should take a part in the ceremony from which they are incapacitated by the rules of Hindu law.

It is clear from the prefatory recital with which the 8th clause of the will commences, that the testator did desire the adoption of a son in accordance with the provisions of the Hindu law, and though it may be unprofitable to speculate as to his motive, I think that he had a purpose beyond the mere designation of a beneficiary to take under his will, and I must decline to put on the language of the will a construction that would render its provisions useless. In my opinion the testator associated the others executors with his wife for the purpose of ensuring a wise exercise of her discretion in the selection of a son for adoption and not with the intention of making it an essential condition of the adoption that they should take a part in the ceremony from which they were precluded, and I therefore hold that the power of adoption is valid.

[667] The next issue I have to consider is whether the power of adoption was validly exercised.

The contention of the defendants in this connection is twofold; for first it is argued that the power could not be exercised inasmuch as the father, one of the executors named by the will, was then dead and the power is not one that passed to the survivors, and next it has been argued by Sir Griffith Evans that it is evident from the terms of the deed of adoption and also from the evidence and admissions in the case, that the surviving executor Dwarka Nath Dutt did not take such a part in the adoption as was required of him by the power, so that even if there was a survival of the power still its terms were not obversed.

Now both these points appear to me to be points of construction so that it is in the first place necessary to determine what the language of the will means, and in that investigation regard must be had to the circumstances of the testator and to every fact a knowledge of which may conduce to the right application of the words used. Cases are of little use except so far as they express or illustrate a general rule of construction; for the words of one will are seldom the same as those of another.

There is, however, a principle to be drawn from decisions which is of importance in relation to the question in hand, and it is this that where a power is vested in executors (though it may not be one reposed in them by the law) if on the true construction of the will it appears that the power was coupled with the executorial office, it will survive to the holders for the time being of the office as though it were a power attached to the office by law.

It obviously, therefore, is necessary first to determine whether or not as matter of construction the power of adoption contained in the will was not given to the executors in their official capacity.

In my opinion the power of adoption is connected with the office, and in confirmation of that view I may point to the fact that excepting the

wife the executors are not named, but are described by reference to their office, and again though the wife is named still she is described as executrix in a manner [668] which points to the conclusion that the power even in her case was not dissociated from the idea of the office. That is not necessarily decisive of the question whether the power was one that survived for any such inference to that effect that might be deduced from the association of the power with the office might be rebutted by a sufficient indication that the testator desired the selection implied by the power to be entrusted to the three persons named as his executors and to no less a a number.

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But to effect such a result the indication must be one of a reasonable clearness drawn from the testator's own words, and not merely based on a speculation as to what a man might be imagined to intend in the testator's circumstances. It is suggested that this indication is to be found in the concluding clause of the will, but after the best consideration that I have been able to give to that clause together with the rest of the document I am unable to arrive at that conclusion. That clause appears to me to indicate the testator's strong desire that a son should be adopted; he may be supposed (not merely as a rigid presumption of law, but as a matter of notoriety) to have known that a Hindu widow of the Bengal School could with her husband's assent adopt, but fearing the contingency of his wife's death he inserted the last clause for what it might be worth.

I should also state that I am not led by this last clause to the conclusion that the testator did not intend that the adoption to be effected under cl. 8 should take effect as and have the results of an adoption according to Hindu law. In support of the view that the power in question could only be exercised by the three persons appointed as executrix and executors by the Will I have been referred by the learned Advocate General to two cases. The first is the case of *Surendrakeshav* v. *Doorga Sundari Dasi* (1) which no doubt establishes that the authority delegated to the widow must be followed strictly, so that where the power only authorized the simultaneous adoption of two sons, it was impossible to exercise the power otherwise than in strict compliance with its terms, [669] though the result of an attempted adoption in accordance with the power would be in contravention of the Hindu law and so without an effective result.

The second was a case of *Beemchurn Sen* v. *Heera Loll Seal* (2) in which the consent of another was required as a condition of the adoption, and it was held that the absence of that consent, though due to death, was a bar to the adoption. Now both these cases are open to the comment, that I have held as matter of construction, that the power contained in this will did in the circumstances of this case survive to those by whom it was exercised, so that in my view of the case the requirements of the power have been observed.

It may, however, be said that the case of *Beemchurn Sen* v. *Heera Loll Seal* (2) so closely resembles this, that I ought in this case to put a corresponding interpretation on this will. In the first place I could not assent to the proposition that there is any real similarity between the two cases, and next I must point out that in that case an adoption according to Hindu law could not have been contemplated, the delegation of the particular power, then under consideration, having been made not to a widow but to a son's widow, and on a careful perusal of the judgment it will be seen that Sir

(1) 19 I.A. 108. (2) 2 Ind. Jur. N. S. 225.

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Barnes Peacock expressly guards himself from expressing an opinion what would have been the result had the adoption intended been one that could have been effective according to Hindu law. It still remains to notice the argument that the terms of the power have not been complied with inasmuch as the widow alone and not in conjunction with the surviving executor actually took the son in adoption. I have already expressed my view of the meaning of the power, and if that view be right then it follows that this objection cannot prevail; the power does not in so many words say that the ceremony, which the law only allows to be performed by the widow, must be performed by the others, and I therefore hold that the mere fact of the surviving executors not having actually and physically taken in adoption is not a failure to comply [670] with the terms of the power, and I accordingly hold that the power was validly exercised.

This brings me to the third issue which turns upon the true construction to be placed on cl. 9 of the will. The testator thereby directs his executors, executrix and trustees to make out of the income of his estate certain payments including a monthly payment of Rs. 200 to his wife during her life and a sum of Rs. 50 monthly to such adopted son who should live and attain the age of eighteen years during the lifetime of his wife, provided he remained under her control and bore a good character, and then he proceeds as follows:—

"My executrix, executors and trustees shall invest the rest and residue of such income and interest in Government securities in their joint names, but in no case shall such adopted son have or exercise any control or dominion over my estate and effects until the death of my wife."

Now it will be seen that there is here a direction to accumulate, and the first point to be decided is whether, according to the law applicable to Hindu wills, this direction is in operation or whether effect can be given to it.

Mr. Bonnerjee, no doubt, treated the point in his opening speech as beyond the realm of argument, but the learned Advocate General declined to accede to that view, and I consequently must examine the point. I must, however, express regret that only a very slender argument has been addressed to me on this point on the part of the defendants—a course the more to be regretted by reason of my want of familiarity with the question, and I need hardly remark that the absence of such argument has not only greatly increased my labours, but compels me to decide the point on materials and information necessarily meagre.

Now accumulation is, with an exception immaterial for the present purpose, absolutely forbidden by s. 104 of the Indian Succession Act, but on turning to s. 2 of the Hindu Wills Act it will be found that s. 104 is one of the few sections not applicable to Hindu wills, such as the one under consideration, and consequently there is no statutory prohibition which forbids accumulation directed in a will made by a Hindu.

It becomes, therefore, necessary to examine whether a direction [671] to accumulate is contrary to the provisions of Hindu law. Probably it would be wrong to attribute much force to the fact that s. 104 is not made applicable to the will of a Hindu, but I certainly cannot accede to the argument that it is a recognition of the fact that accumulation was never allowed in the case of Hindu wills, for a similar train of reasoning would have excluded the application of other clauses of the Succession Act which do govern Hindu wills. Now it unquestionably is the case that a direction

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to accumulate is from time to time to be found in Hindu wills and the practice of inserting such a direction is of some standing.

In *Sreemutty Soorjeemoney Dossee* v. *Denobundhoo Mullick* (1) the will of a Hindu testator who died in 1841 was under consideration, and the case was argued on demurrer before the Supreme Court of Calcutta, and in the course of their judgment the following remarks appear :—

"It was, we apprehend, competent to this testator, if he had been so minded, expressly to provide for the accumulation of the surplus income of his estate within the limits allowed by law, and to make their accumulations subject to the limitation even in the event of any son dying without leaving issue in the male line; but he does not appear to have done so either expressly or by necessary implication. Again in *Bissonauth Chunder* v. *Sreemutty Bama Sundary Dassi* (2) the following passage is contained in the judgment of the Privy Council :—

"In the first place it is to be observed that the testator has given no direction to accumulate. It remains, therefore, to be seen whether the Court can find from the words of the will, as was argued, an irresistible inference that such was the intention of the testator.

"This is the more important because in the case of *Sonatun Bysack* v. *Sreemutty Juggutsoondree Dossee* (3) which is relied on as governing this case, there is an express direction to accumulate. It was there directed that the surplus [672] was to be added to capital. There is an absence of that in this case. It is admitted that the testator could not dispose of the property of his son or prevent the heir of the son from inheriting his property, therefore the only question here is whether the testator has directed the accumulations of the property to be added to or made part of his own property, because if he has not it was the property of the son and the testator had no power of disposing of it. In this view of the case their Lordships think that this will, on whichever construction it is taken, shows an absence of any direction to accumulate."

It is true these cases do not decide that a direction to accumulate is good, but it is clear from them that the practice of directing accumulation is of long standing, and that at that time it was considered that such a direction would have effective operation. I asked Mr. Bonnerjee, who contends that a direction to accumulate is bad, to refer me to the authorities on which he relied, and I now propose to deal with them. The first case is that of *Kumara Asima Kishna Deb* v. *Kumara Kumara Krishna Deb* (4), the purport of which is set out in the head note as follows :—

"A Hindu, by will, attempted to create a trust for the accumulation, for ninety-nine years, of the surplus income (after certain yearly payments) of his estate, in purchase of zemindaries, &c., from time to time, and empowered his trustees to continue such trust after the expiration of the ninety-nine years term. The will contained no disposition of the beneficial interest in the zemindaries so to be purchased. *Held*, that such trust was void.

"*Semble.*—Perpetuity (save in the case of religious and charitable endowments) is not sanctioned by Hindu law. *Goberdhan Bysack* v. *Sham Chand Bysack* explained."

The contention in that case was that the trusts of the will were invalid and void, not only on the ground of perpetuity, but because there was no disposition of the beneficial interest in the estate.

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(1) 6 M.I.A. 526.
(2) 12 M.I.A. 41.
(3) 8 M.I.A. 66.
(4) 2 B.L.R.O.C. 11.

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The case in the first instance came before Mr. Justice Norman who said: "I may add that there is not in the will any disposition [673] whatever of the beneficial interest of the bulk of the testator's property * * * * Even at the end of ninety-nine years there is no gift of the beneficial interest to any one. The manager for the time being may go on at his own will and pleasure indefinitely accumulating the estate. No right is given to the heirs of the testator or the persons indicated as such in the will to use the property for their own benefit taken at that remote time. This goes a long away beyond that of Mr. Thellusson's will."

Then later he says:—

"In the case now before me the trust for perpetual accumulation would deprive the parties of all enjoyment of the profits on the estate. I think it clear that the trust for accumulation must be treated as a condition repugnant to the natural rights of every owner of property to the use or enjoyment of it, inconsistent with the nature of property itself and therefore void."

From this decision there was an appeal which came before the Chief Justice Sir Barnes Peacock and Mr. Justice Markby.

Sir Barnes Peacock says:—

"There is no doubt that this will if construed according to English law would be void under the law relating to perpetuities. The question is, is it valid under Hindu law?"

Further on he proceeds:—

"The will in the present case gives the residue of the property, which is the subject of dispute, to the grandson and his successors upon trusts that the profits of the estate are not to be beneficially used during a period of ninety-nine years, but are to be laid out in the purchase of fresh estates and the formation of a fund for the payment of the Government revenue upon it, and this provision is to be extended, as I understand, in perpetuity, if the Hindu law allows."

I am not aware of any rule of the Hindu law by which grants *inter vivos* or gifts by will in perpetuity are expressly prohibited, but it appears to me to be quite contrary to the whole scope and intention of Hindu law.

In the result the decision of Mr. Justice Norman was upheld, [674] but it appears to me, looking at the facts of the case and the judgments delivered, that the true *ratio decidendi* was that the direction to accumulate was an attempt to create a perpetuity, that thereby it was sought to suspend the enjoyment for a longer period than the absolute vesting could be controlled, and that it consequently was bad. The case did not call for a decision that an accumulation which did not aim at that, which for shortness I may call a perpetuity, is void, and I therefore cannot regard the case as an authority which is or even purports to deal with the point before me.

I was next referred to a case of *Srimati Bramamayi Dasi* v. *Jages Chandra Dutt* (1), but all that case decides which can be regarded as material to the present point is that an attempt to defer the period of payment to or enjoyment by a beneficiary of a vested interest is inoperative.

Then reliance was placed on the case of *Cally Nath Naugh Chowdhury* v. *Chunder Nath Naugh Chowdhury* (2) where the will before the Court contained a present gift of the testator's property to his grandsons followed by provisions postponing payment and directing accumulation, and it was

(1) 8 B.L.R. 400 (2) 8 C. 378.

there held in accordance with principles which are beyond dispute that an absolute gift could not be qualified by a direction to postpone payment and accumulate. The legality of a direction to accumulate was not in question in the case.

Mr. Justice Pontifex says:—

"But his will containing, as in our opinion it does, sufficiently direct words of present gift, the clauses in it, which attempt to postpone the enjoyment of possession and to direct accumulation must be rejected or disregarded as inconsistent or repugnant."

The last case brought to my notice is that of *Mokoondo Lall Shaw* v. *Gonesh Chunder Shaw* (1) which decided that where a Hindu testator gave all his immoveable property to his sons but **[675]** postponed their enjoyment thereof by a clause that they should not make any division for twenty years, the restriction was void as repugnant to the gift.

Mr. Justice Phear in the course of his judgment says: "Now without saying that a Hindu testator might not give the current profits or income of the property to the trustees, and direct them to apply this to the payment of debts throughout a specified period such as twenty years, I do not think it is competent to him to give the corpus of the property to an adult person, and at the same time to forbid that person from enjoying the property in the way which the law allows.

"The prohibition against receiving and enjoying the income for twenty years appear to me simply to be a condition imposed on the property which is repugnant to the gift. It is not merely the giving of one portion of the property to one person or purpose and the remaining portion to another person or purpose, but it is giving the entire property to one person and coupling this gift with a prohibition against his enjoyment."

The key to this and the two previous decisions is obvious, and it simply is the repugnancy and consequent invalidity of a condition which attempts to fetter the enjoyment of an absolute gift, a principle which has no application here.

Mr. Bonnerjee very fairly admits that beyond these cases he is unable to refer to any decision or even dictum that a direction to accumulate is necessarily, and under all circumstances void, so as to entitle the heirs to claim the interest commensurate with the period of directed accumulation as though it were undisposed of, and I must therefore see whether there is any general policy, or principle of law, which calls for such a conclusion.

Is there then any principle of public policy which would discountenance accumulation? I take it that for this purpose regard must be had to Hindu and not to English policy, and so far as I can ascertain such a direction is in accordance with the modes of Hindu life and thought, and agrees in its aims with what is a matter of every-day practice and custom.

[676] Indeed had the life estate been given to the widow, then the accumulation which is directed would, in its practical result, be no greater a restraint on the expenditure of income than would have been almost necessarily incident to that situation. Does it then clash with any principle of law? First it is necessary to see what the effect of the accumulation in this case is. The direction is during the life of the testator's widow to invest the balance of the income, and after her death the trustees

(1) 1 C. 104.

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are to hand it over to such adopted son who shall survive the widow and shall answer the description given in the will.

It will, therefore, be noticed that apart from any question of legality the accumulations are disposed of so as to vest beneficially on the widow's death. It is true that the object of the testator's bounty is not ascertained at the testator's death, but that in itself is not a necessary indication of illegal remoteness. As has been said by a very learned Judge, in common sense it is only giving the accumulation to the person who is to take the fund itself, if it could be foreseen who that person is. That person may be the present plaintiff if he survives the widow, or it may be some one adopted in succession to him, but it is clear in either case that the fund itself will be given and why not the accumulation.

If the testator be permitted to give the fund itself at a future time, it would seem anomalous that he should not be able to give the intermediate rents and profits.

If the individual to take on the widow's death were now ascertained it surely could not be doubted that his title to the intermediate income would prevail against that of the heir-at-law, and how has the heir better right by reason of that person being at present unascertained. If it be urged that the effect is to create an absolute interest at a future date without limiting an intermediate beneficial interest corresponding and commensurate with the interest, and that, therefore, the heir-at-law must take the profits to arise during the interval, then this argument, as it appears to me, is met by Mr. Bonnerjee's own concession that trustees might be directed to accumulate a fund for the payment of debts, and by the further fact that the trustees are in this case directed to hand over the intermediate income to the individual who is to [677] take the fund from which they spring. I may remark incidentally that this is an objection to accumulation which was put forward in the English Courts, but without success though the principle on which it is based has as much force in English as in Hindu law. It cannot be said that the adopted son to whom the fund is given on the widow's death is incapable of being a recipient of the bequest, for by s. 99 of the Transfer of Property Act it is provided that if property is bequeathed to a person described as standing in a particular degree of kindred to a specified individual, but his possession of it is deferred until a time later than the death of the testator by reason of a prior bequest or otherwise; and if a person answering the description is alive at the death of the testator, or comes into existence between that event and such later time the property shall at such later time go to that person. Seeing, therefore, the fact that the right to accumulate has been recognized, if not actually affirmed, both by the Supreme Court and the Privy Council, and that a direction to accumulate is no new expedient, and having regard to the various considerations I have discussed, I hold that it is not incompetent for a Hindu with proper limitations to direct an accumulation of the income of the property which under his will vests in his executors or trustees. That, however, is not necessarily conclusive of the present case, for it still remains to consider whether the particular direction in this case is bad as being in excess of what the law permits.

Now it appears to me on principle that if accumulations are permissible, then in the absence of special provision the limit must be that which determines the period during which the course or devolution of property can be directed and controlled by a testator, and applying that test to the

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present case I am of opinion that the directed accumulation is not in excess of that permitted by law.

In the view, therefore, that I take of the case I am of opinion that the plaintiff is not presently entitled to the surplus income or profits of the properties, until the death of his adoptive mother, and that he is not entitled (even after provision being made for the payments mentioned in the will) to have the corpus of the **[678]** estate made over to him. The plaintiff asks for an account, and as the Advocate-General does not oppose this, I am willing to accede to this inasmuch as when the case first came before me certain charges of breach of trust were waived on the understanding that the plaintiff should be entitled to take such objection to the trustees' conduct as might be open on the taking of the ordinary accounts, but I will only direct accounts at the plaintiff's risks as to costs, and as it has been suggested that the accounts will probably not be required, it will be better that the decree for accounts should be conditional.

The decree, therefore, will contain a declaration that the plaintiff has been validly adopted, but that on the true construction of the will he is not entitled during the life of the widow to have the property left by the testator handed over to him or to receive the rest and residue of the income and interest of the testator's estate by the will directed to be invested; then the decree will direct accounts (at the plaintiff's risk as to costs) of the estate and debts of the testator, but it will be provided that no proceedings are to be taken under this direction without the leave of the Judge in Chambers. There will be an enquiry what is proper to be allowed for all necessary household expenses as well as for the worship of the testator's family idol Sree Sree Radhagobindjee. Further consideration will be adjourned and there will be liberty to apply. As it is so desired the costs of all parties up to and including the trial to be taxed on scale 2 as between solicitor and client will come out of the estate.

The plaintiff appealed from this decree.

Mr. *Pugh* (Mr. *Bonnerjee* with him), for the appellants.—Is a Hindu testator able to give an estate to A and say that he is not to enjoy the estate more than 50 rupees per annum during the lifetime of B, to whom no income has been given? This is a direction to accumulate. Hurry Das Dutt died in October 1875: On 9th August 1876 the first adoption was made. Jotipersaud Mullick died on 29th January 1881 and on 9th February 1881 the second adoption was made, and the plaintiff adopted. There is, therefore, an express gift of the accumulations. [TREVELYAN, J.—The Privy Council have held that, apart from adoption, it **[679]** might be a valid bequest under a power of appointment.] Section 13 of the Transfer of Property Act. The accumulations are without an owner until the death of the widow. [TREVELYAN, J.—The corpus and income must, according to Hindu law, be vested in the same person. It cannot be in the air.] There is a valid gift to Amrito Lall Dutt subject to its being divested. Amrito Lall Dutt is the owner of the estate and any restriction to his use and enjoyment is repugnant to that estate. *Gosair Shivgar Doyagar* v. *Rivett Carnac* (1). [TREVELYAN, J.—There is also the case of *Lloyd* v. *Webb* (2).] I submit there is an immediate gift to my client. If that is not so my client is entitled as heir at law. *Tagore* v. *Tagore* (3); Mayne's Hindu Law, ss. 380, 381, 382. I do not think that there is a gift to trustees: even if there were it would not prevail according to the Tagore case. You cannot do by will what you

(1) 13 B. 463. (2) 24 C. 44. (3) 9 B.L.R. 377

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cannot do *inter vivos*. *Brammamayi Dassi* v. *Jages Chandra Dutt* (1); *Mokoondo Lall Shaw* v. *Gonesh Chunder Shaw* (2); *Kally Nath Naugh Chowdhury* v. *Chunder Nath Naugh Chowdhury* (3).

The Advocate-General (Sir *C. Paul*), Mr. *Garth* and Mr. *Stephen*, for the widow Surnomoni Dasi.—The widow takes an estate by implication. Theobald on Wills, 4th Ed., p. 604; *King* v. *Inhabitants of Ringstead* (4); *Gardner* v. *Sheldon*, Tudor's Leading Cases, 625-630; *Bissa Nath Chunder* v. *Bama Sundary Dassi* (5). No trust for accumulations but a trust to invest. We say that the power to adopt is bad.—*Sumbhu Nath* v. *Surjamoni Dei* (6). First point is that what he has given he could not intend, as it was not legal according to Hindu law. *Bhoobun Moyee Debia* v. *Kishore Acharji Chowdhry* (7); Golap [680] Chunder Sircar's Tagore Lectures, p. 233; *Beemchurn Sen* v. *Heera Loll Seal* (8); *Eaton* v. *Smith* (9); *Crawford* v. *Forshaw* (10); Farnell on Powers, p. 457; Golap Chunder Sircar's Tagore Lectures, p. 142; Babu Shama Charan Sircar's Vyavastha Darpana, 2nd Ed., p. 907; *Ramasawmi Aiyan* v. *Vencata Ramaiyan* (11); *Vellanki Venkata Krishna* v. *Venkata Rama Lakshmi Narsayya* (12); *Pudma Coomari Debi* v. *Court of Wards* (13); *Bykant Monee Roy* v. *Kisto Soonderee Roy* (14); *Jamnabai* v. *Raychand Nahalchand* (15); *Raoji Vinayakrao Jagganath Shankarsett* v. *Lakshmibai* (16); *Gavdappa* v. *Girimallappa* (17). My client takes estate for life by limitation: s. 4 of the Probate and Administration Act. It is clear that the son is not to take beneficially until after the death of the widow. If my first position is wrong then I say the estate is vested in the executors and trustees. Under s. 104 of the Succession Act you cannot accumulate for more than a year. Under the Hindu Wills Act s. 104 is not applicable. The direction to accumulate is quite in keeping with Hindu notions. There is nothing in the will which says what is invested shall be added to the capital and form part of the estate. Heir is not to take until after the death of A and there is nothing to deprive A of the estate she took. As to the adoption, we say that there is no valid power to adopt. It is bad in law.—*Nilmoney Singh* v. *Bakranath Sing* (18). It was a joint power by three jointly or by two executors according to the scheme of the will. *Tagore* v. *Tagore* (19). If one person could perform ceremony efficaciously [681] others could join in it. In the case of *Surendra Keshab Roy* v. *Doorga Sundari Dasi* (20), the adoption was simultaneously made and held to be bad. The power of adoption in its inception is bad. If I assume power is good it is still not validly exercised, it is exercised by two instead of by three. *Crawford* v. *Forshaw* (10); Sugden on Powers, p. 460. The power must not pass to others. Here the power was given to the uncle and the father. If a man dies leaving two sons and a widow, it is clear that the two sons take. If one son dies the widow takes the estate of that son, not the second son. In the case of adoption the mother holds as guardian and in trust until the first adoption. When the son dies it comes to her as her own as the mother and she cannot be divested by

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(1) 8 B.L.R. 400.
(2) 1 C. 104.
(3) 8 C. 378.
(4) (1829) 9 B. & C. 218 (224).
(5) 12 M.I.A. 41.
(6) 1 C.W.N. 649.
(7) 10 M.I.A. 279 (281, 304).
(8) (1867) 2 Ind. Jur. N.S. 225.
(9) (1839) 2 Beav. 236.
(10) (1891) 2 Ch. 261.
(11) 6 I.A. 196 (208).
(12) 4 I.A. 1 (9, 13).
(13) 8 I.A. 229.
(14) 7 W.R. 392.
(15) 7 B. 225.
(16) 11 B. 381 (397).
(17) 19 B. 331.
(18) 9 I. A. 121.
(19) Sup. Vol. I. A. 78, (79).
(20) 19 I.A. 108.

adopting a second son. Here the second adoption is made in derogation of the adopted mother's estate. If you inherit from the son there is no estate to pass on. When the adopted mother takes the estate of a son she has an estate which cannot be divested. 1898 APRIL 5. — APPEAL FROM ORIGINAL CIVIL. 25 C. 662 = 2 C.W.N. 389.

Sir *Griffith Evans* (Mr. *O'Kinealy* with him), for the other respondents —The question of accumulation cannot be decided as between me and the widow. The trustee would in any event have to retain the corpus. The period of distribution is the death of the widow. What is to become of the surplus income between the death of the widow and the period of distribution. As it is impossible to predict who will come in at the period of distribution it will be necessary for the trustees to retain the estate until that period arrives. As regards the power of adoption being bad the executors were the proper persons to be appointed for the adoption, if it took place. Executors can always devolve their offices on the Administrator-General by the Administrator-General's Act. If the power attaches to the office it goes on to the end wherever the office goes. The reasoning of Kekewich, J., would apply to this case, because it is a naked power and does not attach to an executorial office. There is a great distinction between naked powers and powers given to a person by virtue of his office. Farwell on Powers, pp. 129, 140. [682] There is no inflexible doctrine that the full beneficial interest must be vested in some person who is ascertained at the time. The first adopted son took dehors the will; he was entitled because the adoption made him heir-at-law instead of the widow. For five years he was entitled. The result would be if Joti Prasad was properly adopted, he took it as heir-at-law under the power of appointment, dehors the will. However if he acquired it his mother would be his heiress, and if she adopts a second time does she surrender the estate of the adopted son? There must be some limit; she cannot divest herself of anything that did not belong to the testator. If a descent was cast in the way other than the mother, then there is an end of the second adoption. For instance, the widow of the adopted son, if there was one, would have taken to the exclusion of the second adopted son. As regards the doctrine of estates by implication there is the case of *Bissa Nath Chunder* v. *Bama Sundary Dassi* (1). Widow and female there could not take, and in case one of them dies held the female heirs shall not take.

Mr. *Pugh* in reply.

The judgment of the High Court (MACLEAN, C.J., MACPHERSON and TREVELYĀN, JJ.) was as follows ;—

JUDGMENT.

MACLEAN, C.J.—The facts are not disputed on this appeal, and that being so, I do not propose to recapitulate them as they are accurately found and stated in the judgment of Mr. Justice Jenkins. The questions we have to decide are questions purely of law; they are stated in the judgment of the Court below, and it will be convenient to deal with them in the same order as in that judgment.

The first question and in one sense the paramount question is whether the power to adopt in the testator's will is a valid power. It is urged for the respondents, against the validity of the power, that although it is competent to a Hindu testator to empower his widow to adopt, it is a power which can only be given to the widow and to the widow alone,

(1) 12 M.I.A. 41.

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and that, inasmuch as in the present case the power is given to her conjointly [683] with two other persons, *viz.*, the father and uncle of the testator, the power is invalid. If this contention be well founded, there is, at once, an end of the plaintiff's case, for, if there were no valid power to adopt, the plaintiff is not the adopted son of the testator, and has consequently no interest in the testator's estate and cannot maintain the present suit. He is suing as the testator's adopted son, and in that capacity alone. The testator doubtless was anxious that, if he had no natural son, he should have an adopted son, and the reasons for this, not merely on temporal but specially on spiritual grounds, are thoroughly recognised and understood in the Hindu community. But the question is, has he taken such a course as the Hindu law allows for giving effect to his desire?

It may, I think, be regarded as a well-established principle of the Bengal School of Hindu law that it is to the widow alone that the power of adopting a son can be delegated by the husband, and that she has no capacity to adopt, save under the express permission of the husband given in his lifetime. Now, looking at cl. 8 of the will, which is admittedly the salient clause upon which, in a great measure, if not entirely, the case hinges, and reading the language of that clause according to the usual and ordinary meaning of the words used, there cannot, I think, as a matter of construction, be any reasonable doubt that the testator intended to give, and did give, the power of adoption, not to his widow alone, but to his widow conjointly with his father and uncle. If upon the true construction of the clause the power be given to the three, and not to the widow alone, it is not very important to consider whether it was or was not given to them in their executorial capacity, though the language suggests that it was given to them in that capacity, and this view is fortified by a reference to cl. 14 of the will, which indicates that, in the event of the wife's death before the adoption of a male child, the surviving executors were to have the power. It is conceded by the appellant's counsel that the power under cl. 14 is invalid. That clause shows that the testator intended the surviving executors should have the power, and throws a light upon what was in the testator's mind, as regards cl. 8, *viz.*, that the power [684] was given to his executrix, executors and trustees. If it be conceded that the power given to the two executors under cl. 14 is bad, it is somewhat difficult to see how the power under cl. 8 given to the three executors and trustees, even though the wife be one, is not equally bad, unless one can reasonably place upon that clause the construction placed upon it in the Court below. But even if, in cl. 8, the wife, father and uncle had not been alluded to as executrix, executors and trustees, the testator has associated with the wife in this power two other persons, which, under Hindu law, he cannot do as the power can only be delegated to the wife.

It is urged, however, for the appellant that cl. 8 may be read as a power given to the wife alone, and that the association of the father and uncle in the power was not to give them the power of adoption, but merely a power of supervision in order to ensure a discreet exercise of the power by the wife. In other words, we were virtually invited to read the power as if it were one given to the widow alone to be exercised with the consent of the father and uncle. I do not see my way to adopt this construction of the language of the will. There is nothing, so far as I can see, in the language used, to warrant us in placing such a construction upon it; were we to do so, I think we should be going dangerously near to making a new

will for the testator, rather than construing the will he has made. We must look at what the testator has actually said; not what he might have said had the effect of what he has said been drawn to his attention.

The learned Judge in the Court below says he must decline to put on the language of the will a construction that would render its provisions useless. I am entirely in accord with the learned Judge, if by that expression he means that, if the language of the will warrant it, the Court should place such a construction upon it as will give effect to the testator's intentions, rather than render the provisions of the will usless. But we must be guided by what the testator has said; we must gather his intention from the whole will, and then say whether or not effect can be given to that intention consistently with law. Here the question [685] appears to me to be—What did the testator intend, gathering that intention from the language he has used? If he intended to give the power to the three, then, according to Hindu law, such a power is bad; if he intended to give the power to the wife alone and only associated the father and uncle as a fetter on her choice of a son, then it would be good. But I fail to extract the latter intention from the language used. The recent case in the Privy Council of *Surendro Kissen Roy* v. *Durga Sundary Dassi* (1) must not be overlooked in discussing this question of the validity of the power.

For these reasons I am of opinion that the power to adopt was not a valid one.

In the view I take, it becomes unnecessary to discuss whether the power was validly exercised, but one of the grounds upon which Mr. Justice Jenkins decided that it was well exercised has a bearing upon the question of the validity of the power. Mr. Justice Jenkins holds that the power was intended to be annexed to the executorial office, and treats the question as being whether the power of adoption contained in the will was not given to the executors in their official capacity, and he treats it as having been so given. But if the power of adoption were annexed to the executorial office, or if the power were given to the executors in their official capacity, the power is bad, for no such power can be validly given according to Hindu law. If, however, the true construction of cl. 8 be such as the learned Judge in the Court below holds it to be, *viz.*, a power of adoption to the wife alone, with the consent of the other executors and trustees, it would seem almost to follow that the testator intended the selection of an adopted son to be made with the consent of the father and uncle, as the *personæ designatæ* for this purpose in the will, and in whom a personal confidence was reposed by the testator. Clause 14 supports this view, whilst the case of *Beemchurn Sen* v. *Hera Loll Seal* (2) has a distinct bearing upon it. Had it been necessary for me to decide the point, I should have felt considerable difficulty in saying that the [686] power had been well exercised, the father of the testator having died before the adoption took place.

Holding the above views, it becomes unnecessary to express any opinion upon the other points which have been raised, as the plaintiff cannot maintain the present suit, though it is not to be inferred from my silence on those points that I am in accord with Mr. Justice Trevelyan's views upon them.

This is one of those cases in which, having regard to the time which has elapsed since the adoption, one's natural inclination would be to

(1) 19 I. A. 108. (2) 2 Ind. Jur. N. S. 225.

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uphold it if possible. Having regard to that lapse of time I asked the appellant's counsel whether any question of limitation, estoppel, laches or acquiescence could be raised in the appellant's favour, but he very fairly replied that no such question could be successfully raised as against the infant respondents, who will take the property failing a valid adoption of the plaintiff. As, then, any such questions are eliminated, we may view the case as if the matter had been submitted for our consideration shortly after, and not many years after, the alleged adoption; in other words, the lapse of time does not in point of law assist the appellant. It may seem a hard case on the plaintiff who, however, is responsible for having initiated the litigation, to be now told that his adoption is invalid; but, on the other hand, it would be equally hard on the infant respondents, if they have to hand over their property to one who has not been validly adopted as the testator's son. It is, however, not open to us to enter upon any question of hardship one way or the other. I think the appeal fails and must be dismissed.

The cross-objections must be allowed, and the suit dismissed. I will deal with the costs after the other judgments have been delivered.

MACPHERSON, J.—I agree with the learned Chief Justice. I do not think it necessary to express any opinion on the other questions raised in the case.

TREVELYAN, J.—The two main questions in this case are (1) whether there is any valid gift of the accumulation of income; and (2) whether the plaintiff has been validly adopted under Hindu law.

[687] I will deal with this second question first. The defendants are entitled to have it decided, as it goes to the root of the whole suit and is the subject of their cross-objection.

The first question which we have to determine is what the testator meant by his will. As put by their Lordships of the Privy Council in *Tagore* v. *Tagore* (1): "The true mode of construing a will is to consider it as expressing in all parts whether consistent with law or not, the intention of the testator, and to determine upon a reading of the whole will, whether, assuming the limitations therein mentioned to take effect, an interest claimed under it was intended under the circumstances to be conferred. It is true that in giving a power of adoption, a testator is contemplating to a great extent his own welfare, but legal effect cannot be given to his intention, unless he provides for the exercise of that power within the limits of the law. We cannot alter or add to any portion of his directions, and if we attempt to depart from the strict letter of his injunctions, we run the danger of being charged with attempting to make a will for him rather than construing and giving effect to the will which he has actually made. Numerous instances occur to me where powers of adoption have been given with the real object of obtaining a spiritual benefit, but the Courts have declined to give effect to those powers. I need only instance by way of illustration the case of a double adoption, which came before the Privy Council lately in the Andul case. In my opinion we must endeavour to ascertain the intention of the testator as expressed by the words of his will just as carefully and upon the same principles when he is seeking his own spiritual benefit as when he is conferring a bounty upon others. Having ascertained his intention from his will, and without reference to the law on the subject, it is then for us to apply the law and see if the power be valid. I know of no authority

(1) I. A. Sup. Vol., p. 79.

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which lays down that powers of adoption are to be construed differently from other powers. It has been suggested to us that it must be assumed that the testator knew the law, and that the portion of the power which is in accordance with the law must be accepted and the rest rejected. It is [688] impossible for us to deal with the will on this footing. Testators very often, though they know the law, try to evade it. The Law Reports abound with instances of this. The power, so far as is material for the present purpose, is given in the following words:

"I hereby authorise and empower my wife and executrix S. M. Surnomoyee Dassee and my executors and trustees to whom I give full permission and liberty to adopt after my decease a son." There can be no doubt that the only person to whom a power of adoption can be validly given is the wife of the person giving the power. If the testator intended, as he says, that his executors and trustees should execute this power jointly with his widow, it would be impossible to carry out this power. The only way, as far as I can see, by which any effect can be given to this power is by supposing that the testator intended to give the power to the wife alone, but required her to act with the consent of executors. This construction is, however, to my mind an impossible one, having regard to the other terms of the will.

In the first place paragraph 13 authorizes the executrix, executor and trustees and the survivor of them to appoint any other person or persons to succeed them or him in the execution of the trusts of the will. The adoption was one of the trusts of the will, and this power shows that he contemplated the adoption being made by persons other than the widow. Leaving paragraph 13 entirely out of consideration I think that paragraph 14*a* is conclusive on this question. He there says: "In case of any accident arising to cause my wife to depart her natural life before adoption of a male child my surviving executors are empowered to act with my full consent and direction to adopt a male issue." This to my mind shows conclusively that the testator did contemplate that the adoption should be made by persons other than his wife, and therefore there is no reason for giving a forced construction to the earlier paragraph, which gives the power.

Moreover, it is noticeable that whereas the testator gives to his executors powers to adopt on the death of the wife he does not give to the wife any power to adopt in case of the death of the executors. This shows that the testator imposed a greater confidence [689] in his executors than in his wife. I feel it impossible, having regard to all the terms of the will, to hold that the power was anything but a joint power, and was therefore bad.

Even if the power be a good one, namely, that the widow could adopt with the consent of the executors and trustees, I am of opinion that the death of the father, who was one of the executors, prevented the exercise of the power.

Besides his wife the testator appointed his father and uncle as executors and trustees. I have no doubt that this personal relationship operated in the testator's mind when including them in the power of adoption.

Even if the power be construed as giving a power to the widow with the consent of the executors, I think the nature of this particular trust and the relationship of the executors show that, although the power is given to the executors, it is intended to apply only to these particular persons and does not devolve upon other holders of the office.

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In the case of *Bheemchurn Seal* v. *Hera Churn Seal* (1), Mutty Lal Seal was described as executor, yet Sir Barnes Peacock considered that a personal confidence was reposed in him.

An authority to adopt must be strictly pursued. *Chowdhry Pudum Singh* v. *Koer Oodoy Singh* (2), and if the confidence here imposed be a personal one, it follows that the death of one of the persons whose consent is necessary to the execution of the power must destroy the power.

We have been referred to a recent decision of this Court—*Surendra Nandan* v. *Sailaja Kant Das Mahapatra* (3), in which Sir Barnes Peacock's decision seems to have been considered, but beyond expressing their concurrence with the judgment of the Court below, the learned Judges give no reasons for their decision, and, as a matter of fact, in that case the widow was only enjoined to obtain the advice and opinion of the manager. **[690]** The consent was not a condition. Conditions, whether they be possible or impossible of fulfilment, must be considered, and unless they are strictly carried into effect, the power cannot be exercised—see *Rangubai* v. *Bhagirthibai* (4). In my opinion the adoption was bad, and on that ground the suit ought to fail. I desire also to express my opinion as to the other question which has been argued, namely as to the right to the accumulations.

The determination of this question depends upon the terms of the ninth paragraph of the will.

It was contended by the learned Advocate-General that by the provisions contained in that paragraph the widow got an interest for life by implication, but this is scarcely consistent with the direction that she should be paid a fixed monthly sum and that the residue was to be invested. There is no doubt that there is no immediate gift of the residue of the income. It is to be accumulated during the lifetime of the widow. On that event happening it is to be determined who is to succeed. The question is whether a Hindu testator can direct the accumulation of the income of his property for an indefinite or any time without providing for the beneficial interest. The circumstance that the property has been given to trustees is wholly immaterial. A Hindu testator cannot create by a trust an interest which he is otherwise incapable of creating. One of the best known of the several important principles which were enunciated in the Tagore case was that a man cannot be allowed to do; by indirect means, what is forbidden to be done directly, and that a trust can only be sustained to the extent, and for the purpose of giving effect to those beneficiary interests which the law recognizes.

As I understand the Hindu law, there must be a present beneficial interest created in property in order to render the gift, whether under a will or *inter vivos*, valid. In an unreported case (*Gopal Lal Seal* v. *F. J. Marsden*) decided on the 11th March 1887, I expressed my opinion on the subject in the following words:—"I do not think that a gift of this description is valid according to Hindu law. According to that law there must, as I **[691]** understand it, be a present beneficiary in order to make a gift valid. There may be a gift in *future*, but there must also be a gift *in present*. The law of gifts and of wills is the same, and in order that there may be a valid gift the donor must immediately divest himself of the property in favour of some existing beneficiary, and in the same way with regard to wills there cannot be a gift to a person to come into

(1) 2 Ind. Jur. N.S. 225. (2) 12 M.I.A. 356.
(3) 18 C. 385. (4) 2 B. 377.

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operation at a future date, unless there be a gift to a beneficiary in the interim." This is, as I understand it, merely what was decided in the Tagore case. In the judgment of that case we find the following: "Their Lordships for the reasons stated are of the opinion that a person capable of taking under a will must be such a person as could take a gift *inter vivos*, and therefore must, either in fact or in contemplation of law, be in existence at the death of the testator."

I cannot see how a direction to accumulate can be valid unless there be a present gift to support the direction to accumulate. The fact that in cases where there is a minor beneficiary, accumulation can be allowed, and that it may be possible to accumulate income for the purpose of paying debts does not to my mind help us. In the former case accumulation is rendered necessary by the incapacity of the beneficiary and is allowed in order that he may obtain the greater benefit from the gift which is made to him. In the latter case, the direction to accumulate is in aid of the proper administration of the testator's estate, and is sometimes necessary for the due performance of his legal and moral obligation to pay his debts.

I have assumed that the accumulations follow the gift of the *corpus*. I am very doubtful whether under the terms of this will there is any gift of the income.

In my opinion there is no valid gift of the income during the lifetime of the widow.

There remains one matter in contest. It was contended that, even if there was no gift of the property, the widow took as heir of the first adopted son and by the second adoption did not divest herself of her mother's estate. There is no doubt that by adoption a woman divests herself of her widow's estate. I cannot see in [692] principle why she cannot divest herself of her mother's estate in the same way as she can divest herself of her widow's estate. The act is hers, and the object of it is to create an heir to her husband. Why that second adopted son should have different rights in the estate than those enjoyed by the first adopted son I cannot see. In my opinion, by a second adoption, a widow divests herself of her mother's estate in the same way as she divests herself of her widow's estate on the first adoption.

I agree that the suit should be dismissed.

MACLEAN, C. J.—As regards the costs of the suit the order as to them in the Court below may stand. As regards the costs of the appeal and of the cross-objections, the parties to the suit who are *sui juris* not objecting, the costs of all parties of the appeal and cross-objections may, as between solicitor and client, be paid out of the estate.

C. E. G.

Attorneys for the appellants: Messrs. *G. C. Chunder & Co.*

Attorneys for the respondents: Mr. *R. Rutter.*

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FULL BENCH.

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FULL BENCH REFERENCE.

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, Mr. Justice Macpherson, Mr. Justice Trevelyan, Mr. Justice Ghose and Mr. Justice Rampini.

MANGUN JHA AND OTHERS (*Defendants*) v. DOLHIN GOLAB KOER AND OTHERS (*Plaintiffs*).* [3rd February, 1898.]

Limitation—Suit for damages for cutting and carrying away crops—Act XI of 1877, *sch. II, arts.* 36, 39, 48, 49 *and* 109.

In a suit for damages for cutting and carrying away crops—

Held, by the Full Bench (RAMPINI, J., dissenting) such suit does not come within the terms of art. 36 of sch II of the Limitation Act (XV of 1877).

[693] *Per* MACLEAN, C.J. (TREVELYAN, J., concurring).—Assuming that the case does not come within the terms of art. 39, the case is governed by art. 49. The crops, though immoveable in the first place, become specific moveable property when severed, and the fact that the severance was a wrongful act, does not make any difference.

Per MACPHERSON, J.—The case is governed by art. 49 or 48, as the crops, after they had been cut, come under the description of specific moveable property. Possibly, also, the case might be brought under art. 109, if it is not brought under art. 39.

Per GHOSE, J.—Article 49 applied to this case. *Surat Lal Mondal* v. *Umar Haji* (1) followed.

Per RAMPINI, J. (*dissentiente*).—The suit, as framed, not being one for compensation for trespass, art. 39 does not apply. Article 48 or 49 also does not apply as they deal with property which is *ab initio* moveable, and cannot be held applicable unless the first wrongful act, *viz.*, the conversion of the immoveable into moveable property, be disregarded. Article 109 also does not apply, as it referred to a case in which possession of immoveable property was withheld. Article 36, therefore, applied to the case.

Essoo Bhayoji v. *The Steamship* "*Savitri*" (2), referred to.

Pandah Gazi v. *Jennudi* (3), dissented from by TREVELYAN, J.

[F., 5 Bur. L.T. 156 = 17 Ind. Cas. 906 = 6 L.B R. 75; 11 Ind. Cas. 164 = 14 C.L.J. 598; 10 C.L J. 25; R., 34 C. 941 = 6 C.L.J. 237 = 11 C.W.N. 959; 14 C.L.J. 515 = 16 C.W.N. 540 = 11 Ind. Cas. 729; 17 C.L.J. 206 = 17 C.W.N. 308 = 18 Ind. Cas. 253; 12 C.W.N. 1090; 17 Ind. Cas. 605 = 23 M.L.J. 618 = 12 M.L.T. 538 = (1912) M.W.N. 1229; 21 Ind. Cas. 213 = 25 M.L J. 447 = 14 M.L.T. 225 = (1913) M.W.N. 869; 36 C. 141 = 12 C.W.N. 1090 = 9 C.L.J. 109 = 1 Ind. Cas. 788.]

THE plaintiffs in this case sued for a declaration of their zerait rights in respect of certain lands and for recovery of damages for the cutting and carrying away of crops grown by them upon those lands. The material portions of the plaint were as follow :—

"5. On the 23rd November 1892 (the defendants) being emboldened by the order passed in the said Foujdari case, and misunderstanding the order, wrongfully cut and carried away the *dhan* crop of 10 bighas 12 cottahs of khas zerait land of the plaintiffs, which was grown on behalf of the plaintiffs, besides the *dhan* crop of the said land sold by auction. Through fear of recognizance, the servants of the plaintiff were unable to oppose and hinder the defendants strongly, although the zerait land did not lie in the land sold by auction, and neither the defendants nor Ramlal Kopur had any concern with the said zerait land and the crop thereof.

* Reference to Full Bench in Appeals from Appellate Decrees Nos. 426, 460, 461, 462 and 463 of 1896, against the Decree of Babu Jogadurlabh Mozumdar, Subordinate Judge, First Court of Zilla Tirhoot, dated the 18th December 1895, reversing the decree of Babu Joya Pershad Pande, Additional Munsif of Sitamarhi, dated the 28th June 1895.

(1) 22 C. 877. (2) 11 B. 133. (3) 4 C. 665.

This wrongful act of the [694] defendants has been highly prejudicial to the right of the plaintiffs. . . . 1898 FEB. 3. — FULL BENCH. — 25 C. 692 (F.B.) = 2 C.W.N. 265.

"6. Although the plaintiffs are in possession of the zerait land, they should get the *dhan* appropriated by the defendants. As it is difficult for the plaintiffs to get it from the defendants without suing in Court for the same, the plaintiffs are obliged to institute the present suit for damages in respect of the produce of the land as well as for declaration of their right to the zerait land cultivated by them.

"8. The cause of action accrued to the plaintiffs within the jurisdiction of this Court on the 23rd November 1892, when the *dhan* crop was cut and carried away.

"9. The plaintiffs pray for a decree as follows:—

(*a*) That upon determination of the plaintiffs' right and possession, it may be declared that 10 bighas 12 cottahs of land form a part of the plaintiffs' khas zerait and jote; that the *dhan* crop of 1300 Fasli was grown by the plaintiffs; that the defendants had no right to cut, loot and appropriate the crop, and that it was an illegal act of the defendants to cut and appropriate the *dhan* crop of the said zerait along with that of Ramlal Kopur's land sold by auction, taking advantage of the recognizance of the plaintiffs' servants.

(*b*) That upon adjudication of the point alluded to in the first prayer, and upon declaration of the plaintiffs' right to 10 bighas 12 cottahs of zerait land, as per undermentioned boundaries, situate in mauza Pangawa, Rs. 458-9-3 principal with interest, mesne profit on account of *dhan* crop of 1300 Fasli appropriated by the defendants may be awarded against the defendants." . . .

The plaint was filed on the 16th February 1895. The defendants did not raise any plea of limitation in the Courts below. On the merits, the first Court found in favour of the defendants on the question of cutting and taking away of crops and dismissed the plaintiffs' suit. On appeal, the Subordinate Judge found for the plaintiffs and decreed the suit estimating the damage sustained by plaintiffs at Rs. 212.

[695] The defendants preferred a second appeal to the High Court, and one of the objections raised was that the claim for damages was barred by limitation, as the suit was instituted more than two years after the date of the cause of action.

The Division Bench (TREVELYAN and STEVENS, JJ.) before whom the case came on for hearing, being of opinion that there was conflict of opinion between different rulings on this point, made the following order of reference to a Full Bench:—

In these cases the learned vakil for the appellants has raised the objection that the suits are barred by limitation. This objection was not taken in the Courts below, but, having regard to the terms of s. 4 of the Limitation Act, it is an objection we are bound to consider.

The suits were brought for, amongst other things, damages for the cutting and carrying away of crops. This question of limitation only concerns the suit so far as they claim such damages. The suits were brought more than two years and less than three years, after the crops are said to have been cut and carried away. There have been contradictory decisions of this Court as to what article of the Limitation Act applies to a suit for cutting and carrying away crops. The first case is a decision of MITTER and PRINSEP, JJ., in *Shurnomoyee* v. *Pattarri Sirkar* (1), in which

(1) 4 C. 625.

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the learned Judges held that a suit of this kind is a suit for profits of immoveable property belonging to the plaintiff wrongfully received by the defendant within the meaning of Act IX of 1871, art. 109, which corresponds with art. 109 of Act XV of 1877, and not a suit for compensation for any wrong, malfeasance, nonfeasance or misfeasance independent of contract within the meaning of art. 40 of the Act of 1871. Article 40 of Act IX of 1871 corresponds with art. 36 of the present Act According to that decision these suits would not be barred. But in the same volume, p. 665, will be found a case, *Pandah Gazi* v. *Jennuddi* (1), decided by MITTER and MACLEAN, JJ., which holds that art. 40 is applicable. These two cases are directly in conflict. In a case *Surat Lall Mondal* v. *Umar* **[696]** *Haji* (2) in which GHOSE and RAMPINI, JJ., differed, and which was reheard by NORRIS, J., in consequence of such difference of opinion, NORRIS and GHOSE, JJ., considered that art. 36 of Act XV of 1877 did not apply, and RAMPINI, J., considered that it did apply. They dissented from the case to which we have referred in I. L. R., 4 Cal., 665, but did not refer the matter to a Full Bench.

In our opinion this point is one of importance, and as there are conflicting decisions of this Court on the subject we refer these appeals for the final decision of a Full Bench.

We may mention that a question of costs was raised, but, as the appeals have to go to the Full Bench, it is not for us to determine that question.

Babu *Sarada Charan Mitra* and Babu *Lakshmi Narain Singh*, for the appellants.

Babu *Umakali Mukerjee* and Babu *Baldeo Narain Singh*, for the respondents.

Babu *Lakshmi Narayan Singh*, for the appellants, contended that the suit was barred by the two years limitation prescribed in art. 36, sch. II of the Limitation Act (1877). The suit was not one for trespass but for compensation for crops carried away. [MACPHERSON, J.—The suit involved a trespass.] Reading para. 5 of the plaint, it appears that the object of the suit is not for recovering damages for trespass on the land as in art. 39. [MACPHERSON, J.—Why should not art. 49 apply?] That article relates to specific moveable property. Here the crops became moveable after the wrong, but when standing they were immoveable property. *Pandah Gazi* v. *Jennuddi* (1) [RAMPINI, J.—There may be two suits with two different limitations : two years for cutting away the crops ; three years for removing them.] The case of *Shurnomoyee* v. *Pattarri Sirkar* (3) takes a different view. But in that case there was no trespass at all. I rely on the judgment of RAMPINI, J., in the case of *Surat Lall Mondal* v. **[697]** *Umar Haji* (2), and the case of *Essoo Bhayaji* v. *The Steamship "Savitri"* (4), as to art. 49. Article 48 also deals with specific moveable and is, therefore, unapplicable. The case of immoveable property being made moveable is not specially provided for, and art. 36 would apply. Another point was urged on behalf of some of the defendants who appealed on the ground that they were not allowed costs although they were exempted from the claim of damages in the lower Court.

Babu *Umakali Mukerjee*.—On the question of costs, there was no decree against those defendants (2 to 5) and there could be no appeal by them, and further the appeal has been valued at Rs. 212 only, in respect of the damages decreed and not in respect of costs of these defendants.

(1) 4 C. 665. (2) 22 C. 877. (3) 4 C. 625. (4) 11 B. 133.

It is a question of discretion which cannot be interfered with in second appeal. As to defendant No. 1, the Civil Procedure Code authorized the lower Court to saddle him with all costs. *Ship Pershad Chuckerbutty* v. *Gunga Monee Debee* (1), *Radhapershad Singh* v. *Ram Parmeswar Singh* (2).

As to the question of limitation, the article here applicable is either 109, 39, 48, or 49. Article 36 does not apply. In *Pandah Gazi* v. *Jennuddi* (3) the question was whether the limitation was one year under art. 26 of the old law or not. The present question was not decided. That article is now incorporated in art. 49 of the present Act. [TREVELYAN, J.—If so, art. 49 also would not apply under that ruling.] Article 36 would apply only if there be no other article applicable to the case. [RAMPINI, J.—Here, cutting of the crops is the principal wrong, that brings you under art. 36.] The plaintiff wants the value of the *dhan* and nothing for cutting of the standing crops. He does not, it is true, say that he was dispossessed, but that should not be the reason for cutting down the period of three years to two. Paragraph 5 and prayer in the plaint would show that the claim was for mesne profits. **[698]** Article 109 would then apply, *Shurnomoyee* v. *Pattarri Sirkar* (4). Then, again, reaping may be considered as trespass on land, and art. 39 would apply. The other wrong is misappropriation, that brings the case under 48 or 49. In any view three years is the limitation for the suit. RAMPINI, J.'s judgment in *Surat Lall Mondal* v. *Umar Haji* (5) was based on a consideration of the frame of the suit. In this case *dhan* or the value of the crop, and not of the plant or standing crop, is claimed specifically. Article 109, 39, 48, or 49 applies; art. 36 has no application.

Babu *Lakshmi Narain Singh* in reply read Wharton's Law Lexicon, p. 613, and s. 211 of the Civil Procedure Code on the construction of art. 109, and urged that none of the arts. 39, 48, 49, fully contemplated a case like the present. Article 36 would therefore apply.

On the question of costs the judgment of PIGOT, J., in *Secretary of State for India in Council* v. *Marjum Hosein Khan* (6) was cited.

The Full Bench (MACLEAN, C. J., MACPHERSON, TREVELYAN, GHOSE and RAMPINI, JJ.) delivered the following

JUDGMENTS.

MACLEAN, C. J.—The short point we have to decide is whether the case falls within art. 36 of the second schedule of the Limitation Act, or whether it is within some one or other of the articles to which I will refer in a moment. According to the reference, the suit was brought for, amongst other things, damages for cutting and carrying away crops, and it is admitted that, if art. 36 applies, the suit is out of time, but that if art. 39 or arts. 48 or 49 or art. 109, which are the articles upon which the plaintiff relies, apply, then, as the period of three years, which is the period under the latter articles, had not elapsed when the suit was instituted, it was brought within time, and the statute of limitations is not a bar. To my mind art. 36 does not apply to this case. In the first place that section is a general one and only applies when the particular **[699]** case is not specially provided for in the Act. Again, the words "malfeasance," "misfeasance" or "nonfeasance" are scarcely the terms one would ordinarily apply to such a tort as the present. They are terms

(1) 16 W.R. 291 (293). (2) 9 C. 797 (802). (3) 4 C. 665.
(4) 4 C. 625. (5) 22 C. 877. (6) 11 C. 359.

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which more generally, at any rate, I do not say entirely, are applied to some wrongful act committed by persons standing in a fiduciary or *quasi*-fiduciary character, such as executors, trustees, and directors of companies. But be this as it may, I think this particular case is otherwise specially provided for in the Act. Looking at the pleadings, and the nature of the relief sought, I am by no means satisfied that the case does not come within art. 39, namely, compensation for trespass upon immoveable property. But assuming that not to be so, I think the case comes within art. 49, and I agree in the judgment of Mr. Justice Ghose, in the case of *Surat Lall Mondal* v. *Umar Haji* (1). It is difficult to say that, under the circumstances of this case, the crops having been severed from the soil, it was not specific moveable property in respect of which the plaintiff was seeking compensation for the wrongful taking away of the same. Though immoveable in the first place, the crop became moveable property specific in the sense that it was in specie, as soon as it was severed from the soil, and I do not see why, for the purposes of this article, the fact that the severance was a wrongful act on the part of the tortfeasor ought to make any difference. Seeing that the defence is a statutory one, it is for the defendant to show clearly that the case comes within art. 36. However, agreeing as I do with Mr. Justice Ghose's judgment in the case I have referred to, I do not think I can usefully add anything to what he has said.

With respect to the question of costs I see no reason whatever for interfering upon that point with the decision of the Court below.

MACPHERSON, J.—I agree. I would only add that I cannot see any real conflict of opinion in the cases of *Shurnomoye* v. *Pattari Sirkar* (2) and *Pandah Gasi* v. *Jennuddi* (3) or between these [700] cases, and the case of *Surat Lall Mondal* v. *Umar Haji* (1). Mr. Justice Ghose has clearly stated in the latter case the grounds on which he distinguished the case in I. L. R., 4 Cal., 665. Taking the question referred to us in this case to be whether art. 36 applies to facts of the case as found, I agree with the learned Chief Justice that it does not apply. That article only applies to cases which are not otherwise specifically provided for by the Act. In this case the plaintiff's direct complaint is of an act of trespass on his land coupled with the cutting and carrying away of the crops off his land, Clearly he would be entitled to recover damages for trespass. The plaintiff claimed in addition damages for the crops which the defendants wrongfully cut and carried away, and although standing crops are immoveable property, I do not see on what ground we can hold that crops, after they have been cut, do not come under the description of specific moveable property, to which art. 49 or 48 might apply. Possibly also the case might be brought under art. 109, if it is not brought under art. 39. It seems to me immaterial, or of very little importance, under which of the other articles it comes, because the plaintiff would, in any case, have three years from the date of the cause of action within which to bring his suit, and consequently would be in time. On these grounds I think that the appeal must be dismissed.

TREVELYAN, J.—I entirely agree with the view expressed by the learned Chief Justice. I only wish to add this in regard to what Mr. Justice Macpherson has stated, although for the purposes of this appeal, it seems to me unnecessary to decide it. At the time of the reference, I thought, and I still think, that there is a distinct conflict of

(1) 22 C. 877. (2) 4 C. 625. (3) 4 C. 665.

opinion between the decision of the learned Judges in the case reported in I. L. R., 22 Cal., and the decision of Mr. Justice Mitter reported in I. L. R., 4 Cal., 665. I think that the conclusion in the latter case as to art. 40 of the second schedule of the Limitation Act IX of 1871 is equivalent to a conclusion that art. 36 of the second schedule of the Limitation Act XV of 1877, which differs only from art. 40 of Act IX of of 1871 in the [701] prefixing of the word "wrong" to the words "malfeasance" "misfeasance" and "nonfeasance" would be applicable, whereas the ruling in the case in I.L.R., 22 Cal., is that it is not applicable. But, as I said before, having regard to the facts of this case and the judgment of the learned Chief Justice, it does not really very much matter whether those two cases agree or whether they differ.

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GHOSE, J.—I agree with the Chief Justice in holding that art. 36 of the Limitation Act does not apply, but that art. 49 does apply, to the facts of this case. In the case of *Surat Lall Mondal* v. *Umar Haji* (1) I have fully given my reasons for arriving at the conclusion at which I then did, and at which I do now arrive; and I do not think I should be justified in referring to them again.

As regards the case decided by Mr. Justice Mitter and Mr. Justice Maclean reported in I. L. R., 4 Cal., 665, to which reference has been made, it is sufficient to say that for the reasons I gave at p. 886 of I. L. R.. 22 Cal., I do not think that *that* case decided the precise point which is raised before us in this case.

RAMPINI, J.—I regret I am unable to agree with the view taken of this case by the learned Chief Justice and by my learned colleagues. I am of opinion that art. 36 of the second schedule of the Limitation Act applies to this case. I may say briefly that my reasons for thinking so are the same as those which I gave in my judgment in the case of *Surat Lall Mondal* v. *Umar Haji* (1). It appears to me that this case is on all fours with that case. The plaintiff in this case seeks to recover damages for the cutting and carrying away of his crops by the defendants, and consequently it appears to me that no other article of the Limitation Act, except art. 36, will apply to such a case. The learned pleader for the respondent has argued that the case comes under either art. 39 or arts. 48 and 49 or art. 109, but it appears to me that none of these articles will apply.

Article 39 will not, in my opinion, apply because the suit, as framed, is not one for compensation for trespass upon immoveable [702] property. Articles 48 and 49 will not apply, because this is not a suit for wrongfully misappropriating or injuring specific moveable property or for compensation for taking and determining the same. It is a suit, as is clearly shown from paragraph 5 of plaint, for the cutting and carrying away of standing crops which are immoveable property, whereas arts. 48 and 49 can only apply to moveable property, which is *ab initio* moveable, and has not been converted from immoveable to moveable property by the act of the tortfeasor. In my opinion arts. 48 and 49 cannot be held applicable unless the first wrongful act committed by the tortfeasors (in many cases, the principal wrong), *viz.*, the conversion of the immoveable into moveable property, be disregarded. Article 109 will not apply because that article appears to me to refer to a case in which possession of immoveable property has been wrongfully withheld from the plaintiff. That is not the case in the present suit. The defendants disclaim all interest in the land, and it is not alleged that they wrongfully took possession of the land. That this is the

(1) 22 C. 877.

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correct interpretation of art. 109 is apparent from the language of the article itself, from the definition of mesne profits given in s. 211 of the Code of Civil Procedure, and from the description of "an action for mesne profits" given at p. 479 of Wharton's Law Lexicon, 9th edition, where it is said, —"An action for mesne profits is an action of trespass brought to recover profits derived from land whilst the possession of it has been improperly withheld."

For these reasons I am of opinion that art. 36 applies, and I am supported in this view by the decision in the case of *Pandah Ghazi* v. *Jennudi* (1). I may also add that, as a matter of policy, it is a matter of some importance that the period of limitation in such cases should be short. In the case of *Essoo Bhayaji* v. *The Steamship "Savitri"* (2), FARRAN, J., says: "There are no cases in which it is more desirable that the evidence by which they are supported or rejected should be promptly given and scrutinized than in actions of tort," and in my opinion this observation is [703] particularly applicable to cases of cutting crops, so common in Bengal. I have only to add that I have no reason to dissent from the judgment of the learned Chief Justice with regard to the costs of this case.

MACLEAN, C.J.—It is admitted that the appeals Nos. 460, 461, 462 and 463 will be governed by this decision. The same order will be made in those cases also.

S. C. C. *Appeal dismissed.*

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25 C. 703 (F.B.) = 2 C.W.N. 353.

FULL BENCH REFERENCE.

Before Sir Francis W. Maclean, K.C.I.E. Chief Justice, Mr. Justice Macpherson, Mr. Justice Trevelyan, Mr. Justice Banerjee and Mr. Justice Jenkins.

KEDAR NATH RAUT (*Judgment-debtor*) *v.* KALI CHURN RAM (*Decree-holder*) AND KHUBI LAL (*Auction-purchaser*).*
[16th March, 1898.]

Civil Procedure Code (Act XIV of 1882), *s.* 310*A—Sale in execution of mortgage decree—Application by mortgagor under s.* 310*A. Civil Procedure Code—Transfer of Property Act (IV of* 1882), *s.* 104, *Rules framed under—Civil Procedure Code Amendment Act (V of* 1894).

Held by the Full Bench :—

Section 310A of the Civil Procedure Code (Act XIV of 1882, as amended by Act V of 1894), does not apply to sales of mortgaged property under the Transfer of Property Act (IV of 1882).

The rules framed by the High Court (Circular Order No. 13, dated 27th April 1892) under the provisions of s. 104 of the Transfer of Property Act do not make s. 301A applicable to such sales.

Ashruf Ali Chowdhry v. *Net Lal Sahu* (3) overruled; *Raja Ram Singhji* v. *Chuni Lal* (4), dissented from.

Quære.—Whether a rule by the High Court under s. 104 of the Transfer of Property Act making s. 310A of the Civil Procedure Code applicable to sales of mortgaged property under the said Act would not be *ultra vires.*

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* Full Bench Reference on Rule No. 2180 of 1896, issued by Trevelyan and Beverley, JJ., on 8th September 1896, against an order of Babu Sripati Chatterjee, Munsif at Arrah, dated the 17th February 1896.

(1) 4 C. 665. (2) 11 B. 133. (3) 23 C. 682. (4) 19 A. 205.

[Diss., 25 B. 104 ; **N.F.**, 22 M. 286 (288) ; 7 C.L.J. 581=12 C.W.N. 282=3 M.L T. 202 ; **Rel.**, 8 C.W.N. 102 (104); 5 Ind. Cas. 101; **R.**, 28 C. 73 (75); 7 C.L.J. 1 (29); 11 C.L.J. 78=5 Ind. Cas. 302 ; 12 C.L.J. 65=7 Ind. Cas. 258 ; 16 C.L.J. 404=17 C.W.N. 565=17 Ind. Cas. 936; 3 O.C. 42 (44) ; **Comm.**, 25 M. 244 (F.B.) ; **Expl.**, 4 C.W.N. 474 ; **D.**, 31 C. 373 (378).**]**

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KALI CHURN RAM instituted a suit for sale on a simple mortgage bond against Kedar Nath Raut, and obtained a decree on [704] the 29th January 1895, declaring the amount due on account of the mortgage and costs, and directing the defendant to pay the amount within three months from the date of decree. The decree was made absolute on the 22nd June 1895, and proclamation for sale issued. After several postponements, the sale was held on the 7th December 1895, and the mortgaged property was sold to Khubi Lal.

On the 10th December 1895, one Abdul Hye, alleging himself to be sub-lessee of the mortgaged property under the defendant applied to deposit the decretal amount and the purchasers' compensation under s. 310A of the Civil Procedure Code and made the deposit on the 12th December. On the 23rd December, the judgment-debtor applied to deposit the decretal amount, stating that the amount deposited by Abdul Hye really belonged to the judgment-debtor, but as that deposit was made in the name of Abdul Hye, a fresh deposit was rendered necessary. The correct amount was ascertained from the Court and deposit was made by the judgment-debtor on the 4th January 1896.

The decree-holder and the auction-purchaser raised several objections to the sale being set aside. The Munsif held with reference to one of the objections that he had no power to set aside sales under the Transfer of Property Act under the provisions of s. 301A of the Civil Procedure Code unless and until the High Court exercised its powers under s. 104 of the Transfer of Property Act and made s. 310 applicable to such sales. The judgment-debtor's application was refused and the sale was confirmed on the 17th February 1896.

The judgment-debtor preferred an appeal to the District Judge, but the appeal was dismissed on the ground that no appeal was provided by law in respect of an order passed on an application under s. 310A.

The judgment-debtor then moved the High Court (TREVELYAN and BEVERLEY, JJ.) and that Court issued a rule calling upon the opposite party to show cause why the order, dated the 17th February 1896, should not be set aside.

This rule (No. 2180 of 1896) came on for hearing on the 27th [705] July 1897, before Mr. Justice Trevelyan and Mr. Justice Stevens who referred the case to a Full Bench.

The order of reference was as follows :—

The question in this case is whether s. 310A of the Civil Procedure Code applies to sales of mortgaged property under the Transfer of Property Act. The only reported case of this Court on this question is *Ashruf Ali Chowdhry* v. *Net Lal Sahu* (1). In that case it was held that this section applied. The learned Judge then says "that by the rules framed by this Court (C. O. No. 13, dated the 27th April 1892) the provisions of the Civil Procedure Code are made applicable to sales of mortgaged property ordered by the Court under the Transfer of Property Act." On referring to the rules in question we find that the Code generally was not made applicable, but certain sections only were applied. As s. 310A had not been passed at the time the rules were framed, it is of course not included

(1) 23 C. 682.

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among the sections mentioned. It is only by the rules passed under s. 104 of the Transfer of Property Act that any portion of the Civil Procedure Code applies to chap. IV of the Transfer of Property Act. As s. 310A has not been applied by the rules, we are unable to see how force can be given to it. Having grave doubts as to the correctness of the decision to which we have referred, we refer this matter for the final decision of a Full Bench.

The decision, which we have mentioned, was followed by a Division Bench of this Court in appeal from appellate order No. 251 of 1895, decided on the 8th of June 1896.

Circular order No. 13*, dated 27th April 1892, alluded to in the reference runs thus:—

(1) An application under s. 89 of the Transfer of Property Act shall be made by means of verified petition stating the facts.

(2) If the Court passes an order directing that the property, or any part of it, shall be sold, it shall issue a proclamation of sale and cause it to be served in the manner provided by the Code of Civil Procedure for the service of proclamations regarding the sale of immoveable property.

[706] (3) Sections 286 to 294, both inclusive, of the Code of Civil Procedure shall apply to such sales.

(4) Sections 304 to 319, both inclusive, and ss. 328 to 335 of the Code of Civil Procedure, shall apply to proceedings subsequent to sale under a mortgage.

(5) The procedure to be followed in the execution of a decree passed under s. 90 of the Transfer of Property Act is that prescribed by the Code of Civil Procedure.

Section 310A of the Code of Civil Procedure was added to the Code by Act V of 1894, which was passed on 2nd March 1894.

The reference came on for hearing before the Full Bench on the 28th January 1898.

Babu *Karuna Sindhu Mukerjee* (Babu *Asutosh Mukerjee* with him) for the petitioner contended that under the rule of the circular No. 13, ss. 304 to 319 of the Code having been applied to mortgage decrees, 310A which was only an addition to 310 should also be applied, the provision was one of procedure only, and the enumeration of the sections was not exclusive. *Achalabala Bose* v. *Surendra Nath Dey* (1); *Jogodanund Singh* v. *Amrita Lal Sircar* (2). Section 310A is, in its scope and purpose, retrospective. Assuming it to be a section conferring a right, it may be extended to mortgage cases. In *Raja Ram Singh* v. *Chunni Lal* (3), s. 291 of the Code has been extended, although s. 89 provided that the right of redemption was extinguished. The same view was taken in a case *Vallabha Valiya Rajah* v. *Vedapuratti* (4). The correct view appears to be that the Code is applicable to all cases, except as otherwise provided for in the Transfer of Property Act. The latter enactment is not complete by itself and cannot exclude the general procedure, and the rule made under s. 104 was not meant to be exhaustive. *Ashruf Ali Chowdhry* v. *Net Lal Sahu* (5). Before the rules of the High Court came into operation in 1892, the Code was made applicable in the mofussil to all cases under the Transfer of Property [707] Act, and that was for ten years from 1882

* *Calcutta Gazette* of 13th April 1892, Part I, p. 414, and *Assam Gazette* of 16th April 1892, Part III, p. 272.

(1) 24 C. 766 (772) = 1 C.W.N. 550 (555). (2) 22 C. 767. (3) 19 A. 205 (208).
(4) 5 M.L.J. 282 (289) = 19 M. 40. (5) 23 C. 682.

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when the Act was passed. The Privy Council has taken the same view—*Birj Mohun Thakur* v. *Rai Uma Nath Chowdhry* (1).

Syed Shumsul Huda, for the opposite party.—When the rules were framed s. 310A had no existence, and the rule that "ss. 304 to 319 shall apply," did not include 310A. It could not, moreover, have been intended that any future alterations should be incorporated in the rule. The provision of s. 310A is also one which does not come within the purview of s. 104 of the Transfer of Property Act. The application of that section (310A) would not be "consistent" with the Act nor would it "carry out the provisions" of chap. IV. Reads s. 89 and s. 88. The application of 310A would involve a variation in the decree. It would also be inconsistent in the case of a sale on a second mortgage, s. 96. The case cited from I. L. R., 19 Allahabad, is not in point. There is only an *obiter dictum* on the present question. As to the general application of the Code, *vide Deefholts* v. *Peters* (2); *Himatram* v. *Khushal Jethiram Gujar* (3); Claim sections were held inapplicable.

Babu *Karuna Sindhu Mukerjee* in reply.

The judgments of the High Court (MACLEAN, C. J., MACPHERSON, TREVELYAN, BANERJEE, and JENKINS, JJ.) were as follows:—

JUDGMENTS.

MACLEAN, C.J.—The question we have to answer is, whether or not s. 310A of the Code of Civil Procedure applies to a sale of mortgaged property under a decree made in accordance with the provisions of the Transfer of Property Act. The question has arisen by reason of the decision in *Ashruf Ali Chowdhry* v. *Net Lal Sahu* (4) from which the referring Judges, TREVELYAN and STEVENS J., dissented. That case appears to me to be based upon the view that under rules framed by this Court (C. O. No. 13, dated 27th April 1892) "the provisions of the Code were made applicable to sales of mortgaged property ordered by the Court [708] under the Transfer of Property Act." I think this, which is the foundation of that judgment, is a mistake; the rules in question only make certain sections of the Code applicable to such sales and not the whole Code. Section 310A of the Civil Procedure Code only became law in 1894, whilst the above rules came into effect in April 1892. The judgment-debtor, the mortgagor, has contended that the property was sold "under chap. 19" of the above Code, within the meaning of s. 310A. That, to my mind, is a fallacy; the property was sold under the decree made in pursuance of the provisions of the Transfer of Property Act. As s. 310A had not been passed at the time the above rules came into effect, that section could not have been included among those mentioned in the rules in question. But even if it had been, I question whether such a rule would not have been *ultra vires*. Section 104 of the Transfer of Property Act only enables the High Court to make rules "consistent with this Act" (The Transfer of Property Act) "for carrying out......the provisions contained in this chapter." Let us consider what the effect would have been of a rule which made or purported to make s. 310 A applicable to such a sale as that in question. Under s. 89 of the Transfer of Property Act, if an order for an absolute sale be passed, the mortgagor's right to redeem and the security are extinguished and the proceeds of sale are to be applied according to the provisions of s. 88 of the same Act. Those are the mortgagee's rights under that Act. But if s. 310 A of the Code is to

(1) 20 C. 8. (2) 14 C. 631. (3) 18 B. 98. (4) 23 C. 682.

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apply to such a case, the mortgagee's rights are materially affected as are those of the purchaser, since, after the sale has been made, the mortgagor, on certain terms, may yet redeem his property. In other words, the period for redemption is substantially extended. If, then, a rule had been made by the High Court making s. 310 A applicable to such a sale, it seems to me exceedingly doubtful whether such a rule would have been "consistent with the Act." And in the case of a sale ordered at the suit of a puisne mortgagee or where there are a succession of puisne imcumbrances inconvenience at least, if not substantial difficulties, might arise from applying s. 310A to a sale in such a case.

Whilst there is good reason for such a section as 310A [709] in relation to sales of property, other than mortgaged property, there is no such reason as regards the latter. In the former case the sale may have been hurried on, the debtor may consequently not have been able to get the money, and the Legislature may have reasonably thought that the debtor should have one more chance of, perhaps, retaining his ancestral property, by paying the money on certain terms. But this reasoning has no application to the case of mortgaged property, where under the decree the mortgagor is given as least six months to redeem. The case of *Raja Ram Singhji* v. *Chuni Lal* (1) is cited by the applicants as an authority in their favour, but the express point we are now discussing was not decided in that case, and the observations of the Judges were admittedly *obiter dicta*. I am unfortunately unable to concur in them.

It is urged that the provisions for the execution of decrees in the Code of Civil Procedure are general in their application, and apply to the sales of all mortgaged properties, where the decrees have been made under the Transfer of Property Act. I am unable to accede to this view, for, if this were so, it is very difficult to see why s. 104 was introduced into the Act. In other words, if the whole of the provisions of the Code as to the execution of decrees apply to a sale such as that in question, s. 104 of the Transfer of Property Act was quite unnecessary. But it is abundantly clear that the Legislature left it to the High Court to frame rules consistent with the Act to carry out the provisions of that particular chapter of that Act, some of which relate to the sale of mortgaged properties. In the face of this particular section (s. 104) it is difficult to say that the provisions of the Code of Civil Procedure were to apply, and least of all, a provision which was not even law when the Transfer of Property Act was passed. I may add that to apply s. 310A to the sale of mortgaged properties in Calcutta would not only, in my opinion, have a mischievous tendency, but would, I consider, be inconsistent with the practice which has hitherto prevailed. For these reasons I answer the question by saying that s. 310A of the Civil Procedure Code does not apply to sales of mortgaged [710] property under the Transfer of Property Act. The rule must be discharged with costs, including the costs of this reference.

MACPHERSON, J.—I agree.

TREVELYAN, J.—I also agree.

JENKINS, J.—I agree with the Chief Justice.

BANERJEE, J.—The question referred to us is whether s. 310A of the Civil Procedure Code applies to sales of mortgaged property under the Transfer of Property Act.

(1) 19 A. 205.

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I agree with my learned colleagues in thinking that the question ought to be answered in the negative; and I base my decision upon this short ground.

Section 310-A, as its language clearly shows, applies by its own force only to sales of immoveable property under the chapter of the Civil Procedure Code in which it is included; and it may apply to any other sales to which it may be made applicable expressly or by necessary implication. Now the sale in this case was one not under the Code of Civil Procedure, but under the Transfer of Property Act; that is under the rules made by this Court under s. 104 of that Act; and neither by these rules, nor by any other rule or law, has s. 310-A been extended to such a sale. Section 310-A cannot, therefore, apply to the sale in question.

It was argued that as by the rules made by this Court under s. 104 of the Transfer of Property Act, most of the provisions of the Code of Civil Procedure are made applicable to sales under that Act, such sales should be held to be sales under chap. XIX of the Code, and s. 310-A should be held applicable to them in consequence; and in support of this argument the case of *Ashruf Ali Chowdry* v. *Net Lal Sahu* (1) was relied upon. The case cited is no doubt in point. But I must respectfully dissent from it, as the sale is one under the rules made by this Court and not under chap. XIX of the Code of Civil Procedure, and none the less so, because certain of the provisions of that chapter have been made applicable to it. Section 310-A had not been enacted when the rules in question were made by this Court, and [711] these rules do not say that sales under the Transfer of Property Act are to be held under chap. XIX of the Code of Civil Procedure, or that the provisions of that chapter, taken as a whole, shall apply to such sales. The enactment of s. 310-A cannot, therefore, affect such sales.

In this view of the case I think it unnecessary to decide whether this Court has the power under s. 104 of the Transfer of Property Act to make s. 310-A apply to sales under that Act. If it had been necessary to decide that question, I should have been inclined to answer it in the affirmative.

S. C. C. *Rule discharged.*

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25 C. 711 = 2 C.W.N. 369.

APPELLATE CRIMINAL.

Before Mr. Justice Ameer Ali and Mr. Justice Hill.

TAJU PRAMANIK AND OTHERS (*Appellants*) v. QUEEN-EMPRESS (*Respondent*).* [24th March, 1898.]

Charge to the Jury—Misdirection—Criminal Procedure Code (Act X of 1882), s. 423—*Setting aside verdict of the jury—Power of appellate Court to deal with the case.*

It is the duty of the Judge to call the attention of the jury to the different elements constituting the offence and to deal with the evidence by which it is proposed to make the accused liable. Failure to do so amounts to misdirection. *Queen-Empress* v. *Balya Somya* (2) followed.

Statements by some of the accused persons, which do not amount to a confession, and which do not in any way incriminate them, are not admissible in evidence against any persons other than those making them. Omission to direct

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* Criminal Appeal No. 110 of 1898 against the order of F. S. Hamilton, Esq., Additional Sessions Judge of Mymensing, dated the 23rd of December 1897.

(1) 23 C. 682. (2) 15 B. 369.

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25 C 711= 2 C.W.N. 369.

the jury that in dealing with the evidence against the accused other than those making the statements they are not to take into consideration such statements, also amounts to misdirection.

If the verdict of the jury is set aside on any of the grounds mentioned in cl. (d) of s. 423 of the Criminal Procedure Code (Act X of 1882) then there is no restriction on the powers of the appellate Court to deal with a case of which it has complete seizin in any of the manners provided in that section. [712] The law nowhere lays down that when the verdict of the jury is set aside the Court must necessarily direct a new trial.

Wafadur Khan v. *Queen-Empress* (1) dissented from. The course adopted in *Queen-Empress* v. *O'Hara* (2); *Regina* v. *Naoroji Dadabhai* (3) and *Queen-Emprees* v. *Haribole Chunder Ghose* (4) followed.

[Appl., 30 M. 44=1 M.L.T. 399 (400); 7 Bur. L.T. 20=23 Ind. Cas. 465=15 Cr. L.J. 257.]

THE facts of the case sufficient for the purpose of this report appear from the judgment.

Babu *Promotho Nath Sen* appeared on behalf of the appellants.

The Deputy Legal Remembrancer (Mr. *Gordon Leith*), appeared on behalf of the Crown.

The judgment of the High Court (AMEER ALI and HILL, JJ.) is as follows:—

JUDGMENT.

Eight persons were charged in the Sessions Court of Mymensingh under ss. 395 and 412 of the Indian Penal Code and tried with a jury on the 3rd of December 1897. Four of the men so charged were acquitted; against the remaining four named, respectively, Taju Pramanik, Kasir Khan, Shahabatullah *alias* Sadatullah and Surat Khan the jury returned an unanimous verdict of guilty. Surat Khan was convicted under s. 412 and sentenced by the Additional Sessions Judge to six months' rigorous imprisonment; Taju Pramanik was convicted under s. 395 and sentenced to three years' rigorous imprisonment; whilst Kasir Khan and Shahabatullah *alias* Sadatullah were convicted under s. 395 read with s. 75 and sentenced to four and five years' rigorous imprisonment respectively.

On appeal it has been contended before us that the verdict of the jury was erroneous owing to the misdirection of the learned Sessions Judge in not calling their attention either to the ingredients which constitute the offence of dacoity or to the evidence affecting the appellants in relation to the charge under s. 395. It is said that the learned Sessions Judge merely read to the jury the definition of dacoity and left it to them to apply the law; and that [713] considering the complex character of the offence he ought to have explained the law to the jury with special reference to the facts proved in the case. It is also contended that the learned Judge was wrong in admitting against the appellants the statements of two men who were also accused in the case and certainly in not calling the attention of the jury to the fact that those statements were not admissible against the appellants, and that no weight should be attached to them in considering the case against any of the accused other than those making them. There are other contentions raised in connection with the question of misdirection, to which we think it unnecessary to refer, as, in our opinion, the verdict must be reversed on the two grounds to which we have already adverted.

In our opinion it was not sufficient for the Judge merely to read to the jury the definition of dacoity, and to leave it to them to find out whether the evidence produced for the prosecution made out a case under

(1) 21 C. 955. (2) 17 C. 642. (3) 9 B.H.C. 358. (4) 1 C. 207.

s. 395 against the accused. It was the duty of the judge to call the attention of the jury to the different elements constituting the offence, and to deal with the evidence by which it was proposed to make the accused liable under the section. His failure to do so, in our judgment, amounts to misdirection. The charge of the learned Sessions Judge under s. 412 seems to us equally defective. In the case of *Queen-Empress* v. *Balya Somya* (1), the accused were charged with retaining stolen property under s. 411 of the Indian Penal Code. The Sessions Judge, in his charge to the jury, merely directed them to find whether the property was stolen, and whether it was retained by the accused. The Bombay High Court held that the charge was defective and amounted to a misdirection. It appears to us that in the present case also it was incumbent on the Sessions Judge to have explained to the jury that, in order to convict the accused under s. 412, it was necessary to find they retained or had possession of the goods with guilty knowledge. We think also that the Judge ought to have brought to the notice of the jury the fact that the appellants, at the time of the search, were in Police custody. It would then [714] have rested with the jury to draw any inference of fact they chose regarding the *bona fides* of the search.

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As regards the second contention, namely, the improper admission of the statements made by some of the accused, it is enough to say that those statements do not amount to a confession. They do not in any way incriminate the persons making them. The learned Sessions Judge, in his charge to the jury, stated as follows: "There being no evidence against Basir and nothing against Haran, but an uncorroborated statement of the accused Wazer, on which it is not safe to rely without corroboration, I direct you to return a verdict of not guilty against them."

But the Judge did not direct the jury that in dealing with the evidence against the present appellants they were to omit entirely from consideration the statements made by Fakir and Uzir, and we are distinctly of opinion his failure to do so has resulted in a miscarriage of justice. Those statements, without a direction from the Judge to the effect that they were not admissible in evidenee against any person other than the men making them, must have weighed with the jury in bringing in a verdict of guilty against the present appellants, certainly against Shahabatullah *alias* Sadatullah, against whom there is no evidence on which he could possibly be convicted under s. 395 or s. 412.

Upon these grounds we are of opinion that the verdict of the jury must be reversed, and we accordingly reverse it. The verdict being thus set aside, we have under s. 423 the power to deal with the case upon the facts; and after going through the evidence we are of opinion that Shahabatullah *alias* Sadatullah must be acquitted and the other two appellants retried.

Mr. *Leith* however contends on the authority of the case of *Wafadur Khan* v. *The Queen-Empress* (2) that we have no power to consider whether the evidence is sufficient or not against any of the accused, and the only thing we can do, if we find the verdict must be reversed, is to direct a retrial. No doubt this proposition is broadly laid down in that case, but we are not prepared to agree with the view of the law enunciated there. We [715] do not, however, think it necessary to refer the question to a Full Bench, as, in our opinion, the course taken by the full Court in the case of

(1) 15 B. 369. (2) 21 C. 955.

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The Empress v. *O'Hara* (1) fully warrants the view we take of the law. The same course was adopted by the Bombay High Court in the case of *Regina* v. *Nauroji Dadabhai* (2), and by this Court in that of *The Empress* v. *Huribole Chunder Ghose* (3). These cases are not referred to by the learned Judges in *Empress* v. *Wafadur Khan* who proceed simply on the principle laid down in *Makin* v. *The Attorney-General for New South Wales* (4). We admit that theoretically the principle enunciated in Makin's case is of considerable importance. But it seems to us the policy of the law in this country is different, and that the Legislature has, with a distinct purpose, vested the appellate Court with very large powers. A reference to s. 423 of the Criminal Procedure Code will make clear our meaning on this point. That section deals with the powers of the appellate Court and runs as follows:—

"The appellate Court shall then send for the record of the case, if such record is not already in Court. After perusing such record, and hearing the appellant or his pleader, if he appears, and the Public Prosecutor, if he appears, and in case of an appeal under s. 417, the accused, if he appears, the Court may, if it considers there is no sufficient ground for interfering, dismiss the appeal, or may—

(*a*) In an appeal from an order of acquittal, reverse such order and direct that further inquiry be made, or that the accused be retried or committed for trial, as the case may be, or find him guilty and pass sentence on him according to law.

(*b*) In an appeal from a conviction (1) reverse the finding and sentences and acquit or discharge the accused, or order him to be retried, by a Court of competent jurisdiction subordinate to such appellate Court or committed for trial; or (2) alter the finding, maintaining the sentence, or with or without altering **[716]** the finding, reduce the sentence; or (3) with or without such reduction, and with or without altering the finding, alter the nature of the sentence, but not so as to enhance the same.

(*c*) In an appeal from any other order, alter or reverse such order.

(*d*) Nothing herein contained shall authorize the Court to alter or reverse the verdict of a jury, unless it is of opinion that such verdict is erroneous owing to a misdirection by the Judge, or to a misunderstanding on the part of the jury of the law as laid down by him."

Clause (*d*) restricts the grounds on which the verdict of the jury can be reversed or altered. But once the verdict is out of the way, there is no restriction on the powers of the Court to deal with the case of which it has complete *seisin*, in any of the manners provided in that section. For example, taking cl. (*b*) the High Court, as the appellate Court, has the power either to reverse the finding and sentence and acquit or discharge the accused, or order him to be retried, or alter the findings, maintaining the sentence, or, without altering the finding, reduce the sentence. Nowhere does the law lay down that, when the verdict of the jury is set aside, the Court must necessarily direct a new trial.

In this view it seems to us that a reference to a Full Bench will only cause unnecessary harassment to the appellants. As already stated, against Shahabatullah *alias* Sadatullah there is no evidence whatsoever to warrant a conviction. We accordingly set aside his conviction and acquit him and direct that he be discharged. We also set aside the conviction of the other two, Taju and Kasir and in their cases direct a retrial.

(1) 17 C. 642. (2) 9 B. H. C. 358. (3) 1 C. 207. (4) (1894) L. R. A. C. 57.

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[717] APPELLATE CIVIL.

Before Mr. Justice O'Kinealy and Mr. Justice Rampini.

PUNUK LALL MUNDAR (*Defendant*) v. THAKUR PROSAD SINGH AND OTHERS (*Plaintiffs*).* [21st March, 1898.]

Land Registration Act (Bengal Act VII of 1876), *s.* 78 *and s.* 42—*Suit for rent by unregistered proprietor—Transfer of proprietary right by succession.*

Section 78 of the Land Registration Act, 1876, precludes a person claiming as proprietor from suing a tenant for rent unless his name has been registered as such under the Act. It is immaterial how the transfer of proprietorship is effected, whether it is a case of transfer by purchase or a case of transfer by succession.

Section 42 of the Act makes it clear that every person succeeding to the proprietary right in any estate must apply for registration of his name. *Surjakanta Acharjya Bahadur* v. *Hemanta Kumari* (1) applied.

THE plaintiffs, who were the heirs of the registered proprietors, brought this suit for the recovery of arrears of rent. The defendants pleaded, amongst other things, that the suit could not proceed, as the plaintiffs had not been registered as proprietors as required by s. 78 of Bengal Act VII of 1876. The District Judge held that that section was applicable to cases of transfers of proprietorship and not to cases of its devolution on the heirs of registered proprietors, and decreed the plaintiffs' suit. The plaintiffs appealed to the High Court.

Babu *Prosunno Chunder Roy*, appeared for the appellant.

Babu *Lakshmi Narain Sinha*, appeared for the respondents.

The judgment of the High Court (O'KINEALY and RAMPINI, JJ.) is as follows:—

JUDGMENT.

This is a suit for arrears of rent, to which objection is raised by the defendant that the plaintiffs are not entitled to sue for rent, [718] inasmuch as their names have not been registered under the provisions of s. 78 of Bengal Act VII of 1876. The learned District Judge has overruled this objection and decreed the suit, and the defendant now appeals to this Court.

We are of opinion that the judgment of the District Judge is not correct. We think that the objection under s. 78 of the Land Registration Act must prevail. The learned District Judge says that the case of *Surjakanta Acharjya Bahadur* v. *Hemanta Kumari* (1) is not a precedent in this case, because that refers to a case of transfer of proprietorship and not to one, as in this case, of sons succeeding their parents. We think, however, that under s. 78 it is immaterial how the transfer of proprietorship is effected, whether it is a case of transfer by purchase or a case of transfer by succession. It is further apparent, under the provisions of s. 42 of the Act, that every person succeeding to the proprietary right in any estate, must apply for registration of his name. The learned pleader for the respondents in this case urges that his clients are governed by the Mitakshara law, and they succeed by survivorship. We think, however, that in these circumstances the provisions of the second clause of s. 42

* Appeal from Appellate Decree No. 709 of 1896 against the decree of C. M. W. Brett, Esq., District Judge of Bhagulpore, dated 31st of January 1896, affirming the decree of Babu Prayag Nath, Munsif of Mudhepurah, dated the 22nd of June 1895.

(1) 16 C. 706.

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of the Act still apply. In any case, the plaintiffs come within the terms of s. 78 of the Act, and they are barred from recovering rent by suit under the provisions of that section.

We decree the appeal, and, setting aside the decrees of both the lower Courts, dismiss the suit with costs in all the Courts.

S. C. B.

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25 C. 718=2 C.W.N. 247.

APPELLATE CIVIL.

Before Mr. Justice Ghose and Mr. Justice Ameer Ali.

ISWAR CHANDRA DUTT AND OTHERS (*Plaintiffs*) *v.* HARIS CHANDRA DUTT AND OTHERS (*Defendants*).*
[14th January, 1898.]

Code of Civil Procedure (Act XIV of 1882), *ss.* 244 *and* 258—*Uncertified adjustment—Separate suit—Suit by judgment-debtors to recover back* [719] *their property, which the decree-holder obtained possession of, in execution of his decree, whether maintainable.*

One *M* obtained a decree for possession of a *jote* and for mesne profits against the plaintiffs. Subsequently, by a registered *ekrarnamah*, the decree-holder having received from the judgment-debtors (the plaintiffs) the amount due on account of mesne profits, and also a further consideration of Rs. 156, relinquished an eight-anna share of the *jote* in favour of them. The remaining eight-anna share of the *jote* was also sold by the decree-holder by a registered *kobala* to the judgment-debtors. The heirs of the decree-holder on his death applied for execution of the decree, but notwithstanding the judgment-debtors' objection that the decree could not be executed, it having been satisfied by virtue of the aforesaid *ekrarnamah* and *kobala*, they obtained possession of the *jote*; the adjustment not having been certified, was not taken into account by the Court executing the decree. On a regular suit by the judgment-debtors for a declaration of title to, as well as for the recovery of, possession of the *jote*, the defence mainly was that under s. 244 of the Code of Civil Procedure no separate suit would lie.

Held, that such a suit was maintainable, and that s. 244 of the Code of Civil Procedure was no bar to it.

Azizan v. *Matuk Lall Sahu* (1) distinguished.

[F., 44 P.R. 1906=82 P.L.R. 1907; R., 31 C. 480=8 C.W.N. 395; 16 C.W.N. 951=14 Ind. Cas. 574; U.B.R. (1905) 4th Qr. C.P.C. 15, 244: D., 2 O.C. 315 (318).]

THE facts of the case, so far as they are necessary for the purposes of this report, are sufficiently stated in the judgment of the High Court.

Babu *Saroda Charan Mitter*, with him Babu *Hara Kumar Mitter*, for the appellants.

Babu *Girija Sunker Mazumdar*, for the respondents.

The following judgments were delivered by the High Court (GHOSE and AMEER ALI, JJ.):—

JUDGMENTS.

GHOSE, J.—The facts of this case are stated by the Subordinate Judge in his judgment as follows: "One Mohesh Chunder Dutt obtained a decree for possession of a *jote* against the defendants, appellants (it

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* Appeal from Appellate Decree No. 1711 of 1896 against the decree of Babu Mohendra Nath Roy, Offg. Subordinate Judge of Pubna and Bogra, dated the 27th of June 1896, reversing the decree of Babu Amar Chundra Mookerjee, Munsif of Pubna, dated the 30th of April 1895.

(1) 21 C. 437.

should be plaintiffs, respondents), and also for mesne profits for the period of dispossession. Subsequently to the passing of the decree, on the 12th of Sraban 1298, Mohesh Chunder received from the judgment-debtors the amount due on account of *wasilat*, and for a further consideration of Rs. 156 relinquished an eight-anna share of the *jote* in favour of the **[720]** judgment-debtors by an *ekrarnamah* which was duly registered. By a subsequent *kobala* (also registered), dated the 19th of Bhadra 1299, Mohesh sold the remaining eight annas share of the *jote* to the judgment-debtors. But, on his death, his heirs, the present appellants, took out execution of the decree, and the judgment-debtors raised the objection that the decree was satisfied by virtue of the *ekrarnamah* and *kobala* executed by Mohesh, but as this adjustment was not certified under s. 258 of the Civil Procedure Code, it was not taken into account, and the heirs of the decree-holder, Mohesh Chunder, were put in possession of the *jote*. Thereupon the judgment-debtors, the present respondents, brought a regular suit against the heirs of the decree-holders, the present appellants, claiming the following reliefs, *viz.*, (1) a declaration of the plaintiffs' rights to the *jote* in question; (2) a declaration that the heirs of Mohesh Chunder have no right to the *jote* in question; (3) for recovery of possession of the *jote* in question; (4) for an order restraining the defendants from recovering the mesne profits in execution of the decree; (5) for recovery of the value of the crops taken by the defendants from the *jote* in question; (6) for mesne profits for the period the plaintiffs were kept out of possession; (7) for costs of the suit; and (8) for any other suitable relief."

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The main defence to this action was that it was barred by the provisions of s. 244 of the Code of Civil Procedure.

The Court of first instance overruled this plea, and held that the plaintiffs were entitled to the reliefs asked for in the plaint, save and except the fourth relief, namely, that the defendants may be restrained from recovering the mesne profits in execution of the decree. So far as this particular matter is concerned, it is not before us, the plaintiffs not having appealed in the lower appellate Court against the judgment of the Court of first instance. The Subordinate Judge has, on appeal by the defendants, dismissed the suit upon the ground that s. 244 of the Code is a bar to the maintenance thereof; and in support of this view he has quoted the case of *Azizan* v. *Matuk Lal Sahu* (1). The sole question **[721]** therefore, for our consideration is whether, by reason of the provisions of s. 244 of the Code, this suit is barred.

Now, it will be observed that the deeds under which the plaintiffs sought for the reliefs to which we have already referred, are deeds that were executed in their favour by the decree-holder upon dates subsequent to the passing of the decree, and for fresh consideration. No doubt, when the decree was sought to be executed, the plaintiffs contended before the execution Court that, by reason of the said two deeds, the decree in question had been satisfied, and, therefore, it could not be executed. But the Court in execution declined to go into the question, as indeed it was not competent to go into it, having regard to the provisions of s. 258 of the Code of Civil Procedure, the adjustment of the decree having been made out of Court, and having not been certified to the Court in accordance with the Code. Section 258 in the last paragraph provides: "Unless such a payment or adjustment" (that is to say, payment or adjustment out of Court) "has been certified as aforesaid, it shall not be

(1) 21 C. 437.

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recognized as a payment or adjustment of the decree by any Court executing the decree." So that it seems to be quite clear that the execution Court was not competent to recognize the adjustment, which was pleaded by the plaintiffs, of the decree in question.

In the case of *Azizan* v. *Matuk Lal Sahu* (1) referred to by the Subordinate Judge, the facts were that the defendant had obtained a decree against the plaintiff, which he partially executed, and thereupon an adjustment of account took place between the plaintiff and the defendant, in which a certain sum was found due by the plaintiff to the defendant, for which sum the plaintiff gave a bond to the defendant, and in consideration of which the defendant agreed to exonerate the plaintiff from liability for the balance due under the decree. This satisfaction of the decree was not certified to the Court. Subsequently, the defendant applied for further execution of the decree. In a suit for a declaration that the defendant had no right to execute the decree, and for an injunction to restrain him from executing it, it was contended that the action was barred by s. 244 of the Civil Procedure Code. [722] It was held by the majority of the Judges who composed the Divisional Bench that s. 244 is not limited by s. 258, and that the suit is not maintainable, and that where a decree is satisfied by an agreement out of Court, and such satisfaction is not certified to the Court, a subsequent suit on the agreement is not maintainable if the object of the suit is to restrain the decree-holder from executing his decree in contravention of the agreement.

The circumstances of this case are very different. Eliminating from our consideration the fourth relief, which the plaintiffs asked for, namely, that the defendants might be restrained from recovering the mesne profits in execution of the decree, the object of the present suit is not to restrain the decree-holder from executing his decree in contravention of the agreement entered into between the parties as evidenced by the two documents, the *ekrarnamah* and the *kobala*, to which we have already referred, but rather the suit is with the object of recovering property under that agreement. The defendants, decree-holders have already in execution of the decree been put in possession of the properties covered thereby, and what the plaintiffs now say is in effect this: Subsequent to the decree, you received from us certain considerations for which you conveyed the property covered by the decree; we were not at liberty to oppose the execution of the decree, and so you were put in possession of the property in execution; but we are, notwithstanding, entitled to recover the same from you upon the conveyances executed by you. We think that this action is quite maintainable.

It has, however, been contended by the learned vakil for the respondents that the adjustment which was pleaded by the plaintiffs in the execution department could have been dealt with by the Court under s. 244 of the Code of Civil Procedure, and, therefore, the present suit is incompetent. But having regard to the provisions of the last paragraph of s. 258, to which we have already referred, we are unable to hold that the executing Court could go into a question which is distinctly prohibited from being gone into by "any Court executing the [723] decree." It seems to us, therefore, that there is no reason why the plaintiffs should not be entitled to recover upon the documents to which we have already referred—documents executed subsequent to the passing of the decree, and by which distinct rights were conveyed to them.

(1) 21 C. 437.

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Upon these considerations we think that the decree of the Court below should be set aside, and that of the Court of first instance restored with costs, the *ekrarnamah* and *kobala* having been found to be genuine by the Court of first instance, and that finding not having been impeached by the defendants before the lower appellate Court.

AMEER ALI, J.—The only question in this case is whether, having regard to the provisions of s. 244 of the Code of Civil Procedure, this suit is maintainable. Mohesh Chunder Dutt, the predecessor of the defendants, appears to have obtained a decree against the plaintiffs in respect of the lands in suit. Subsequent to the decree an arrangement was arrived at between him and the plaintiffs by which, in consideration of a certain sum of money paid by the plaintiffs, he transferred to them, or relinquished in their favour, a moiety of the said lands. Subsequent thereto he conveyed to them the remaining moiety also for consideration. Upon the death of Mohesh Chunder the defendants took out execution of the decree obtained by him. The plaintiffs objected that the decree having been adjusted no execution could issue. That objection was overruled on the ground that, inasmuch as the adjustment had not been certified, the Court was not in a position to entertain it. The defendants, thereupon, in execution of the decree, obtained possession of the lands in suit. The plaintiffs now bring this suit for a declaration of their right in respect of this *jote* upon the basis of the relinquishment and the conveyance executed by Mohesh, and they pray for the usual ancillary reliefs. They also ask for an injunction, which has been refused by the first Court. The suit, therefore, was not directed to interfere in any way with the execution of the decree that had been obtained by Mohesh nor was its scope parallel to any of the matters referred to in s. 244 of the Civil Procedure Code, and consequently it does not appear to be barred in any way by the provisions **[724]** of that section. But it is contended that, under the ruling in the case of *Azizan* v. *Matuk Lal Sahu* (1) the suit is not maintainable because the plaintiffs could have, in the course of the execution of the decree, raised the objection that, there being this relinquishment and conveyance from Mohesh in their favour, the decree could not be executed. But if regard be had to the provisions of s. 258 it will be seen that it covers a much larger ground than what is covered by s. 244 of the Code of Civil Procedure. Section 258 deals with all adjustments arrived at between the decree-holder and the judgment-debtor. An adjustment may not be confined to the satisfaction or discharge of the decree. There may be matters in the course of an adjustment which may be outside that, and there is no reason whatsoever why, if any other arrangement has been arrived at, the judgment-debtors should not be entitled to maintain an action upon it, nor does there appear to be any ground based upon the provisions of s. 244 which would preclude the maintenance of such an action.

I may observe that the case of *Azizan* v. *Matuk Lal Sahu* (1) is one of a peculiar character. The decision there is limited to the reason that a subsequent suit brought with the object of interfering with the execution of the decree cannot be maintained under s. 244. How far I would be prepared to concur in the conclusion arrived at in that case it is not necessary to consider in the present case, for the facts here are totally different.

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(1) 21 C. 437.

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I am of opinion, therefore, that the suit was maintainable, that there is nothing in the provisions of s. 244 which covers this suit, and that the lower appellate Court was wrong in dismissing the plaintiffs' action on the ground it has done. I agree, therefore, in setting aside its order and in restoring the decree of the first Court.

S. C. G. *Appeal allowed.*

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25 C. 725 = 2 C.W.N. 407.

[725] APPELLATE CIVIL.

Before Mr. Justice O'Kinealy and Mr. Justice Rampini.

BHUGWATI KUWERI CHOWDHRANI (*Plaintiff*) *v.* CHUTTERPUT SINGH (*Defendant*).* [21st March, 1898.]

Cess Act (Bengal Act IX of 1880), s. 34 and s. 35—Preparation and publication of valuation roll—Liability to pay cess.

In the case of rent-paying lands the publication of the valuation rolls under s. 35 of the Cess Act (Bengal Act IX of 1880) is not a condition precedent to the attaching of liability to pay road cess in accordance with the valuation rolls. *Askanullah Khan* v. *Trilochan Bagchi* (1) distinguished.

[F., 28 C. 109.]

THE plaintiff instituted this suit for recovery of arrears of rent and cesses against the defendants, who held a *patni* tenure under him. The plaintiff was held liable by the Collector to pay road cess upon the basis of some valuation rolls prepared in 1892 under s. 34 of the Cess Act. The defendant, who was, previous to the suit, paying the cess at the same rate as the plaintiff was paying to the Collector, objected to pay at that rate any longer on the ground that the valuation rolls were not published under s. 35 of the Cess Act, but was willing to pay according to the previous valuation of 1889. The Subordinate Judge decided in favour of the defendant holding that publication was necessary before liability to pay cess would arise.

Sir *Griffith Evans* and Mr. *C. Gregory*, on behalf of the appellants.

Dr. *Rash Behari Ghose*, Babu *Digumbur Chatterjee*, Babu *Dwarka Nath Chakravarti* and Babu *Joy Gopal Ghose*, on behalf of the respondent.

The judgment of the High Court (O'KINEALY and REMPINI, JJ.) is as follows:—

JUDGMENT.

The only point raised in this appeal is as to whether the defendant is liable to pay road cess to the plaintiff at the same rate as [726] that at which the plaintiff has been held bound to pay road cess to the Collector.

The plaintiff is the holder of an estate in which the defendant holds a patni tenure, and the plaintiff has been held liable by the Collector to pay road cess upon the basis of certain valuation rolls of 1892. The defendant has been paying road cess for some years at the rate specified in these papers, but in this suit he contends that he is not liable to pay road cess at that rate any longer, in consequence of the valuation roll not having been published under s. 35 of the Cess Act, and that he is liable to pay according to the previous valuation of 1889.

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* Appeal from Original Decree No. 348 of 1896, against the decree of Babu Hari Krishna Chatterjee, Subordinate Judge of Purneah, dated the 14th of July 1896.

(1) 13 C. 197.

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The Subordinate Judge has found in favour of the defendant, being of opinion that the publication of the valuation rolls under s. 35 of the Cess Act is a condition precedent to any liability attaching to the defendant to pay road cess in accordance with these valuation rolls. The plaintiff now appeals to this Conrt. We are of opinion that the learned Subordinate Judge is incorrect in the view which he takes of the law. He relies upon the ruling in the case of *Ashanullah Khan* v. *Trilochan Bagchi* (1), in which it was held that when under the Act certain things are required to be done before any liability attaches to any person in respect of any right or obligation, it is for the person who alleges that liability has been incurred to prove that the things prescribed in the Act have been actually done, and he appears to think that this ruling lays down the general principle that the publication of the valuation rolls under the Cess Act is a condition precedent to the attaching of any liability to pay road cess. We are, however, of opinion that this ruling (1) is no authority for the defendant being held not liable to pay the road cess in the case. The ruling cited by the learned Subordinate Judge refers to the publication of valuation rolls under s. 52 of the Cess Act, which relates to payment of road cess for rent-free lands; and it appears from s. 56 of the Act that owners of rent free land are not bound to pay road cess before the publication of the valuation rolls under s. 52. The present case, however, does not relate to the road cess [727] of rent-free lands; it relates to road cess of rent-paying lands, and the publication of the valuation rolls of such lands has to be made, not under s. 52, but under s. 35 of the Act. Then, there is no provision in the Act relating to rent-paying lands corresponding to s. 56 of the Act. On the contrary, it would appear from the provisions of ss. 36 and 41 of the Act that the publication of valuation rolls is not a condition precedent to the attaching of liability to pay road cess for rent-paying lands. Section 36 prescribes that "except as otherwise in this part" (that is Part II) expressly provided, "every valuation and revaluation made under this chapter shall remain in force for the term of five years;" and s. 41 lays down that "except as otherwise in this Act provided, every holder of a tenure shall yearly pay road cess to the holder of the estate or tenure within which the land held by him is included. There is, therefore, no provision prescribing that the publication of the valuation rolls is necessary before any liability attaches to the tenure-holder. On the contrary, it would seem that "except as otherwise provided," he is bound to pay the road cess on the preparation of the valuation rolls, and there is no provision in the Act which exempts him from, or limits his, liability.

For these reasons we think the view taken under s. 35 by the learned Subordinate Judge is incorrect, and we accordingly decree the appeal with costs in this Court and with proportionate costs in the Court below.

S. C. B.

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(1) 13 C. 197.

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CRIMINAL REVISION.

Before Mr. Justice Banerjee and Mr. Justice Wilkins.

THE LEGAL REMEMBRANCER *v.* BHAIRAB CHANDRA CHUCKERBUTTY AND OTHERS.* [16th November, 1897.]

Transfer of criminal case—Criminal Procedure Code (Act X of 1882), s. 526, cl. (e)—Expression of belief by the District Magistrate—Fairness and impartiality of the jury—Jury an important part of the tribunal.

When two such officers, as the District Magistrate and the Sessions Judge, emphatically express their belief that it will be next to impossible [728] to obtain a fair and impartial trial if the case be heard before a jury chosen from a particular district, the bare expression of such belief, quite apart from the foundations thereof, must shake the confidence of the parties interested and of the public in the fairness and impartiality of the particular jury to try the case. An order for transfer in such cases is expedient for the ends of justice under s. 526, cl. (*e*) of the Criminal Procedure Code. The importance of securing the confidence of parties in the fairness and impartiality of the tribunal is next only to the importance of securing a fair and impartial tribunal. *Dupeyron* v. *Driver* (1) followed.

The jury in a case triable by jury constitute a part and an important part of the tribunal. It is not quite reasonable to say, where doubt is entertained as to the fairness and impartiality of the jury, that the trial should, nevertheless, go on before such a jury, because an erroneous verdict may, in the end, be set right by the High Court. *Empress* v. *Nobo Gopal Bose* (2), distinguished.

[Appl., 25 B. 179 (183); R., 28 C. 709 (718) = 5 C.W.N. 749; 88 P.R. 1903 = 17 P. L.R. 1904.]

THIS was an application by the Deputy Legal Remembrancer for the transfer from the Sessions Court at Burdwan of a case under s. 526 of the Criminal Procedure Code (Act X of 1882). In support of the application the District Magistrate of Burdwan made an affidavit in which he, amongst other things, stated :—

"That in his letter marked C, the Sessions Judge says that, not only stories of all sorts are afloat about it, but even the merits of the case appear to have been discussed and various conclusions arrived at, and under the circumstances it will be very difficult to get a jury with a quite unbiassed and open mind."

"That I firmly believe that it would be next to impossible to obtain a fair and impartial trial if the case be heard before a jury chosen from this district; such a course would, I believe, prejudice both the prosecution and the defence."

The rule was granted calling upon the accused to show cause why the case should not be transferred to the Sessions Court of some other district on the grounds : (1) That a fair and impartial trial cannot be had in the Sessions Court at Burdwan, and (2) that the transfer is expedient for the ends of justice having regard chiefly to the above statements.

[729] The Officiating Deputy Legal Remembrancer (Mr. *Abdur Rahim*), for the Crown.

Mr. *P. L. Roy*, Babu *Debendro Chundro Mullick* and Babu *Dwarka Nath Mitter*, for the accused.

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* Criminal Miscellaneous Revision No. 84 of 1897.

(1) 23 C. 495. (2) 6 C. 491.

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The judgment of the High Court (BANERJEE and WILKINS, JJ.) is as follows:—

JUDGMENT.

This is a rule granted on the application of the Deputy Legal Remembrancer, calling upon the accused to show cause why the case against them now pending in the Sessions Court of Burdwan should not be transferred to the Sessions Court of Alipur or to the Sessions Court of any other district, on the grounds: (1) That a fair and impartial trial cannot be had in the Sessions Court of Burdwan before a Burdwan jury, and (2) that the transfer is expedient for the ends of justice.

In support of these two grounds two affidavits have been filed, one by Mr. Fisher, Magistrate of the district, and the other by Sheikh Bistu, brother of one of the two persons, said to have been murdered by the accused.

The material statements contained in the District Magistrate's affidavit are to the effect that the accused are sons and "near relations of men of influence and position," that the Magistrate who has been at Burdwan for about a year and-a-half and has come to know many people of the district is aware, from his "personal knowledge," "that various kinds of rumours, both true and false, are being circulated among all classes of the community all over the district" about the facts of this case; that the Magistrate is credibly informed from various sources, including the Sessions Judge's letter to him (which is filed with the affidavit and marked C), "that this case has caused a profound sensation throughout the district among all classes of people;" that the Magistrate firmly believes "that it will be next to impossible to obtain a fair and impartial trial" if the case be heard before a jury chosen from the district of Burdwan; and that it is necessary in the interests of justice that the case should be transferred from Burdwan.

The affidavit further states that this case "has created an [730] extremely" bitter feeling among the Mahomedan population of the town, that they "are an excitable people" and "have not much patience," that it is therefore necessary that the case should be tried under such circumstances as will give the Mahomedans every confidence, and that "this will not be the case if it be tried at Burdwan."

The affidavit of Sheikh Bistu contains statements nearly to the same effect.

The accused in showing cause have filed six affidavits, three of which are by the fathers of the three accused, one by a pleader of the Burdwan Court engaged for the defence, and two by two Mahomedans residing at Burdwan, who, however, do not say anything as to what their position in life is, nor anything as to what their means of knowledge are, beyond stating that they have been living in Burdwan for many years.

These affidavits more or less deny most of the allegations contained in the affidavits filed on behalf of the petitioner; and they further state that the case should not be transferred from Burdwan, as a local inspection of the alleged place of occurrence by the jury may be necessary, and that transfer of the case would cause inconvenience to the accused and their witnesses, and would involve expense which it would be difficult for two of the accused, and impossible for the third, to bear.

It is unnecessary for our present purpose, and it is undesirable at the present stage of the case, to enter into a detailed examination of all the various statements contained in these affidavits and counter affidavits. We shall confine our attention to such of them as relate to matters

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coming within the scope of s. 526 of the Criminal Procedure Code and are relevant to the present purpose, and exclude from consideration those that are irrelevant and likely to misguide the judgment.

We may add that under this latter description come those statements which speak of the Mahomedans being "an excitable people" who "have not much patience," and which hint at the necessity of allaying their irritation to prevent possible serious consequences. Those are considerations which do not come within the scope of s. 526 of the Code of Criminal Procedure, and which [731] should not, therefore, influence our judgment. The only clause of the section which may possibly be referred to in this connection is cl. (*e*); but that clause refers to expediency for the ends of justice and not to expediency from any political point of view. In dealing with an application like the present, it is, no doubt, the duty of this Court to have all due regard for the importance of securing the confidence of the public generally, and of every section of the community interested in the result, in particular, in the fairness and impartiality of the trial that is going to be held; but it is equally its duty to see that no undue regard is shown to the abnormal susceptibilities of any section of the public, from an apprehension of ulterior consequences. If that were done, it would result in the obvious injustice of showing greater consideration to the less peaceful than to the more peaceful. We regret that the Sessions Judge, and following him the District Magistrate, should have referred to matters which ought not to be taken into account in this case.

We should further add that it was improper for the District Magistrate, as representing the prosecution, to have consulted in this matter the Sessions Judge in whose Court this case was pending, and still more so for the Sessions Judge to have addressed the District Magistrate the communication marked as Ex. C. While making these remarks, however, we fully appreciate the object they had in view, which was to secure a fair and impartial trial in this case, and peace and harmony in their district.

Coming now to the consideration of those statements in the affidavits and counter-affidavits which relate to matters lying within the scope of s. 526 of the Code of Criminal Procedure, we find that while the statements relied upon by the petitioner seek to bring the case under cls. (*a*) and (*e*) of the section, those relied upon by the opposite side seek, not only to contradict those allegations, but also to show that cls. (*c*) and (*d*) operate against the applications for transfer. That is to say, while the affidavits of the District Magistrate and Sheikh Bistu state that a transfer of the case is necessary for a fair and impartial trial and is otherwise expedient for the ends of justice, the affidavits relied upon on behalf of the accused affirm that a transfer is not necessary [732] for a fair and impartial trial, nor otherwise expedient for the ends of justice; that the allegations to the contrary are not well founded; and that the trial ought to be held in Burdwan, because a view of the place in which the offence is said to have been committed is necessary for the satisfactory trial of the same, and because the accused and their witnesses would otherwise be greately inconvenienced. Thus there are conflicting statements giving rise to conflicting considerations, and the questions for determination are: *first*, which of these conflicting statements should be accepted; and, *second*, which of the conflicting considerations arising upon the statements to be accepted should prevail.

With reference to the first question Mr. *Roy* for the accused contends that the statements in the District Magistrate's affidavit are indefinite,

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and therefore insufficient to form the basis of a decision, while those in the affidavits filed on behalf of the accused are definite and point to specific sources of information; and he relied upon the case of *The Empress* v. *Nobo Gopal Bose* (1) as showing that a somewhat similar affidavit by the District Magistrate was considered insufficient by this Court. But the facts of that case were different from those of the present in several respects. In the first place, there the District Magisrate who made the affidavit had been in the district for about three months only, whereas in this case the Magistrate has been in the district for about a year and-a half; and in the second place, in the case cited, the Magistrate did not state his sources of information, or the ground of his belief, whereas in the case before us he gives the sources of his information and states that he is aware of certain facts from personal knowledge. But though that is so, and though we are quite willing to accept the District Magistrate's statements in preference to counter-statements in the affidavits on the other side, we must say that some of those statements which give reasons for the Magistrate's belief are vague and general; and having regard to the facts stated in the counter-affidavits that there are on the jury list of Burdwan as many as 471 names, of which 22 are the names of Mahomedans and 28 of Europeans, we find it difficult to hold that a **[733]** fair and impartial trial *cannot* be had by a jury at Burdwan. The facts stated, therefore, are not quite sufficient to bring the case under cl. (*a*) of s. 526 of the Code of Criminal Procedure.

The statements in the District Magistrate's affidavits are, however, in our opinion sufficient to bring the case under cl. (*e*) of the section. The statements to which we refer are those contained in paragraphs 8 and 9 of the affidavit, which are to the effect that the Sessions Judge thinks that "it will be very difficult to get a jury with a quite unbiassed and open mind," and that the Magistrate firmly believes "that it will be next to impossible to obtain a fair and impartial trial if the case be heard before a jury chosen from this district," *i.e.*, Burdwan.

These statements, as statements of belief, stand practically uncontradicted, though the grounds of such belief are challenged in the counter-affidavits. But when two such officers as the District Magistrate and the Sessions Judge, whose honesty of purpose cannot be called in question, and who are the persons responsible for the administration of criminal justice in the district, have so emphatically expressed their belief on the subject, the bare expression of such belief, quite apart from the foundations thereof, must shake the confidence of the parties interested, and of the public, in the fairness and impartiality of the Burdwan jury to try this case, and create in their minds a reasonable apprehension that a fair and impartial trial cannot be had, if the case is tried in Burdwan. And when that is the case, an order for transfer must be held to be expedient for the ends of justice, the importance of securing the confidence of parties in the fariness and impartiality of the tribunal being next only to the importance of securing a fair and impartial tribunal. The view we take is in accordance with that taken by this Court in *Dupeyron* v. *Driver* (2).

It was contended by Mr. *Roy* for the accused that the considerations which influenced the Court in the case just referred to, apply only to cases where the confidence of either party in the fairness of the presiding Judge or Magistrate is shaken, and that **[734]** where, as in this case, the fairness and impartiality of the Sessions Judge is not doubted, the mere

(1) 6 C. 491. (2) 23 C. 495.

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possibility of the jury being biassed should not form a ground for transfer, when the law provides a remedy against a wrong verdict by authorizing the Sessions Judge to refer the case to this Court; and in support of this contention the cases of *Queen* v. *Amir Khan* (1) and *Empress* v. *Nobo Gopal Bose* (2) were relied upon.

We are unable to accept this contention as sound. The jury, in a case triable by jury, constitute a part and an important part of the tribunal; and this Court, on a reference by the Sessions Judge under s. 307 of the Code of Criminal Procedure, is required to determine the case upon the entire evidence after giving due weight to the opinions of the Judge and the jury. It would not, therefore, be quite reasonable to say where doubt is entertained as to the fairness and impartiality of the jury, that the trial should nevertheless go on before such a jury, because an erroneous verdict may, in the end, be set right by the High Court. As for the cases cited, that of *Amir Khan* (1) is not quite in point, the trial there being not by jury but with the aid of assessors. The case of *Empress* v. *Nobo Gopal Bose* (2) is no doubt in point; but the learned Judges in that case do not hold as a matter of law that a case triable by jury is not to be transferred on the ground of the fairness and impartiality of the jury being questioned, because there are safeguards against miscarriage of justice; all that they decide is that it would require very strong grounds to justify a transfer in such a case.

The statements in the Magistrate's affidavit, in our opinion, therefore, bring the case under cl. (*e*) of s. 526 of the Code of Criminal Procedure.

The statements in the affidavits filed on behalf of the accused, on the other hand, show that a view of the place where the offence is said to have been committed may be necessary for a satisfactory trial; and that a transfer of the case will cause **[735]** inconvenience to the accused and their witnesses, and these statements we see no reason to reject as unfounded.

There are thus conflicting considerations arising upon the statements which we accept; and this brings us to the second question stated above, namely, which of these considerations should prevail?

Now the importance of having a fair and impartial jury ranks very much higher than the convenience of parties and witnesses, and the convenience of the Court in having a local inspection. If a local inspection is deemed necessary, the Judge and the jury at Alipur may have such an inspection, though not as conveniently as the Judge and jury at Burdwan might have had it; and the costs of such inspection will have to be paid by the Government. The same remark applies with reference to the expenses of the witnesses (see s. 544 of the Code of Criminal Procedure).

The matter, which pressed most upon us against the transfer of the case, was the statement in the affidavit of the father of one of the three accused who says that, if the case is transferred, he has not means enough to pay for legal assistance, whereas if the trial is held in Burdwan where he has a few friends amongst the members of the local bar, he may succeed in inducing one of them to defend his son. There is no provision in the Code of Criminal Procedure for meeting this difficulty; and the only consideration which has relieved our minds to a certain extent is this, namely, that the accused, who will be tried with two others whose means are not so limited, may have the benefit of the legal aid which they will be able to secure.

(1) 7 B. L. R. 240 = 15 W. R. Cr. 69. (2) 6 C. 491.

After weighing the conflicting considerations arising in this case, the conclusion we come to is that the balance of reason is in favour of allowing the application for transfer, which we think is expedient for the ends of justice; and we accordingly order that this case be transferred to the Sessions Court of 24 Pargannas.

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25 C. 736 = 2 C.W.N. 484.

[736] APPELLATE CRIMINAL.

Before Mr. Justice Ameer Ali and Mr. Justice Henderson.

ABBAS PEADA AND ANOTHER (*Appellants*) v. QUEEN-EMPRESS (*Respondent*).* [5th April, 1898.]

Misdirection—Charge to the jury—Explaining the law — Evidence Act (*I of* 1872), s. 126 —*Communications to* Mukhtears *privileged—Admission of inadmissible evidence.*

In charging a jury it is incumbent on the Judge to explain the law to them in order to assist them in applying the law to the facts of the case. Mere reference to sections of the Penal Code defining the offences is not sufficient.

The restrictions imposed by s. 126 of the Evidence Act in respect of what are known as privileged communications extend also to communications made to *mukhtears* when acting as pleaders for their clients.

In cases tried by jury it is the duty of the Judge to prevent the production of inadmissible evidence whether it is or is not objected to by the parties.

Evidence relating to proposals of compromise ought not, in the exercise of a proper discretion, to be allowed to go in as evidence of guilty knowledge against the accused.

[D., 14 Cr.L.J. 316 = 19 Ind. Cas. 1004 = 244 P.L.R. 1913; 44 P.W.R. 1913 (Cr.).]

THE facts of the case appear sufficiently from the judgment.

Babu *Dasarathi Sanyal* appeared on behalf of the appellants.

The Deputy Legal Remembrancer (Mr. *Gordon Leith*) appeared on behalf of the Crown.

The judgment of the High Court (AMEER ALI and HENDERSON, JJ.) is as follows :—

JUDGMENT.

In this case the petitioners, Abbas Peada and Chhirru *alias* Shibu Gain were tried by the Additional Sessions Judge of the 24-Pergunnahs with a jury, who convicted the former under ss. 365 and 346, and the latter under ss. 365 and 346 read with s. 109 of the Indian Penal Code; and the Judge has sentenced them to four years' and three years' rigorous imprisonment, respectively.

[737] The grounds upon which we admitted the appeal were of a two-fold character, namely, *first*, that the Judge had misdirected the jury in his charge with reference to certain evidence, which was not legally admissible against the accused; and, *secondly*, that there was no sufficient explanation of the law in the charge.

The case has been argued by the learned pleader for the appellants on one side and the learned Deputy Legal Remembrancer for the Crown on the other. The appellants' pleader has taken three principal grounds upon which he impugns the verdict of the jury; and he asks that we should set aside that verdict and either acquit the petitioner or direct

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* Criminal Appeal No. 155 of 1898, against the order passed by C. P. Caspersz, Esq., Additional Sessions Judge of 24-Pergunnahs, dated 17th December 1897.

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a retrial of the case. He contends, as he contended at the time of the admission of the appeal, that, having regard to the character of the offence charged against the accused, the learned Sessions Judge ought to have given a sufficient explanation of the law on the subject in order to assist the jury in the consideration of the facts of the case; that not having done so, he thus failed to comply with the provisions of s. 279 of the Code of Criminal Procedure, and that his clients have been prejudiced by the omission. He contends further that the learned Judge ought not to have admitted in evidence certain statements alleged to have been made by the petitioners to a *mukhtear*, named Kedar Nath Chakravarti, who had acted as legal adviser and representative for one of the accused in a previous case; and, that the learned Judge was also in error in asking the jury to draw any inference of guilty knowledge from a compromise spoken of by the clerk of their present *mukhtear* Hem Chundra; and, *thirdly*, he has contended that the trial had relation to the detention of the woman Lakhi at several places, and had reference to more than one individual, and that consequently the appellants were prejudiced in their defence.

We shall first refer to the law on the subject before dealing with the learned Sessions Judge's charge to the jury.

Section 297 of the Code of Criminal Procedure provides that, "in a case tried by jury when the case for the defence and the prosecutor's reply (if any) are concluded, the Court shall proceed to charge the jury summing up the evidence for the prosecution and defence and laying down the law by which the jury are to [738] be guided." And s. 367 declares "that in trials by jury the Court need not write a judgment, but the Court of Session shall record the heads of the charge to the jury."

It has been repeatedly held in this Court that it is incumbent on the Sessions Judge to explain the law relating to the particular offence with which the accused is charged before him, in order to enable the jury to apply the law to the special facts of the case; and that although the Judge is not bound to record a judgment, yet he should give sufficient indication in his charge that he has complied with the law, so as to enable the appellate Court to form an opinion whether he has acted in accordance with the provisions of the section or not. No doubt in this case the Sessions Judge has in different parts of his charge mentioned the sections of the Penal Code we have referred to; but we regret there is very little indication to suggest that any explanation, such as is contemplated by s. 297 of the Code of Criminal Procedure, as has been laid down in the different cases already decided, was given to the jury. Mere references to sections, unless the jurors are trained men, cannot be of much assistance to them to apply the law to the facts; and we think, therefore, it is always desirable in charges to juries that the law should be sufficiently explained in order that the jury may be assisted in the consideration of the case. That in this particular case the jury were not assisted in the consideration of the case by an explanation of the law is sufficiently clear from the manner in which they appear to have given their verdict which is recorded as follows:—

"*Q.*—Are you unanimous?

Ans.—We are.

Q.—What is your verdict?

Ans.—Abbas and Chhirru are guilty. Charan is not guilty.

Q.—Is Luckmi under sixteen years of age?

Ans.—Yes, under sixteen.

Q.—Under what charge do you convict Abbas and Chhirru? **1898**

Ans.—We convict as regards the road occurrences. Sections 147, 365, 363. **APRIL 5.**

[739] *Q.*—What is your verdict as regards the charges under ss. 346 and 346-109 (The jury retired again to consider)." * * * **APPELLATE CRIMINAL.**

We think we may take that as an indication that the jury were not quite clear in their minds about the application of the law to the facts of the case, and that their confusion or want of clearness on the subject was due, in some measure, to the omission of a sufficient explanation of the law on the subject. **25 C. 736 = 2 C.W.N. 484.**

The Sessions Judge's charge begins thus: "The charges relate to four occurrences:—

(*a*) *On the Road*, ss. 363, 365, 147 of the Indian Penal Code.

(*b*) *At Abbasbari*, s. 342 of the Indian Penal Code.

(*c*) *At Jampabaria*, ss. 346 and 346-109 of the Indian Penal Code.

(*d*) *At Kalikapala*, s. 346 of the Indian Penal Code.

Then it goes on: "All the accused are charged in respect of (*a*) and (*c*) and accused Abbas only is charged in respect of (*b*) and (*d*)," and so forth.

We are inclined to attach some weight to the argument of the learned pleader for the appellants that the mode in which the matter was placed before the jury was a little confusing and one likely to have prejudiced the accused at the trial.

But the matter does not rest here. The occurrence is alleged to have taken place on the 29th of August. On the 30th August the accused went to the *mukhtear* Kedarnath, who was at the time defending the appellant Chhirru in another case of abduction in respect of the same girl, and stated that another false case was likely to be brought against them, and that he must appear in it for them and on their behalf. The learned Sessions Judge refers to the evidence of Kedarnath in the following terms:—

"Then the evidence of Kedar Babu (witness No. 3) who acted as accused's *mukhtear* is very important." And he goes on to add, "because, he says, accused Abbas and Chhirru came to him at 5 or 6 A.M. on the day after the night attack on Naba's party. This conduct of these accused, I think, you will agree with me, and the statements they made to Kedar Babu, indicate guilty knowledge."

[740] It does not appear that when Kedar was being examined regarding this matter, any objection was taken by the accused to his making the statements in question.

Section 298, however, provides "that in cases tried by jury it is the duty of the Judge to decide all questions of law arising in the course of the trial. and specially all questions as to the relevancy of the facts which it is proposed to prove, and the admissibility of evidence or the propriety of questions asked by or on behalf of the parties, and in his discretion to prevent the production of inadmissible evidence, whether it is or is not objected to by the parties." If one may venture to say so, this is a wise provision of the law, because in many of these cases tried in the Sessions Court by a jury sometimes the prisoners are not defended at all, and sometimes defended by persons not fully qualified for their work. It is, therefore, the duty of the Judge to see that evidence, which is not admissible in itself, should not be allowed to go in to the prejudice of the accused. The pleader for the appellants contends that the statements made by the accused to the *mukhtear* Kedarnath were privileged, and that, without the consent of the accused,

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Kedarnath ought not to have deposed to those statements in Court; and reliance is placed on s. 126 of the Indian Evidence Act, which declares that "no barrister, attorney, pleader, or vakil shall at any time be permitted, unless with the client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such barrister, pleader, attorney or vakil, or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course of such employment."

The cognate section in Act II of 1855, s. 24, declared that "a barrister, attorney or vakil shall not, without the consent of his client, disclose any communication made by the client to him in the course of his professional employment or any advice given by him professionally to his client, the knowledge of which he shall have acquired in the course of his professional employment. The privilege, however, is that of the client to disclose [741] any such matter." It will be noticed that there are two important additions in s. 126, which differentiate it from s. 24 of Act II of 1855, namely, the addition of the word "pleader" and of the word "express" before the word "consent," which make it specially stringent in favour of the privilege. Now, there is no suggestion in this case that the accused expressly consented to Kedar disclosing in Court the statement or statements made to him by the accused. The question that was raised here was this: That inasmuch as he was a *mukhtear* he did not come within the purview of s. 126, and that consequently the statements made by the accused were not privileged; and we have been referred to the case of *Queen* v. *Chandra Kant* (1) which proceeded upon Act II of 1855. As we have already pointed out, s. 24 of the old Act is different from the section in the present Act.

The Procedure Codes (Act XXV of 1861 and Act X of 1872) did not contain any definition of the term "pleader." Act X of 1882 for the first time defines the word as follows: "Pleader," used with reference to any proceeding in any Court, means a pleader authorized under any law for the time being in force to practise in such Court, and includes (1) an advocate, a vakil and an attorney of a High Court so authorized; and (2) any *mukhtears* or other person appointed with the permission of the Court to act in such proceeding."

The result of that definition, therefore, is this that all persons who appear in a Court in any legal proceeding as representing parties for the purpose of pleading in any particular case come within the category of pleaders, and s. 126 must, we take it, be construed as applying to all persons who come within the category of pleaders as defined in the Criminal Procedure Code. It would indeed be a strange anomaly if *mukhtears* who act in certain Courts as pleaders were excluded from the provisions of s. 126 of the Indian Evidence Act, and statements made to them by their clients were not regarded as privileged, whilst in the case of all persons who hold a recognized position as barristers, attorneys or vakils, they should be privileged. We may say that the provision which was contained in Act II of 1885, and [742] which was subsequently amplified by s. 126 of the present Evidence Act, embodies one of the wisest principles of the English law; and that although in England there is no analogue to a *mukhtear*, the Indian Legislature, having regard to

(1) 1 B. L. R. App. Cr. 8.

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the conditions of this country, has properly included in the term "pleader" all persons who plead for clients in any legal proceeding in a Court of Justice.

We think, therefore, that the learned Sessions Judge was in error in allowing the statements which the accused had made to Kedarnath (who was at the time acting for one of them as his *mukhtear* and legal adviser, and to whom certain matters were mentioned with the object that he should appear for them in Court) to be given in evidence against the accused, and we also think that he was in error in asking the jury to agree with him in drawing an inference of guilty knowledge from those statements, even if those statements were admissible in evidence. The statement which the accused made to Kedarnath was that a false charge was going to be brought against them. We are inclined to think an inference of guilty knowledge was hardly warranted from that circumstance, and we have little doubt that the jurors were more or less influenced to the prejudice of the accused by the distinct direction given by the Sessions Judge in this behalf. Then, again, as regards the compromise, which was "discussed and effectuated at a later stage," it appears that the complainant and his party with another person went to the *mukhtear* who represented the accused in Court with the object of compromising the charge, and a paper was written out and apparently filed in Court. The learned Sessions Judge deals with the subject in this way: "Then you have the evidence of witnesses 4, 12 and 16 with regard to the compromise discussed and effectuated at a later stage." He had already mentioned that there was evidence indirectly bearing against the accused, and we may take it that his mention of the compromise at this stage and under the sixth head of his charge was intended to draw the attention of the jury to what he considered to bear indirectly on the case against the accused. In the first place it seems to us the evidence relating to the compromise ought not, in the exercise of **[743]** a proper discretion, to have been allowed to go in as evidence of guilty knowledge against the accused; in the second place the statements relating to the compromise were made to the clerk of the *mukhtear*, who was acting as the pleader of the accused, and under s. 127 statements made to the clerks are as privileged as those made to their employers.

Other objections have been taken to the charge to the jury. But we do not think it necessary to deal with them, as it seems to us the verdict must be set aside on the grounds already referred to.

With reference to the third ground taken by the appellants' pleader we may mention he relies upon the statement contained at the beginning of the charge in order to show that the offences were not so connected with each other as to warrant the accused being tried together under s. 245 of the Code of Criminal Procedure, and he contends that the charges relate to separate offences alleged to have been committed by separate individuals at separate places. The learned Deputy Legal Remembrancer, on the other hand, argued that the section justifies the procedure adopted in this case. Looking at the statement at the beginning of the charge, we are not prepared to say the learned pleader's contention is without some force. But it is unnecessary to express any definite opinion on the point, as we think that when the case is retried the learned Sessions Judge will see that the trial is conducted in a manner which will not be likely to prejudice the accused or confuse the jury in any way in dealing with the facts.

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On the whole, therefore, we have come to the conclusion that the verdict of the jury ought to be set aside in this case, and we accordingly set it aside and direct that the case be retried.

S. C. B.

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[744] FULL BENCH.

Before Sir Francis William Maclean, K.C.I.E., Chief Justice, Mr. Justice Macpherson, Mr. Justice Trevelyan, Mr. Justice Ghose and Mr. Justice Ameer Ali.

DULHIN GOLAB KOER (*Plaintiff*) v. BALLA KURMI AND OTHERS (*Defendants*).* [2nd February, 1898.]

Bengal Tenancy Act (VIII of 1885), s. 50—Record of rights—Presumption from twenty years' uniform payment of rent—Raiyats holding at fixed rates.

In a proceeding for record of rights under chap. X of the Bengal Tenancy Act (VIII of 1885), it having been found that certain raiyats were holding their lands at rates which had not been changed during twenty years before the institution of the proceeding, the Settlement Officer recorded them as " raiyats holding at fixed rates." In second appeal,

Held, that under s. 50 of the Bengal Tenancy Act, the Settlement Officer was right in giving effect to the presumption that the raiyats were holding at fixed rates of rent and in recording them as " raiyats holding at fixed rates."

Bansi Das v. *Jagdip Naram Chowdhry* (1) dissented from.

[F., 13 C.L.J. 418 = 15 C.W.N. 752 = 10 Ind. Cas. 325 ; 7 C.W.N. 132; R., 33 C. 1219 = 10 C.W.N. 1033 ; 15 C.L.J. 220 = 16 C.W.N. 567 = 13 Ind. Cas. 606.]

THIS case arose out of proceedings under chap. X of the Bengal Tenancy Act (VIII of 1885). The defendants, respondents, who are raiyats, were recorded by the Assistant Settlement Officer as "raiyats holding at fixed rates." The landlord, plaintiff, objected to the entry and applied for its correction under s. 106 of the Act, alleging that the defendants were not raiyats at fixed rates, but only occupancy raiyats. The application was rejected by the Settlement Officer, and on appeal to the Special Judge, the order of the Settlement Officer was confirmed on the ground that the raiyats had been holding their lands at an uniform rent for twenty years, and the presumption arose that this rent was fixed in perpetuity.

The plaintiff preferred a second appeal to the High Court.

The appeal was first heard by a Division Bench consisting of two Judges (Mr. Justice BEVERLEY and Mr. Justice AMEER ALI), who having differed in opinion on a question of law referred it to [745] a third Judge, Mr. Justice JENKINS, who agreed with Mr. Justice AMEER ALI, but referred the case to a Full Bench as the case of *Bansi Das* v. *Jagdip Narain Chowdhry* (1) appeared to be in conflict with his view. As, however, it was decided in a previous case before the Full Bench that there could not be a valid reference from a single Judge to a Full Bench, a special Bench was constituted in this case.

The judgments of Mr. Justice BEVERLEY and Mr. Justice AMEER ALI were as follows :—

BEVERLEY, J.—As I adhere to the opinion I expressed in special appeal No. 844 of 1895, and in another case which I cannot now trace,

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* Reference to a Full Bench in Appeal from Appellate Decree, No. 626 of 1894.

(1) 24 C. 152.

the papers must be laid before the Chief Justice in order that he may refer the hearing of the appeal to one or more of the other Judges of this Court under the provisions of s. 575 of the Code.

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The point of law upon which Mr. Justice Ameer Ali and I differ is shortly this.

In making a record of rights under chap. X of the Bengal Tenancy Act, the Settlement Officer entered the respondents as belonging to the class of raiyats holding at fixed rates (*shara muaiyin*). The landlords objected to the entry under s. 106 of the Act; but their objection was disallowed, and on appeal the Special Judge has held that "the raiyats having proved their holdings for twenty years" (I assume that he means at a rent which has not been changed during that period) the presumption arises that their rent was fixed in perpetuity.

My opinion is that no such presumption arises upon the correct reading of either s. 50 or any other section of the Bengal Tenancy Act. The presumption which is created by s. 50, sub-s. (2) is a presumption that the tenant has held at the same rent or rate of rent from the time of the Permanent Settlement. But that is a wholly different thing from a presumption that the tenant is a raiyat holding at fixed rates, as defined in s. 4 of the Act.

It is quite true that under sub-s. (1) of s. 50 the rent of a tenure or holding, which has not been changed from the [746] time of the Permanent Settlement, is declared to be not liable to be increased except on the ground of an alteration in the area of the tenure or holding.

Section 6 of the Act also provides that when a tenure has been held from the time of the Permanent Settlement, its rent shall not be enhanced except under certain circumstances. But nowhere, so far as I am aware, does the Act say that such a tenure or holding is to be presumed to be held at a fixed rent or at a fixed rate of rent.

"Raiyats holding at fixed rates" constitute one of the classes of tenants mentioned in s. 4, and the expression is there defined to mean "raiyats holding either at a rent fixed in perpetuity or at a rate of rent fixed in perpetuity." By this expression I understand that the class of raiyats holding at fixed rates are those whose rent or rate of rent was "fixed" in perpetuity at the time of the creation of the tenancy—not raiyats whose rent cannot be increased, except in certain circumstances, by reason of the presumption created by s. 50, sub-s. (2). A raiyat with a right of occupancy may, by virtue of that presumption, be entitled to hold at a rent which is not liable to be enhanced; but he does not thereby become a raiyat holding at fixed rates. By s. 18 certain incidents attach to the status of raiyats holding at fixed rates. Their holdings are for many purposes put on the same footing as permanent tenures. For instance, by s. 11 they are capable of being transferred or bequeathed like other immoveable property. But the holding of an occupancy raiyat is only transferable by custom, and the incidents of occupancy rights are set out and defined in different sections of the Act (ss. 23—26).

I hold, therefore, that a finding that a raiyat has held at the same rent for twenty years will not under s. 50 (2) raise any presumption that he belongs to the class of "raiyats holding at fixed rates."

AMEER ALI, J.—The question involved in this second appeal is one of great importance, and I regret therefore I cannot agree with Mr. Justice Beverley in the construction of s. 50 of the Bengal Tenancy Act.

[747] It appears that in the course of settlement proceedings in connection with the estate of the appellant, the respondents who are the raiyats

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of Mouzah Bishenpur were entered in the *khatian* as raiyats at fixed rents. The appellant thereupon presented a petition under s. 106 of the Bengal Tenancy Act to have the entry corrected, alleging that the respondents were not raiyats at fixed rents, but only occupancy raiyats. The respondents, on the other hand, pleaded that they were raiyats at fixed rents. The Settlement Officer of Hajipur rejected her petition, and the Judge on appeal has confirmed that order holding, as I understand his judgment, that, inasmuch as it has been proved that the tenants have been in possession of their lands without any alteration in their rents for the last twenty years, they must be presumed under s. 50 of the Tenancy Act to be raiyats at fixed rates of rent. In special appeal it is contended that s. 50, upon which the lower appellate Court has proceeded, does not apply to raiyats whose rents are fixed in perpetuity ; that it only protects, under certain circumstances, occupancy raiyats from the enhancement of their rents, but that it does not relate to fixity of rent, and that therefore the District Judge was wrong in holding that the respondents were raiyats at fixed rents.

In order to consider whether this contention is well founded, I shall refer for a moment to the provisions of the different chapters before dealing with the meaning of s. 50 as I understand it.

Chapter II gives the various classes of tenants and defines the expressions "tenure-holder" and "raiyats."

Chapter III deals with the enhancement of rent of tenure-holders and with other incidents of their tenures.

Chapter IV deals with the incidents of holdings at fixed rents or rates of rent, but does not lay down any rule as to the ascertainment of such holding.

Chapter V deals with occupancy raiyats; chap. VI with non-occupancy raiyats and chap. VII with under-raiyats. We then come to chap. VIII which is headed thus : " General provisions as to rent, rules and presumptions as to amount of [748] rent." Section 50 which comes in this chapter lays down in general terms the rules and presumptions as to fixity of rent. Sub-section 1 declares that " where a tenure-holder or raiyat and his predecessors in interest have held at a rent or rate of rent which has not been changed from the time of the Permanent Settlement, the rent or rate of rent shall not be liable to be increased except on the ground of an alteration in the area of the tenure or holding." But in the majority of cases it would be impossible to establish that a tenure or holding has been possessed at an uniform rent or rate of rent from the time of the Permanent Settlement. To meet such cases the Legislature provides in sub-s. 2 that " if it is proved in any suit or other proceedings under this Act that either a tenure-holder or raiyat and his predecessors in interest have held at a rent or rate of rent which has not been changed during the twenty years immediately before the institution of the suit or proceeding, it shall be presumed, until the contrary is shown, that they have held at that rent or rate of rent from the time of the Permanent Settlement." It is clear, therefore, that these two sub-sections deal with two different cases : (1) where the raiyat (I am omitting the tenure-holder) is able to prove that he and his predecessors in interest (the use of the word " predecessor in interest " is of importance) have been in possession of the holding at a rent or rate of rent which has not been changed from the time of the Permanent Settlement, it declares absolutely that his rent shall not be liable to be increased except on the ground of an alteration in the area of the holding (a provision applicable to all classes of tenants, see s. 52) ; (2) where the

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raiyat is able to show that he and his predecessors in interest have held at a rent or rate of rent which has not been changed during the twenty years immediately before the institution of the suit or proceeding, the law declares it shall be presumed until the contrary is shown that the raiyats had held from the time of the Permanent Settlement. In other words unless the presumption is rebutted "his rent or rate of rent" shall not be liable to be increased except on the ground common to all tenants, *viz.*, alteration in the area. The Permanent Settlement is regarded as the starting point, and the result is that where it is found, either upon evidence or upon the basis of the statutory presumption provided in sub-s. 2, that [749] the rent of the tenure or holding has not altered from its inception, it cannot be altered on any ground other than that provided in s. 52. If the rent of a holding has not altered since its inception, and it is not liable to enhancement except on certain grounds, it must necessarily follow that the rent is fixed in perpetuity. As already mentioned occupancy raiyats are dealt with in chap. V; and s. 27 and the following sections lay down the rules relating the enhancement of the rents of occupancy holdings. A reference to ss. 19 and 20 will show that occupancy raiyats are a class wholly apart. Section 19 runs as follows :—

"Every raiyat who immediately before the commencement of this Act has, by the operation of any enactment by custom or otherwise, a right of occupancy in any land, shall, when this Act comes into force, have a right of occupancy in that land."

Section 20 defines "a settled raiyat" and provides in sub-s. 7 for a presumption in his favour. This presumption, it is unnecessary to observe, is wholly different from that provided for in s. 50. Nor does it contain any exclusive reference to an occupancy raiyat. The general term "raiyat" is used as defined in s. 5, and therefore to construe it correctly, one will have to read it thus: where a tenure-holder or a person who has acquired a right to hold land, etc. Any raiyat, therefore, by whatever name he may be called, if he pleads and proves the particular state of facts provided in s. 50, is entitled to its benefit.

As already observed, chap. IV, which declares the incidents of tenancies held at fixed rents or rates of rent, lays down no rule for the ascertainment of such tenancies. Without expressing any opinion on the question whether such tenancies can be created now (since the passing of the Act) by contract, it seems to me that s. 18 must be read with s. 50. In my opinion the latter section lays down the circumstances under which tenancies at a fixed rent or rate of rent will be taken to exist, whilst s. 18 declares the incidents that will attach to them under the law. In considering whether s. 50 is applicable to raiyats holding at fixed rents or rates of rent, or whether it is only intended for the protection against enhancement of a certain class of occupancy raiyats, it is necessary to bear in mind another fact. A tenure-holder under the Tenancy Act has the right of transferring [750] his tenure by sale, gift or testamentary devise. In connection with a tenure-holder, therefore, the expression "predecessor in interest" includes a person from whom the holder for the time being derives his title as well by purchase, gift or will as by inheritance. A raiyat holding at fixed rent or rate of rent has the same right as a tenure-holder. Now in s. 50 the term "predecessor in interest" is used in respect of both tenure-holder and raiyat. In the construction of the section the collocation of the words is of importance, and it seems to me that it would be against all principle of right reasoning to suppose

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that the Legislature intended the words "predecessor in interest" in connection with a raiyat in a different sense from that in connection with a tenure-holder.

As a matter of fact, the Act itself supplies an index to the meaning of the Legislature. For with reference to occupancy raiyats who do not (apart from custom) possess the right of transferring their holding, and whose interest can therefore only devolve by inheritance, it uses a totally different expression, carefully abstaining from the use of the words "predecessor in interest." Sub-section 3 to s. 20 declares that "a person shall be deemed for the purpose of this section to have held as a raiyat any land held as a raiyat by a person whose heir he is." The difference in the phraseology here is most marked; that s. 50 applies to class (*a*) of raiyats mentioned in s. 4, and the incidents of whose tenancies are described in s. 18 will be apparent from the proviso which runs thus: "Provided that if it is required by or under any enactment that in any local area tenancies or any classes of tenancies at fixed rents or rates of rent shall be registered as such on or before a date specified by or under the enactment the foregoing presumption shall not after that date apply to any tenancy or, as the case may be, to any tenancy of that class in that local area unless the tenancy has been so registered." It shows clearly that the presumption provided for sub-s. 2, and the scope of which is limited by the proviso, relates to "tenancies at fixed rents or rates of rents." Upon the evidence, the sufficiency of which it is not open to us to consider in special appeal, the District Judge has found that the tenants have been holding their lands at rents which have not altered for the last twenty years. I am of opinion [751] that under s. 50 he was right in giving effect to the presumption that they are holding at fixed rents or rates of rents. I am not inclined to interfere with this judgment.

Mr. Justice JENKINS to whom the case was referred made the following order of reference to a Full Bench :—

This case, in consequence of a difference of opinion on the part of the two learned Judges before whom it came in the first instance, has been referred to me, under s. 575 of the Code of Civil Procedure, in order that I may deliver my opinion thereon; and as the case has been argued fully and ably by the learned vakils who appeared, and the view I hold will necessitate a reference to a Full Bench, no object will be attained by my reserving judgment or elaborating my reasons.

The point for decision is, whether the Assistant Settlement Officer was right in recording the defendants as raiyats holding at fixed rates.

The facts of the case are fully set forth in the judgments of BEVERLEY and AMEER ALI, JJ., and it is not necessary that I should recapitulate them now, but I would state that on the part of the appellant it has been conceded before me that the facts proved *do* give rise to the presumption contained in the 2nd sub-section of s. 50 of the Bengal Tenancy Act. Now that Act is stated to be one passed for the purpose of amending and consolidating certain enactments relating to the law of landlord and tenant within the territories under the administration of the Lieutenant-Governor of Bengal; and by s. 4 a description, rather than a definition, is given of the classes of tenants to whom the Act is applicable, among them being raiyats who are divided into the following classes :—

(*a*) "Raiyats holding at fixed rates."
(*b*) "Occupancy raiyats."
(*c*) "Non-occupancy raiyats."

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The same section defines "raiyats holding at fixed rates" by providing that the expression means "raiyats holding either at a rent fixed in perpetuity or at a rate of rent fixed in perpetuity."

[752] The next section to which I may refer is the 18th, which describes the incidents of holding at fixed rates, and then I come to s. 50 upon which the present case turns, and whereby it is provided that :—

1. "Where a tenure-holder or raiyat and his predecessors in interest have held at a rent or rate of rent which has not been changed from the time of the Permanent Settlement, the rent or rate of rent shall not be liable to be increased except on the ground of an alteration in the area of the tenure or holding.

2. "If it is proved in any suit or other proceeding under this Act that either a tenure-holder or raiyat and his predecessors in interest have held at a rent or rate of rent which has not been changed during the twenty years immediately before the institution of the suit or proceeding it shall be presumed, until the contrary is shown, that they have held at that rent or rate of rent from the time of the Permanent Settlement.

"Provided that if it is required by or under any enactment that in any local area tenancies, or any classes of tenancies, at fixed rents or rates of rent shall be registered as such on or before a date specified by or under the enactment, the foregoing presumption shall not after that date apply to any tenancy or, as the case may be, to any tenancy of that class in that local area unless the tenancy has been so registered."

The expression "predecessors in interest," it is argued on the part of the defendants, is a strong indication in favour of the view they support. But I am unable to attach much importance to its use except to the extent that it is consistent with the construction for which they contend. But I think it is clear from the proviso to the second sub-section that it was in the contemplation of the Legislature that a tenancy to which the presumption would be applicable should be capable of registration under a system which provided for the registration of tenancies, or classes of tenancies, at fixed rents or rates of rent ; and the inference I draw from that is that a tenancy to which the presumption is applicable may be aptly described as one held at fixed rates.

The matter, however, does not rest there, for under s. 102, provision is made as to the particulars to be recorded in records of rights and settlements of rent. By sub-s. (*b*) it is provided that the particulars to be recorded shall include "the class to which the tenant belongs, that is to say, whether he is a [753] tenure-holder, raiyat holding at fixed rates, occupancy-raiyat, non-occupancy-raiyat or under-raiyat, and if he is a tenure-holder, whether he is a permanent tenure-holder or not, and whether his rent is liable to enhancement during the continuance of his tenancy."

It would seem that non-liability to enhancement was regarded for obvious reasons as a matter proper to be recorded ; but there is no provision which requires or permits such a record in the case of a raiyat unless it be by the entry in the record of the fact that he is a raiyat holding at fixed rates, and it appears to me to be the intention of the sub-section that the immunity from enhancement arising under s. 50 should be recorded by the statement that the tenant was a raiyat, holding at fixed rates. In connection with this section I may refer to s. 115, which provides that "when the particulars mentioned in s. 102, cl. (*b*) have been recorded under this chapter in respect of any tenancy, the presumption under s. 50

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shall not thereafter apply to that tenancy," for it appears to me that this section also points to the same conclusion.

Further looking outside the Bengal Tenancy Act, 1885, one finds that the expression "raiyats holding at fixed rates" was one in use before that Act came into operation, for it appears both in Act X of 1859 and also in the Bengal Council Act VIII of 1869. I may particularly refer to ss. 3, 4 and 5 of both those Acts. Sections 3 and 4 correspond closely with sub-ss. 1 and 2 to s. 50 of the Bengal Tenancy Act of 1885, and it will be seen from s. 5 of those Acts that the raiyat in whose favour the presumption operated would be properly described as one holding at fixed rates. My own opinion, therefore, apart from authority, would be that upon the construction of the Act the record of the Assistant Settlement Officer was properly made.

I have, however, been referred to a prior decision of this Court where the same question arose, and it was there said in the course of the judgment :—

"We entertain grave doubts whether this class of raiyat [that is raiyat holding at fixed rates] can be created by the operation of s. 50. All that that section says is that a raiyat who has held **[754]** at the same rent or rate of rent since the time of the Permanent Settlement shall not be liable to have his rent increased except on the ground of an alteration in the area of the holding. It does not say that such a raiyat is a raiyat holding at fixed rates, or that the tenancy shall be subject to the incidents of a holding at fixed rates as prescribed by s. 18 of the Act."

The learned Judges there appear to have arrived at their decision not without "grave doubts," but still it is a decision which clearly covers the present case, and it will, therefore, be necessary to refer the matter to a Full Bench. The question referred is whether, having regard to the case cited, the Assistant Settlement Officer was right in recording the defendants as raiyats holding at fixed rates.

Babu *Raghunandan Prosad* (for Babu *Umakali Mukerjee*) contended on behalf of the appellant that the raiyats were not entitled to the status of a raiyat at a fixed rate by merely showing that they paid uniformly for twenty years. The case of *Bansi Das* v. *Jagdip Narain Chowdhry* (1) is in my favour, and that is a case referred to in the order of reference.

MACPHERSON, J.—Supposing the raiyat proved uniform payment for twenty years and was entitled to the presumption that he held from the Permanent Settlement at that rate, would any Court be justified in holding as a matter of fact that he does not hold at fixed rates ?

TREVELYAN, J.—Is it not a natural inference of fact ?

GHOSE, J.— Your case, I suppose, is that there must be an agreement ?

Yes.—The tenant does not plead any agreement to hold at a fixed rate. Mere uniform payment for twenty years does not make him a "raiyat at fixed rent." Section 21 does not confer the right, and there is no other section conferring it. The statute should not be interpreted to confer a right which has not been expressly **[755]** given. The case of *Norendra Nath Sircar* v. *Kamal Basini Dasi* (2) lays down the rule.

Babu *Horendra Narayan Mitra* (for Babu *Satis Chandra Ghose*) who appeared for the respondent was not called upon.

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(1) 24 C. 152. (2) 23 C. 563.

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The judgments of the High Court (MACLEAN, C. J., and MACPHERSON, TREVELYAN, GHOSE and AMEER ALI, JJ.) were as follow :—

JUDGMENTS.

MACLEAN, C. J.—The question we have to decide is whether the Assistant Settlement Officer was right in recording the defendants as raiyats holding at fixed rates. There was a difference of opinion between Mr. Justice BEVERLEY and Mr. Justice AMEER ALI upon the point, and the case was referred to Mr. Justice JENKINS, who took the same view as Mr. Justice AMEER ALI, and referred the case to a Full Bench. As, however, it has been decided that a Judge of the High Court, sitting alone, has no power to refer a case to a Full Bench, the case has to be dealt with by the present Court, which has been specially constituted to hear it. For my part I think that the conclusion at which Mr. Justice AMEER ALI and Mr. Justice JENKINS arrived is the correct one, and I do not think I can usefully add anything to what they have said in their judgments. In my opinion the Assistant Settlement Officer was right in recording the defendants as raiyats holding at fixed rates and the present appeal must be dismissed with costs. There will be no costs of the abortive reference.

MACPHERSON, J.—I also think that the view taken by Mr. Justice AMEER ALI and Mr. Justice JENKINS is correct ; when the question is whether a raiyat holds at a fixed rent, that is to say, whether the rent or rate of rent was fixed in perpetuity, and the raiyat proves that he had held the land at an uniform unchanged rent or rate of rent for, say, a hundred years, the Court would, I think, be justified in presuming, apart from any statutory enactment, that the rent was fixed in perpetuity. In sub-s. 2 of s. 50 of the Bengal Tenancy Act the Legislature apparently recognise the difficulty [756] a raiyat might have in proving that the rent was unchanged for any such length of time, and it provides on proof of certain facts for the presumption which might in my opinion be made if in fact the finding of the Court was that the rent had been unchanged since the time of the Permanent Settlement.

TREVELYAN, J.—I agree in thinking that the Assistant Settlement Officer was right in recording the defendants as raiyats holding at fixed rates, and I prefer to place my decision entirely upon the terms of cl. 2 of s. 50 of the Bengal Tenancy Act. It having been proved in this case that these raiyats held at a rate of rent which had not been changed during the twenty years immediately before the institution of the suit or proceeding, it ought to be presumed, in accordance with the provision of that clause, that they have held at that rent or rate of rent from the time of the Permanent Settlement. It seems to me, as Mr. Justice MACPHERSON pointed out, that the fact that they held at that rent or rate of rent, raises in fact the presumption, apart from the Act, that the original contract was a contract to hold at fixed rates, and it would be evidence from which any judge of fact could reasonably presume that there had been such a contract. That is what has been done in this case. I, therefore, agree in thinking that the Settlement Officer was right in what he did.

GHOSE, J.—I agree in thinking that the question referred to us should be answered in the affirmative.

AMEER ALI, J.—I gave my reasons very fully on the previous occasion for holding that the Assistant Settlement Officer was right in recording

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the defendants as raiyats holding at fixed rates, and I have nothing more to add.

MACLEAN, C.J.—The appeal will be dismissed with costs, including the costs of all the hearings in this Court.

S. C. C. *Appeal dismissed.*

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[757] FULL BENCH REFERENCE.

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, and Mr. Justice Macpherson, Mr. Justice Trevelyan, Mr. Justice Banerjee and Mr. Justice Jenkins.

MAHOMED WAHIDUDDIN (*Petitioner*) *v.* HAKIMAN *alias* HAKKU (*Opposite Party*).* [16th March, 1898.]

Civil Procedure Code (Act XIV of 1882), *ss.* 525 *and* 526—*Arbitration—Award—Denial of reference to arbitration—Jurisdiction of Court to determine the factum of reference —Appeal.*

Held, by a majority of the Full Bench (MACPHERSON, J., dissenting) that when an application has been made under s. 525 of the Code of Civil Procedure and notice has been given to the parties to the alleged arbitration, the jurisdiction of the Court to order the award to be filed and to allow proceedings to be taken under it is not taken away by a mere denial of the reference to arbitration on an objection to the validity of that reference.

Amrit Ram v. *Dasrat Ram* (1), followed.

Held, also, that an order under s. 525 determining that there has been no valid reference to arbitration and rejecting the application is a "decree" within the meaning of s. 2 and an appeal lies from such order.

Kali Prosanno Ghose v. *Rajani Kant Chatterjee* (2), followed.

[**Overruled**, 29 C. 167 (180) (**P.C.**) = 6 C.W.N. 226 = 29 I.A. 51; **F.**, 23 M. 101 (104); 7 C.L.J. 486; 13 C.L.J. 467 = 10 Ind. Cas. 51; 7 Ind. Cas. 31; 4 L.B.R. 130; 100 P.R 1907 = 17 P.L.R. 1908; 80 P.R. 1909; U.B.R. (1897—1901) 297 (299); **Appr.**, U.B.R. (1897-1901) Vol. II, 5 (6); **R.**, 28 A. 621 = A.W.N. (1906) 136; 28 B. 287 (289); 29 C. 278 (280) = 6 C.W.N. 235; 31 C. 516 (517); 33 C. 757 = 3 C.L.J. 450 = 10 C.W.N. 609; 40 C. 955 = 16 C.L.J. 508 = 18 Ind. Cas. 207; 27 M. 255 (257) (**F.B.**) = 14 M.L.J. 356; 2 C.L.J. 80 (84); 2 C.L.J. 153 = 10 C.W.N. 601; 2 C.L.J. 431 (437); 11 C.L.J. 131 = 5 Ind. Cas. 98; 12 C.L.J. 545 = 7 Ind. Cas. 481; 13 C.L.J. 677 = 9 Ind. Cas. 994; 15 C.W.N. 787 = 10 Ind. Cas. 542; 13 C.P.L.R. 53 (54); 9 Ind. Cas. 173 = 21 M.L.J. 263 = 9 M L T. 251 = (1911) 1 M.W.N. 151; 9 O.C. 205 (209); 84 P.R. 1901 = 112 P.L.R. 1901 (**F.B.**); 1 S.L.R. 149 (153); 46 P.R. 1909 = 72 P.L.R. 1909 = 41 P.W.R. 1909 = 1 Ind. Cas. 474.]

THE petitioner in this case applied to the Court of the Subordinate Judge of Patna under s. 525 of the Civil Procedure Code for filing an award alleged to have been made on a reference to the arbitration without the intervention of a Court of Justice. Notices were issued to the parties to the arbitration other than the applicant; the opposite party, Bibi Hakiman, appeared and objected to the award being filed in Court on the ground that there was no reference to arbitration by her, and that the deed of reference had been fraudulently caused to be signed by her without the purport of the document being explained to her. The Subordinate Judge rejected the application of the petitioner upon the objection of the

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* Reference to the Full Bench in Rule No. 1137 of 1897, issued by the High Court against an order of Babu Upendra Chunder Mullick, Subordinate Judge of Patna, dated 27th March 1897.

(1) 17 A. 21. (2) 25 C. 141.

opposite party without determining the factum of the objection and without taking any evidence **[758]** of the truth of the allegation made therein. The petitioner moved the High Court under s. 622 of the Civil Procedure Code, and the present rule was issued by that Court.

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Upon the hearing of the rule before a Division Bench (Mr. Justice TREVELYAN and Mr. Justice STEVENS) the case was referred to a Full Bench for final decision. The order of reference was as follows:—

"The question to be determined in this case is whether, when an application has been made under s. 525 of the Civil Procedure Code, and notice has been given to the parties to the alleged arbitration other than the applicant, the jurisdiction of the Court to order the award to be filed and to allow proceedings to be taken under it is taken away by a mere denial of the reference to arbitration on an objection to the validity of that reference.

"The learned Judge in the Court below held that he had no jurisdiction to deal with the matter in the case of a denial of the existence or validity of the reference. His decision follows the decision of a Division Bench of this Court in the case of *Bijadhur Bhugut* v. *Monohur Bhugut* (1). The view which the Judge of this Court took in that case is supported by the judgment of three of the Judges of the Full Bench in the case of *Surjan Raot* v. *Bhikari Raot* (2), but the opinions there expressed have no reference to the question referred to the Full Bench. Speaking with all respect for those opinions, we think that we are not obliged to treat them as of the same force as if they had been directly in point. We are unable to see why the Court cannot determine the factum or validity of a reference to arbitration in the same way as it can determine any disputed question in a suit, and we feel reluctant to accept an argument which places the jurisdiction of the Court in the power of the defendant.

"The other cases which have been cited before us are: the case of *Rung Lall* v. *Hem Narain Gir* (3); the case of *Amrit Ram* v. *Dasrat Ram* (4); the case of *Tejpur* v. *Mahomed Jamal* (5), and the case of *Husananna* v. *Linganna* (6).

"We refer this matter for the final decision of a Full Bench."

The rule came on for hearing before the Full Bench on the 25th January 1898.

[759] Dr. *Asutosh Mukerjee* (with him Moulvi *M. Mustafa Khan*), for the petitioner, contended that the jurisdiction of the Court was not ousted by the bare denial of the existence or validity of the reference. When the factum of the reference is denied the case comes under s. 520, cl. (*a*). *Amrit Ram* v. *Dasrat Ram* (4). Section 526 is not exclusive, and does not fix the limits of the inquiry to be held under s. 525; under that section the jurisdiction of the Court is dependent upon certain matters, and if any of these be disputed, the Court is bound to inquire. *Amrit Ram* v. *Dasrat Ram* (4). See also *Tejpur* v. *Mahomed Jamal* (5); *Micharaya Guruvu* v. *Sadasiva Parama Guruvu* (7); *Husananna* v. *Linganna* (6). The dicta in *Bijadhur Bhugut* v. *Monohur Bhugut* (1) and *Surjan Raot* v. *Bhikari Raot* (2) ought not to be followed.

Moulvi *Mahomed Yusuf* (with him M. *Syed Shumsul Huda*) showed cause.—Section 526 is exclusive and prohibits the Court from inquiring into

(1) 10 C. 11. (2) 21 C. 213. (3) 11 C. 166. (4) 17 A. 21.
(5) 20 B. 596 (603). (6) 18 M. 423. (7) 4 M. 319.

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objections not falling within the terms of ss. 520 and 521. Section 525 prescribes only a summary inquiry, as there is no appeal from an order rejecting an application under that section. *Chintaman Singh* v. *Rupa Koer* (1). Complicated questions cannot therefore be gone into. [JENKINS, J. —Section 526 describes the proceedings as a suit.] It is not a suit for all purposes. *Sashti Charun Chatterjee* v. *Tarak Chandra Chatterjee* (2); *Sree Ram Chowdhry* v. *Dinobundhoo Chowdhry* (3). Sections 331, 523 and 529 also show that the proceedings under s. 525 are not a suit. The language of s. 327 of Act VIII of 1859 was wider, and a narrower construction should be put upon the new section. The English cases referred to by PAUL, J., in **[760]** Sashti Charan Chatterjee's case support my contention. The earlier cases in the Allahabad High Court took the same view. If the contention of the other side prevails the consequence will be serious; there being no appeal, the decision in the summary proceeding will operate as *res judicata*.

Dr. *Asutosh Mukerjee* in reply.—The effect of taking s. 526 to be exclusive and construing it strictly is to shut out all inquiry into the objection raised by the opposite party, but it is an elementary principle that when the jurisdiction of a Court is disputed, the Court must adjudicate upon the question. Besides the cases already cited see *Huree Persad Malee* v. *Koonjo Behary Shaha* (4); *Chunder Koomar Mundul* v. *Bakur Ali Khan* (5); *Sashti Charan Chatterjee* v. *Tarak Chundra Chatterjee* (2); *Mayor of London* v. *Cox* (6). That the question is one of jurisdiction appears from *Nusserwanjee Pestonjee* v. *Mynoodeen Khan* (7); *Pestonjee Nusserwanjee* v. *Maneckjee & Co.* (8). The case of *Bindessuri Pershad Singh* v. *Jankee Pershad Singh* (9) clearly supports this argument. *Wright* v. *Graham* (10) and *Barton* v. *Ranson* (11) are distinguishable and would not now be followed in England under the Arbitration Act, s. 12. See also *Lord* v. *Lord* (12), and Russell on Arbitrators (7th ed., 593). There is nothing to show that the inquiry is to be a summary one. As to the meaning of the word "suit" see the judgment of PETHERAM, C. J., in *Surjan Raot* v. *Bhikari Raot* (13). The question of validity of the reference cannot be more complicated than the questions which arise under ss. 520 and 521. **[761]** A similar argument found no favor in *Brojodurlabh Sinha* v. *Ramanath Ghose* (14). As to the question of appeal, if the award is ordered to be filed, there will be an appeal from the final decree. See *Kali Prosanno Ghose* v. *Rajani Kant Chatterjee* (15), where the earlier cases are discussed. If the application is rejected the order does not operate as *res judicata*—see *Mahommed Nawaz Khan* v. *Alam Khan* (16), which shows at any rate that the validity of the reference may be put in issue under s. 525. The mischief of a contrary decision is forcibly put by PRINSEP, J., in *Surjan Raot* v. *Bhikari Raot* (13). If there is an appeal from the order of the lower Court the present petition under s. 622 may be regarded as a memorandum of appeal, a deficient Court-fee being levied from the petitioner.

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(1) 6 W. R. Mis. 83 (F. B.).
(2) 8 B.L.R. 315 (324) = 15 W.R. F.B. 9.
(3) 7 C. 490.
(4) W.R. F. B. 29 = Marsh. 99.
(5) 9 W. R. 598.
(6) (1866) L.R. 2 H. L. 239 (261, 263).
(7) 6 M I. A. 134 (155).
(8) 12 M. I. A. 112.
(9) 16 C. 482 (486).
(10) (1848) 18 L. J. Exch. 29.
(11) (1838) 3 M. & W. 322.
(12) (1855) 26 L. J. Q. B. 34.
(13) 21 C. 213 (221, 224).
(14) 24 C. 908.
(15) 25 C. 141.
(16) 18 I. A. 73 (76).

The following judgments were delivered by the Full Bench :—

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JUDGMENTS.

MACLEAN, C.J.—The question referred for the decision of the Full Bench in this case is, whether when an application has been made under s. 525 of the Code of Civil Procedure, and notice has been given to the parties to the alleged arbitration (other than the applicant), the jurisdiction of the Court to order the award to be filed and to allow proceedings to be taken under it, is taken away by a mere denial of the reference to the arbitration on an objection to the validity of that reference. The affirmative of the proposition involved in the reference has no doubt been decided by more than one Division Bench of this Court, and it further has the support of the opinion expressed, though unnecessarily for the purposes of their decision, by certain members of a Full Bench Court in the case of *Surjan Raot* v. *Bhikari Raot* (1). There is, however, no authority on the point by which we are bound, so that it is open to us to consider the question on the words of the Code itself, apart from previous decision. The sections of the Code more directly governing the present case are ss. 525 and 526, which are in these terms :—

[762] SECTION 525.—" When any matter has been referred to arbitration without the intervention of a Court of Justice, and an award has been made thereon, any person interested in the award may apply to the Court of the lowest grade having jurisdiction over the matter to which the award relates, that the award be filed in Court.

" The application shall be in writing and shall be numbered and registered as a suit between the applicant as plaintiff and the other parties as defendants.

" The Court shall direct notice to be given to the parties to the arbitration other than the applicant, requiring them to show cause, within a time specified, why the award should not be filed."

SECTION 526.—" If no ground, such as is mentioned or referred to in s. 520 or s. 521, be shown against the award, the Court shall order it to be filed, and such award shall then take effect as an award made under the provisions of this chapter."

Now, according to a literal reading of s. 525, two conditions are requisite to warrant an application that an award be filed in Court: *first*, the matter must have been referred to arbitration without the intervention of a Court of Justice ; *second*, an award must have been made thereon. It would, therefore, seem, on general principles, that the existence or non-existence of each of those conditions is a matter for enquiry and adjudication. It is difficult to see how the Court can ascertain whether or not such an award as is mentioned in the section has been actually made, without first ascertaining, if the matter be disputed, whether or not there has been such a reference as is mentioned in the section. It is urged that the section presupposes the existence of a submission or reference to arbitration, and that if this be disputed, the Court cannot go into the matter, but must leave the parties to have the factum or otherwise of reference decided in an independent suit. The practical effect of such contention, if sound, would be that any party to a reference against whom an adverse award has been made, has only to allege that there was no reference, and he can throw the matter over and paralyze the operation of ss. 525 and

(1) 21 C. 213 (224).

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526 of the Code. [763] I can scarcely think this was the intention of the Legislature, nor do I think the language of the section warrants such a contention. It is difficult to see why the Court, on an application under s. 525, can go into the delicate questions indicated in ss. 520 and 521, and yet is unable to go into that of whether or not there were any reference to arbitration, which is the substratum of the whole matter, and upon which the summary jurisdiction under s. 525 is based. It seems a rather odd conclusion that the Court may go into questions which may result in the award being set aside, and yet cannot go into the question of whether or not there has been any valid reference to arbitration. It has however been urged before us that this literal interpretation of this section must be discarded, because, it is contended, there would be no right of appeal from an adjudication on the factum of reference. This by itself, even were the contention well founded, would not be sufficient reason for withholding from clear and unequivocal language its ordinary meaning, for the function of the Court is to expound the Act as it stands according to the plain sense of the words used. Moreover, any argument drawn from the alleged absence of any right to appeal loses its force, in view of the fact that the same consideration would apply to the adjudication as to the existence of an agreement to refer on an application under s. 523, and also as to those matters of far greater difficulty and intricacy indicated in s. 521, and referentially incorporated into s. 526, though undoubtedly they would have to be investigated and determined. But in fact the whole basis of this argument, in my opinion, has no existence, for I think the right of appeal exists. In the recent case of *Kali Prosanno Ghose* v. *Rajani Kant Chatterjee* (1), a Division Bench of this Court has held that an appeal will lie against a decree given in accordance with an award under s. 522 of the Code, when the award upon which the decree is based is not a valid and legal award. An award cannot be valid or legal award if there has been no submission to aribitration, and how then can the Court go into the question of whether or not it is valid or legal if it cannot go into the question of whether or not there were a submission to arbitration. I do not think [764] that s. 522 contemplates there should be no appeal where the validity of the award is challenged. Another argument addressed to the Court on behalf of the opposite party was, that the question of whether or not there had been any submission to arbitration could not be determined, on the ground that under ss. 525 and 526 the Court could only investigate such matters as are indicated in ss. 520 and 521. This is a somewhat dangerous argument, for, if it were to prevail, the result would be that the existence and validity of the agreement to refer cannot be questioned, and the order to file the award would be a matter of course. It will be noticed that under s. 526 it is compulsory on the Court to file the award, unless some such ground as is mentioned in ss. 520 and 521 be shown against it. The result is that, in my opinion, the jurisdiction of the Court to order an award to be filed, and to allow proceedings thereunder, is not taken away by a mere denial of the reference to arbitration. This view is consistent with the decision of a Full Bench of the Allahabad High Court in the case of *Amrit Ram* v. *Dasrat Ram* (2).

I think, however, that this application must be treated as an appeal, the time for appealing not having expired, and not as an application under s. 622 of the Code, and the petitioner must undertake to pay any additional Court-fee there may be on the footing of its being an appeal.

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(1) 25 C. 141. (2) 17 A. 21.

TREVELYAN, J.—I agree entirely with the view expressed by the learned Chief Justice.

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JENKINS, J.—I am of opinion that the question referred to us must be answered in the way proposed by the Chief Justice, and for the reasons expressed in his judgment, and I agree with him as to the mode in which the case should be dealt with.

MACPHERSON, J.—I regret that I must in this case dissent from the decision of the other learned Judges of this Bench. In my opinion s. 525 of the Code presupposes that there has been a reference to arbitration and an award made thereon, and **[765]** the Court under s. 526 must deal with the award on that footing, if it can do so, having regard to the nature of the cause shown. If it cannot, if for instance the cause shown is that there was no submission and consequently no award, the Court must hold its hand and refuse the application.

Section 525 does not, it is true, refer to an admitted reference or an admitted award, but the Legislature might well refrain from using language which was too suggestive. If stress is to be laid on this circumstance, equal stress must be placed on the absence of any indication that when the question of submission is a question in dispute, the Court is to determine on evidence the fact of a submission. I may point out that an express provision to this effect is to be found in s. 531 when an alleged agreement to refer is filed by one of the parties.

Section 526 is silent as to the course to be adopted if, in showing cause, there is a denial of any submission, and I see nothing in that section or in s. 525 to prevent the Court from refusing the application on that ground without enquiring into and deciding the disputed fact. The cause to be shown under s. 526, and established according to the decision of the Full Bench in *Surjan Raot* v. *Bhikari Raot* (1) is some cause as is mentioned or referred to in s. 520 or 521, but such cause could only be shown when there was an actual and not merely an alleged award. It would, moreover, be contrary to established practice and to all ideas of justice and fairness that when one party alleges and the other denies a submission, the burden of proof should be placed on the party denying. It is the party objecting who is to show cause, and this Court has held that to show cause means to establish cause.

The corresponding section (321) of the Code of 1859 enacted that if no sufficient cause was shown against the award, the award should be filed. The cases *Iswari Prosad* v. *Bir Bhanjan Tewari* (2) and *Chowdhri Murtaza Hossein* v. *Massumat Bibi Bechanissa* (3) show that there was a difference of opinion as to what those words **[766]** meant. The intended scope of the section has not been made very clear in the present Code, but the altered language of s. 526, coupled with the absence of any extending provisions, indicate to my mind that the Courts were intended to deal with actual and not with disputed award. Sections 525 and 526 must be read together, and so reading them they bear in my opinion the construction which I have put upon them. This construction is, moreover, consistent with what one may reasonably suppose to have been the intention of the Legislature that when the tribunal undisputedly chosen by the parties has made its award, the Court should determine in a summary way, without any right of appeal and having regard only to matters arising on the award on the conduct of the parties or the arbitrators in the making of it, whether effect should be given to the award. In determining the scope of these sections

(1) 21 C. 213. (2) 8 B.L.R. 315=15 W.R.F.B. 9. (3) 3 I.A. 209.

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one cannot overlook the fact that finality is given to the decree which by the operation of ss. 526 and 522 is to follow on the filing of the award, except in so far as the decree is in excess of or not in accordance with the award. No appeal is allowed against an order for the filing of the award, and when such an order is made, the award filed is to take effect as an award made under the provisions of chap. XXVII. That is to say, the Court is to give judgment according to the award, which must of necessity be the award filed ; upon that judgment a decree is to follow, and no appeal is to lie against that decree except in so far as it is in excess of or not in accordance with the award. When the decree is in strict accordance with the award filed, I fail to see that there is any right of appeal against the decree. If the Legislature intended that the Court of the lowest grade having jurisdiction in the matter should decide disputed questions of submission, I cannot believe that an appeal from the decision would have been disallowed. Possibly an appeal might lie on the ground that the Court had made a decree which it had no jurisdiction to make, but that would mean that the Court had decided matters which it was not competent to decide, and such an appeal would be very different from an appeal against the decree, on the ground that the decree was wrong by reason of an erroneous decision on a question of fact antecedent to the award with which alone the Courts can deal under ss. 525 and 526.

[767] A Full Bench of the Allahabad High Court held in *Amrit Ram* v. *Dasrat Ram* (1) that the words in s. 526 "if no ground such as is mentioned or referred to in s. 520 or s. 521" covered all objections relating to the submission and the authority of the arbitrators to act. If this decision is right my view of the section is wrong. I must however with due respect dissent from the decision. It has been already dissented from by FARRAN, C.J., and STRACHEY, J.—in *Tejpur* v. *Mohomed Jammal* (2), and I cannot do better than adopt the reasons of those learned Judges for holding that s. 526 bears no such construction as that. It is argued, however, that as the application under s. 525 is to be registered and numbered as a suit between the applicant as plaintiff and the other parties as defendants, it must be dealt with as a suit, and that the Court has at the least an implied power to try and decide all matters arising on the application. I think no such implication rises from that direction standing alone and without the addition of further words such as are to be found in s. 331 and in s. 529 read with s. 531, and having regard to the language used it would, in my opinion, be going very far to hold that the provisions of the Procedure Code relating to suits apply to applications under s. 525, and that every such application is to be dealt with as a suit. If, moreover, the application is to be dealt with as a suit culminating in a decree one way or the other, one is driven to what seems to me to be an absurd conclusion. The Court makes an order refusing the application on one or other of the grounds referred to in s. 526 after adjudicating on the objections which come within that section. The order is a decree as defined in s. 9 of the Code, for as it is an adjudication on a right claimed on a defence set up which, so far as regards the Court expressing it, decides the suit. An appeal would lie against the decree, an appeal not being prohibited by any provision of law. If, however, the Court after a similar adjudication overrules the objections coming under s. 526 and makes an order that the award should be filed, the order is not an appealable order, and it is not a decree because it does not finally dispose of the suit.

(1) 17 A. 21. (2) 20 B. 596.

Obviously also no appeal would lie against the decree which is [768] to follow on the filing of the award, if the decree was in accordance with the award.

It would follow, therefore, that if the application was refused on any ground set out in s. 521, the plaintiff would have a right of appeal, but if the application was allowed, the objections under that section being overruled, the defendants would have no right of an appeal. I am unable to believe that any such result as this was intended or contemplated and I must decline to put upon the sections a construction which would lead to it, the more especially as I think they bear a more reasonable construction by which such a result is avoided.

The consequence would, of course, be much more serious, if there was a dispute as to the submission. In that case, if the Court held there was no submission and refused the application on that ground, the plaintiff would have a right of appeal. If it held that there was a submission and made a decree in accordance with the award, the defendant, in the view which I take and have already expressed, would have no right of appeal.

The real objection to putting a limited construction on the two sections seems to be that the defendant by denying that there was any submission could prevent the operation of the sections. I presume that the applicant would have to support his application by affidavit on verified petition, and that the defendant when called on to show cause must show cause in the same sort of way. His denial, therefore, if false, would not be without risk to himself. Nor do I see that in my construction of the sections any serious hardship or inconvenience is involved. The refusal of the application on the ground that there is a dispute as to the factum of a submission means only this, that the special and summary procedure provided by these sections is not applicable to the case. The applicant is not left without a remedy, he can bring a suit to enforce the award, and in that suit all questions upon which the parties are at issue would be tried in the ordinary way and with the ordinary right of appeal.

The cases in this Court seem to me to be all one way and in favour of the view I have expressed. I need only refer to [769] *Ichamoyee Chowdhranee* v. *Prosunno Nath Chowdhri* (1) decided by Wilson, J., and myself, and to *Monohur Bhugut* v. *Bijadhur Bhugut* (2) decided by Mitter and Tottenham, JJ. The head-note in the former case does not seem to be quite accurate. Wilson, J., although he went further than I was disposed to go, says this: "There is an additional objection to the present order because the applicant when before the Subordinate Judge denied altogether that the submission was binding upon her, and s. 525 seems to me to have no application to a case in which the submission or its binding effect is in dispute." Then there is the opinion expressed by Prinsep and Pigot, JJ., and in which I concurred, in the Full Bench case *Surjan Raot* v. *Bhikari Raot* (3). That case overrules some of the decisions of this Court in which other learned Judges had taken a still more restricted view of the powers of the Court in dealing with applications under s. 525, and although the opinion above referred to on the question now raised has not the force of a decision, it was deliberately formed and expressed in order to prevent the decision of the Full Bench being carried further than it was intended to go.

(1) 9 C. 557. (2) 10 C. 11. (3) 21 C. 213.

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The Bombay High Court has practically adopted the same construction in *Samal Nathu* v. *Jaishankar Dalsukram* (1), and *Tejpur Dew Chand* v. *Mahomed Jamal* (2).

The decision of the Madras High Court in *Husananna* v. *Linganna* (3) when examined will be found to be no authority on the question now raised. On the other side there is the decision of the Allahabad High Court already referred to.

It follows from what I have said that I entirely dissent from the conclusion that an appeal lies in this case.

BANERJEE, J.—The question for the determination of which this case has been referred to a Full Bench is—

[770] "Whether when an application has been made under s. 525 of the Civil Procedure Code, and notice has been given to the parties to the alleged arbitration other than the applicant, the jurisdiction of the Court to order the award to be filed, and to allow proceedings to be taken under it, is taken away by a mere denial of the reference to arbitration on an objection to the validity of the reference."

The facts of the case upon which this question arises are shortly these: The petitioner before us applied to the Court of the Subordinate Judge of Patna, under s. 525 of the Civil Procedure Code, for filing an award on the allegation that the same had been made on a reference to arbitration without the intervention of the Court. The opposite party appeared on notice being served on her, and objected to the award being filed in Court on the ground that there was no reference to arbitration by her, and that the *ekrar* or deed purporting to embody her assent to the reference had been fraudulently caused to be signed by her without the purport of the document being explained to her. And the Court below following the cases of *Bijadhur Bhugut* v. *Monohur Bhugut* (4) and *Surjan Raot* v. *Bhikari Raot* (5) rejected the application without taking any evidence or making any enquiry into the truth of the allegations on either side. Aggrieved by the order rejecting the application, the petitioner moved this Court, and has obtained the rule which has given rise to this reference.

The answer to the question referred to us must depend upon the meaning of ss. 525 and 526 of the Code of Civil Procedure, and in ascertaining that meaning we must look not merely to the letter but also to the spirit of the law, and must also, as far as possible, have regard to the interpretation put by previous decisions upon these and other cognate provisions of the Code.

Section 525 says: "When any matter has been referred for arbitration without the intervention of a Court of Justice, and an award has been made thereon, any person interested in the award may **[771]** apply to the Court of the lowest grade having jurisdiction over the matter to which the award relates, that the award be filed in Court.

"The application shall be in writing and shall be numbered and registered as a suit between the applicant as plaintiff and the other parties as defendants.

"The Court shall direct notice to be given to the parties to the arbitration other than the applicant, requiring them to show cause within a time specified why the award should not be filed."

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(1) 9 B. 254. (2) 20 B. 596. (3) 18 M. 423.
(4) 10 C. 11. (5) 21 C. 213.

An applicant under s. 525 must, therefore, allege that there has been a reference to arbitration without the intervention of a Court of Justice, and an award has been made thereon in which he is interested, and it must be competent to the party summoned to show cause to show, not only that the award is open to the objections referred to in s. 526, but also that the alleged reference to arbitration never took place. Section 526, it is true, enacts that "if no ground such as is mentioned in s. 520 or 521, be shown against the award, the Court shall order it to be filed, and such award shall then take effect as an award made under the provisions of this chapter;" but that cannot be taken to imply that the party summoned to show cause can resist the application only if he can show that the award is open to one or more of the objections contemplated by ss. 520 and 521, and that he is precluded from urging that there was no actual or valid reference to arbitration. It was argued that the effect of s. 526, referring only to the objections under ss. 520 and 521, is to make the absence of other objections such as that there was no actual or valid submission to arbitration, a necessary condition for the Courts entertaining an application under s. 525. But if that had been the intention of the Legislature, it would have been expressed, not in this obscure and indirect way, but more clearly and directly by making s. 525 run, not as it does, but somewhat to the following effect, namely, "when it is admitted by all the parties concerned that any matter has been referred to arbitration without the intervention of a Court of Justice, etc." Moreover, if this argument was well founded, that is, if the jurisdiction to entertain an application for filing a private arbitration award depended upon the admission [772] of all the parties concerned that there was a valid reference to arbitration, it would make the section practically nugatory, it being always in the power of a recusant party to say that he does not admit the fact of valid reference to arbitration having been made.

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When s. 525 allows a party to apply to the Court for filing an award on the allegation that there was a private reference to arbitration and that the award was made upon such reference, and when it directs that the application shall be numbered and registered as a suit between the applicant as plaintiff and the other parties as defendants, and the other parties shall be summoned to show cause why the award should not be filed, the Court must be held to have jurisdiction (unless it is expressly taken away, which is not the case) to enquire into and determine the question whether there has been a valid reference to arbitration, in the event of the parties summoned denying the reference. And the object of s. 526 is, in my opinion, not to limit the jurisdiction of the Court under s. 525 to cases in which the reference to arbitration is admitted, but simply to provide that the only grounds upon which the validity of a private arbitration award, made upon a reference to arbitration either admitted or proved, can be questioned are precisely those upon which an award made on a reference to arbitration in the course of a suit can be called in question; or, in other words, its object is to show that the validity of a private arbitration award cannot any more than that of an award made on a reference to arbitration in the course of a suit, be questioned on the ground of the award being erroneous in fact.

It was next argued that if it had been intended that the Court in a case under s. 525 should determine the question whether there has been any reference to arbitration when such question is raised, then the Legislature would have provided in s. 588 for an appeal against an order determining such question adversely to the applicant; and it would further

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have provided for an appeal against the decree based on the award when such question is decided in his favour, instead of making such decree final as the latter part of s. 526 by implication does.

[773] The answer to this argument is simple. An order under s. 525 determining on the objection of the party summoned to show cause that there has been no valid reference to arbitration and rejecting the application which is numbered and registered as a suit, is clearly a decree as defined in s. 2, and an appeal lies against it under s. 540. The case of *Baboo Chintaman Singh* v. *Uma Kunwar* (1) was relied upon as showing that such an order is not appealable, but that was a case under the Civil Procedure Code of 1859 which contained no such definition of the term "decree" as is given in s. 2 of the present Code. Again, when the Court disallows the objection that there has been no reference to arbitration, and orders the award to be filed, and a decree is made in accordance with the award under the latter part of s. 526, which by implication makes s. 522 applicable to the case, though such decree, in so far as it is in accordance with the award, is under the last-mentioned section not open to appeal, yet that does not bar an appeal against the decree when the appeal raises the question whether there was any submission to arbitration and whether there was any valid award at all—See *Joy Prokash Lal* v. *Sheo Golam Singh* (2), *Kali Prosunno Ghose* v. *Rajani Kant Chatterjee* (3), *Suppu* v. *Govinda Charyar* (4), and *Lachman Das* v. *Brijpal* (5). The finality that s. 522 contemplates attaches to a decree made in accordance with a valid award; the appeal that that section bars is an appeal against the award on the ground of the award being erroneous in fact on the merits.

It was then argued that though s. 525 requires that an application for filing a private arbitration award is to be numbered and registered as a suit, it does not, like ss. 331 and 531, say that the Court is to try the case in the event of opposition in the same manner as a suit, or that its order shall have the same force as a decree; and that a notice to the other parties to the award requiring them to show cause is not the same thing as [774] a summons to them requiring them to defend a suit. I think this argument is fully met by the following answer:—

In the proceedings under the two sections referred to, namely s. 331 and s. 531, the matter in dispute between the parties is intended to be determined by the Court, and accordingly it is expressly provided in those sections that the matter shall be determined by the Court in the same manner as a suit, and the order of the Court shall have the same force as a decree. In the class of cases to which ss. 525 and 526 relate, the primary matters in dispute between the parties are, or are alleged to be, determined by the award of the arbitrators; the dispute, if any, that may arise is only as to certain secondary or subsidiary matters, that is, as to the fact or the validity of the award, or of the submission to arbitration or of both; and if on any ground (including a ground such as this, namely, that there was no real or valid submission to arbitration), the Court holds that the award cannot be filed, it is evidently not open to the parties to ask the Court to decide for itself the matters to which the award relates; so that any specific provision to the effect that the Court is to decide the case as a suit would have been wholly out of place. The absence of any such provision cannot therefore afford valid ground for any adverse argument.

(1) 6 W. R. Mis. 63 = Sup. Vol. B. L. R. 505. (2) 11 C. 37.
(3) 25 C. 141. (4) 11 M. 85. (5) 6 A. 174.

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Then as to the supposed distinction between a notice to show cause and a summons to defend a suit, I think it is sufficient to say that when upon a notice to show cause, the party served with notice must allege and prove cause, and the Court must fully and finally determine the validity of the cause shown so far as it relates to matters contemplated by ss. 520 and 521, as has been settled by the decision of the Full Bench in *Surjan* v. *Bhikari* (1), there can be no good ground for thinking that those words imply either that the Court is not to determine at all, or that it is to determine only summarily, and subject to a more complete determination by a suit, the cause shown, when the cause shown consists in a denial of any reference to arbitration.

It was lastly argued that as the procedure prescribed by s. 525 is a summary one, and the proceeding is instituted by an **[775]** application and not by a plaint on payment of a proper Court-fee, it is not likely that the Legislature intended that any difficult questions, such as those relating to the fact or validity of a reference to arbitration, should be enquired into by the Court under that section. But the simple answer to the argument is this, that the Court must under s. 526 enquire into and determine objections such as those referred to in ss. 520 and 521, which raise questions of far greater nicety and difficulty than those sought to be excluded from the Court's consideration, and there is no reason why the Court should not determine these last which lie at the threshold of the case, when it must enquire into the former.

Sections 523 and 524 to some extent favour the view I take. They provide that a party to a private agreement to refer to arbitration any matter in dispute may apply to have the agreement filed in Court ; thereupon the application is to be numbered and registered as a suit between the applicant and the other parties to the agreement, and a notice is to be issued to them to show cause why the agreement should not be filed, and if no sufficient cause be shown the agreement will be filed, arbitrators appointed, and the case proceeded with in the same manner as if the reference to arbitration had been made in a pending suit. Now in such a case the cause shown can relate only to the fact, validity or subsistence of the agreement to submit to arbitration, and if the Court is to enquire into these matters in a proceeding instituted under s. 523, there is no good reason why it should not enquire into them in a case under s. 525. As I understand the sections included in chap. XVII of the Code of Civil Procedure, they are intended to provide for all cases of reference to arbitration, whether it be made in the course of a suit, or privately without the intervention of a Court. The first group of sections, that is, ss. 506 to 522, provide for reference to arbitration in the course of a pending suit ; the second group, that is ss. 523 and 524, relate to cases in which the parties have, or are alleged to have, before instituting any suit, privately come to an agreement to refer any matters in dispute to arbitration, but have proceeded no further ; and the third group, that is ss. 525 and 526, to cases in which there has been, or is alleged to have been, a private submission to arbitration followed by an **[776]** award. In the first group of sections are given in detail the provisions applicable to the subject, while the other two groups concisely and by implication refer to such of the provisions of the first group as are respectively applicable to the classes of cases they contemplate, and it is their brevity which has given rise to the difficulty of construing them.

(1) 21 C. 213.

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I may add that the view I take has the effect of preventing multiplicity of judicial proceedings by making the proceedings under s. 525 determine finally all the necessary questions that may arise in it, and it is in accordance with the view taken by the majority of the Full Bench in *Brojo Durlubh Sinha* v. *Roma Nath Ghose* (1), upon a somewhat analogous question arising upon the construction of s. 375.

It remains now to consider the cases cited.

Of these *Chintamoni Singh* v. *Rupa Koer* (2) (which has already been referred to above), and *Lala Iswar Prosad* v. *Bir Bhanjan Tewari* (3), were decided under the Civil Procedure Code of 1859 under which the provisions relating to appeal were, as has been shown above, different from those under the present Code.

The cases of *Ichamoyee Chowdhranee* v. *Prosunno Nath Chowdhri* (4), *Hurronath Chowdhry* v. *Nistarini Chowdhranee* (5), which not only favour the contention of the opposite party, but go a great deal further, have been dissented from by the Full Bench in *Surjan Raot* v. *Bhikari Raot* (6).

The case of *Bijadhur Bhugut* v. *Monohur Bhugut* (7) is no doubt against the view I take. The decision in that case is based upon the terms of s. 526. MITTER, J., in delivering the judgment of the Court says: "It appears from s. 526 that the Court has jurisdiction to adjudicate only upon the grounds of objection mentioned in ss. 520 and 521." For the reasons given above I [777] must respectfully dissent from this view. And the same remarks apply to the case of *Tejpur* v. *Mahomed Jamal* (8).

The opinions of PRINSEP, PIGOT and MACPHERSON, JJ., in *Surjan Raot* v. *Bhikari Raot* (6) are also against the view I take. But those opinions were not necessary to be expressed for the determination of the question before the Court. The ground upon which those opinions are based is the absence of any reference in s. 526 to any objections other than those contemplated by ss. 520 and 521. But this ground, as I have tried to show above, is not sufficient to support the inference that is based upon it.

The case of *Muhammed Nawas Khan* v. *Alam Khan* (9) was referred to as showing that the Privy Council held that an order rejecting an application for filing an award under s. 525 would not operate as *res judicata* upon the question of the validity of the award, and thence it was argued that the jurisdiction of the Court under that section must be of a very limited character. I do not think that the case cited lays down any such broad rule or supports any such inference. Their Lordships overruled the plea of *res judicata*, not upon the ground of the jurisdiction of the Court under s. 525 being limited in any way, but solely upon the ground of the question as to the validity of the award not having been raised and decided in the former proceeding.

On the other hand the cases of *Amrit Ram* v. *Dasrat Ram* (10) and *Husananna* v. *Linganna* (11) support the view I take.

For the foregoing reasons I would answer the question referred to us in the negative.

But here an important point arises for consideration. As in the view I take the order of the Court below rejecting the application is open to appeal, is it competent to the petitioner to invoke our interference under s. 622 of the Code of Civil [778] Procedure? The question I think must

(1) 24 C. 908. (2) 6 W.R. Mis. 83. (3) 8 B.L.R. 315=15 W.R. F.B. 9.
(4) 9 C. 557. (5) 10 C. 74. (6) 21 C. 213. (7) 10 C. 11.
(8) 20 B. 596. (9) 18 I.A. 73. (10) 17 A. 21. (11) 18 M. 423.

be answered in the negative. But as, regard being had to the value of the subject-matter to which the award relates, the appeal lies to this Court, and as the application under s. 622 was made before the expiry of the time allowed for an appeal, I would treat the application as an appeal (provided the applicant puts in the proper Court-fee) and I would decree the appeal, set aside the order of the Court below, and remand the case to that Court for a decision on the merits.

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MACLEAN, C.J.—With this indication of our opinion we remit the case to the Division Bench which referrrd it to us. We fix three gold mohurs as the hearing fee for the hearing before the Full Bench.

S. C. C. *Appeal allowed*; *case remanded.*

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25 C. 778.

APPELLATE CIVIL.

Before Mr. Justice Trevelyan and Mr. Justice Stevens.

BRAHMADEO NARAYAN (*Plaintiff*) v. HARJAN SINGH AND OTHERS (*Defendants*).* [25th February, 1898.]

Transfer of Property Act (*IV of* 1882), *s.* 6, *cl.* (*a*)—*Reversionary right—Assignment of the interest of a Hindu reversioner.*

The interest of a Hindu reversioner upon the death of a widow does not come within the terms of cl. (*a*) of s. 6 of the Transfer of Property Act (IV of 1882), and an assignment of such interest is allowed by law.

[Overruled, 29 C. 355; R., 30 B. 304=7 Bom. L.R. 742; 9 C.L.J. 50 (52); 11 Ind. Cas. 211=214 P.L.R. 1911=135 P.W.R. 1911; 13 Ind. Cas. 495=15 O.C. 122; 2 Ind. Cas. 865.]

MUSSUMMAT LALITA KOER, widow of one Lala Bhekdhari Lal, inherited from her husband an eight-anna share of Mouza Norowli Sen and other properties, and sold two annas out of her share to Birjlal Singh for alleged necessities on the 20th December 1868. The defendants (first party) are the heirs and assignees of Birjlal in possession of the said two annas. The defendant (second party) who is the nearest sapinda and heir of Lala Bhekdhari Lal, sold his reversionary right in respect of the said two annas and [779] other property during the lifetime of Lalita Koer to the plaintiff on the 7th November 1882. Lalita died in 1884, and the present suit was brought by the plaintiff for recovering possession of the said two annas on the ground that the sale to Birjlal was without any legal necessity, and became "an absolute nullity" on the death of Lalita Koer. Various objections were raised by the different parties, defendants, and issues joined thereon, but the Court below dismissed the suit, on the ground that the transfer of the reversionary interest to the plaintiff under the deed of 7th November 1882 was invalid under s. 6 of the Transfer of Property Act (IV of 1882).

The plaintiff appealed to the High Court.

Dr. *Rash Behari Ghose*, Babu *Saligram Singh*, and Babu *Lakshmi Narayan Singh*, for the appellant.

Babu *Tarak Nath Palit* and Babu *Umakali Mukerjee*, for the respondents.

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* Appeal from Original Decree No. 200 of 1896, against the decree of Babu Juggut Durlabh Majumdar, Subordinate Judge of Tirhoot, dated 25th of March 1896.

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The judgment of the High Court (TREVELYAN and STEVENS, JJ.) was as follows:—

JUDGMENT.

In this case the assignee from a reversioner is seeking to question a sale made by a Hindu widow. The widow is now dead. The assignment was made to the plaintiff during her lifetime.

The learned Subordinate Judge has held that no effect can be given to that assignment, having regard to the terms of s. 6 of the Transfer of Property Act.

In that section the following property is stated not to be capable of transfer, namely, "the chance of an heir-apparent succeeding to an estate, the chance of a relation obtaining a legacy on the death of a kinsman, or any other mere possibility of a like nature." The question before us is whether the right of a Hindu reversioner during the lifetime of the widow is included within this expression. It is not, we are confident, possible to include it within the expression "The chance of an heir-apparent succeeding to an estate." The words "heir-apparent" are always used with reference to the relation between a living person and his successor. It is not quite certain exactly what was meant by the expression "heir-apparent." It is an expression which is very rarely used, except with regard to [780] the heir to the throne. As far as we can see, the provisions of s. 6 are only intended to apply to cases of a mere hope or chance of succession which may be defeated by the act of some person having the present disposal of the property. It can scarcely be said that the right of a Hindu reversioner is a mere possibility. It is an interest contingent upon the reversioner surviving the widow, and also upon the non-intervention of a full heir. This is a contingency dependent on no man's will, but upon the happening of uncertain events. It is an interest which is capable of being protected by the Court. The reversioner can sue to restrain waste; he can, on making out a proper case, obtain a receiver; and he can contest alienations made by the widow. It is an interest which may at any time cease to be contingent by the widow giving up her estate. The reversioner with the widow can make a complete title to the property. A transfer of this interest is, in our opinion, not within the letter of the law, and, moreover, it is not within the mischief which the section was intended to counteract. Mere possibilities of succession are wholly incapable of valuation, whereas with the aid of an actuary it is not difficult to put a money value upon the interest of a reversioner.

The decisions under the Civil Procedure Code as to what is attachable can be of no assistance to us in this case. Much which, under the law, cannot be sold in execution is capable of being dealt with by voluntary transfer, and we think that it would be wholly unsafe to apply to the Transfer of Property Act decisions which have been given with regard to the Civil Procedure Code. In our opinion there is nothing in the law to prevent the assignment to the plaintiff. An argument was addressed to us with reference to s. 43 of the Transfer of Property Act, but having regard to our view of the construction of s. 6 of the same Act, it is unnecessary for us to consider that argument. The decree of the lower Court must be set aside, and the case remanded for determination on its merits.

The plaintiff is entitled to his costs of this appeal as against defendants 1 and 3 to 8.

S. C. C. *Appeal allowed; case remanded.*

25 C. 781.

[781] APPELLATE CIVIL.

Before Mr. Justice Ghose and Mr. Justice Wilkins.

MOTHURA MOHUN LAHIRI AND OTHERS (*Plaintiffs*) v. MATI SARKAR AND OTHERS (*Defendants*).* [31st January, 1898.]

Bengal Tenancy Act (*VIII of* 1885), *ss.* 27 *and* 29—*Landlord and tenant—Suit for rent —Enhancement of rent—Enhancement of rent by a registered* kabuliat *within* 15 *years from a previous oral agreement to pay enhancement of rent, effect of.*

By an oral agreement in the year 1885 the tenant defendant agreed to pay an enhancement of rent, and he paid rent at that rate until subsequently he executed in the year 1893 a registered *kabuliat* by which he agreed to pay a further enhancement of rent which was more than two-annas in the rupee. Upon a suit for rent by the landlord based on the registered *kabuliat*:

Held, that, inasmuch as the enhancement of rent, in s. 29 of the Bengal Tenancy Act, refers to enhancement after the promulgation of the Act, if in this case the enhancement which was made in the year 1885 was before the Act came into force, it would not bar an enhancement during the period of fifteen years from the date thereof as contemplated by cl. (3) of s. 29. But if the said enhancement was made after the Act came into force, it would also not bar a subsequent enhancement within fifteen years from the date thereof, as the previous contract was only an oral one, and was not effectual and binding upon the defendant.

Held, also that having regard to cl. (*b*) of s. 29 as the enhancement was more than two annas in the rupee, the registered *kabuliat* was bad in law, if the rent then agreed to be paid was an enhanced rent. The *kabuliat* would also be bad in law, if the rent agreed to be paid is partly enhanced and partly increased rent.

Held, further, that having regard to proviso (1) of s. 29, as also the provisions of s. 27, the plaintiff would at any rate (*i e.* failing the *kabuliat*) be entitled to recover rent at the rate paid by the defendant for more than three years.

[Overruled, 32 C. 395=1 C.L.J. 10=9 C.W.N. 265; R., 16 C.L.J. 422=17 C.W.N. 430=16 Ind. Cas. 929.]

THE facts of the case, so far as they are necessary for the purposes of this report, are sufficiently stated in the judgment of the High Court.

Babu *Saroda Churn Mitter*, with him Babu *Mukund Nath Roy*, for the appellant.

[782] Babu *Mohiny Mohun Chuckerbutty*, for the respondent.

The judgment of the High Court (GHOSE and WILKINS, JJ.) was as follows :—

JUDGMENT.

This appeal arises out of a suit for rent at the rate of Rs. 103 per year, upon a *kabuliat* executed by the defendant in the year 1893. The defendant pleaded that the *kabuliat* was not a *bona fide* transaction, but was the result of coercion exercised by the plaintiff and that the rent payable was Rs. 39-3 a year.

The Munsif, among other issues, laid down the following :—

(1) Whether the *kabuliat* was illegally and forcibly extorted from the defendant ?

(2) At what rate should the plaintiff recover rent ?

It transpired in the course of the trial that the rent of the defendants' holding had been once enhanced in the year 1292 (B. S.) ; and that there was a further enhancement in the year 1893 by the *kabuliat* executed by

* Appeal from Appellate Decree No. 1082 of 1896, against the decree of K. N. Roy, Esq., Officiating District Judge of Pubna and Bogra, dated 19th of March 1896, reversing the decree of Babu Amar Chundra Mukerjee, Munsif of that district, dated the 9th of September 1895.

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the defendant. The defendant, however, admitted in his deposition that he had been paying for some years at the rate of Rs. 50.

We should here mention that, in the course of argument before the Munsif, the plaintiff stated that the increased *jumma* mentioned in the *kabuliat* was due to increased area found in the occupation of the defendant, and urged that, inasmuch as the defendant in his written statement did not raise any defence as to alteration of rate of rent and area, he, the plaintiff, did not place before the Court all the evidence which was available explaining the circumstances under which the defendant agreed to pay the rent as mentioned in the *kabuliat*. The Munsif, however, disallowed this plea upon the ground that the issue having been raised as to what *jumma* the plaintiff was entitled to recover, he should determine upon the evidence adduced whether the enhanced *jumma*, as mentioned in the *kabuliat*, was really due to increased area, or increased rate, or both.

The Munsif held that the *kabuliat* had not been extorted from the defendant as it was pleaded, and that the rent agreed to be paid under the *kabuliat* was partly increased rent on account of the excess area found in the occupation of the [783] defendant, and partly enhanced rent, and in excess of the rent then payable by the defendant. He accordingly gave a decree for such increased rent *plus* the rent then payable by the defendant, *i. e.*, Rs. 50 with an enhancement upon it at the rate of two-annas in the rupee.

On appeal by the defendant, the District Judge has held that there having been an enhancement in the year 1292, the plaintiff is not entitled to any enhancement within fifteen years from that time; that the Munsif was not, therefore, right in allowing an enhancement at the rate of two-annas upon the rupee; and that the case does not fall within the proviso (1) to s. 29 of the Bengal Tenancy Act. He has further held that it is not proved that the enhancement as mentioned in the *kabuliat* was increased rent owing to increase of area. He has accordingly given the plaintiff a decree at the rate admitted by the defendant in his written statement.

Against this decree the plaintiff has preferred this second appeal.

The first question that has been raised before us for consideration is, what may be the legal effect of the enhancement in the year 1292 (B. S.) as bearing upon the *kabuliat* executed by the defendant in 1893.

It is not clear upon this record whether the enhancement in the year 1292 (B. S.) was before or after the promulgation of the Bengal Tenancy Act. Assuming, in the first instance, that it was before the Act came into operation, let us examine how does the matter stand.

Section 29 of that Act provides (omitting the 2nd and 3rd provisos which have no bearing in this case): "The money rent of an occupancy *raiyat* may be enhanced by contract, subject to the following conditions: (*a*) the contract must be in writing and registered; (*b*) the rent must not be enhanced so as to exceed by more than two annas in the rupee the rent previously payable by the *raiyat*; (*c*) the rent fixed by the contract shall not be liable to enhancement during a term of fifteen years from the date of the contract.

[784] "Provided as follows: (*i*) Nothing in cl. (*a*) shall prevent a landlord from recovering rent at the rate at which it has been actually paid for a continuous period of not less than three years immediately preceding the period for which the rent is claimed."

When the section says that the money rent may be enhanced by contract in writing and registered, it evidently means to refer to enhancement after the promulgation of the Bengal Tenancy Act: it does not refer

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to any enhancement which has already taken place. Under the old law, it was not necessary that the contract should be "in writing and registered;" it could be made orally. The contract by which rent was enhanced in the year 1292 (B.S.) does not, therefore, fall within s. 29; and it follows that *that* contract was no bar to an enhancement during the period of fifteen years from the date thereof, as contemplated by cl. (*c*) of the section.

In this view of the matter, it seems to us that the contract (as evidenced by the *kabuliat*) under which the defendant agreed to a further enhancement, though it is a contract falling within s. 29 of the Act (it having been entered into after the Bengal Tenancy Act came into force), could not be rejected upon the ground adopted by the District Judge. But then cl. (*b*) of the section enjoins that the rent payable by a *raiyat* must not be enhanced so as to exceed by more than two-annas in the rupee. The rent agreed to be paid under the *kabuliat* of 1893 was certainly more than the limit prescribed by the section; and it, therefore, follows that the *kabuliat* is bad in law, *if the rent then agreed to be paid was enhanced rent.*

But supposing, on the other hand, that the enhancement of 1292 (B.S.) was effected after the Bengal Tenancy Act came into operation, let us examine what may be the relative rights of the parties.

What s. 29 of the Act evidently contemplates is that when the rent of an occupancy *raiyat* is enhanced after the promulgation thereof it must be, in order to make the contract effectual and binding, in writing; and the document must be registered. The contract by which the rent was enhanced in **[785]** 1292 B. S., if it was after the Act came into force, and being only an oral contract, was not and is not effectual and binding upon the defendant. It may, therefore, be left out of consideration. If it be so left out, the provisions of cl. (*c*) of s. 29 would not operate so as to debar the plaintiff from claiming enhancement in the year 1893. But then, having regard to cl. (*b*) of the section, the rent could not be enhanced so as to exceed by more than two-annas in the rupee the rent previously payable. It is unquestioned that the enhancement made in the year 1893 was far above the limit prescribed by cl. (*b*), and that being so the *kabuliat* is bad in law *if the rent then agreed to be paid was enhanced rent.*

But it has been contended before us that, having regard to the defence raised in the written statement, the issue framed by the Munsif as to what the *jamma* was which the plaintiff was entitled to recover in this case, was not clear enough, so as to call upon the plaintiff to adduce evidence upon the question whether the rent mentioned in the *kabuliat* was enhanced rent, or it was but increased rent assessed upon the increased area found in the occupation of the defendant. We think that the contention of the appellant in this respect is correct. The Munsif practically admitted it to be so, but yet he examined the evidence such as it was upon the record, and found that the rent stated in the *kabuliat* was partly increased rent and partly enhanced rent. The learned Judge, however, has upon the same evidence arrived at a conclusion wholly adverse to the plaintiff.

In the view that we have just expressed, we think that the plaintiff is entitled to a remand for the purpose of enabling him to adduce evidence upon the question, whether the rent agreed to be paid under the *kabuliat* was increased rent with reference to the increased area in the occupation

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of the defendant. If this question be found against him, the claim for rent at the rate of Rs. 103 must be disallowed, otherwise it should be allowed.

We should here state that, supposing it be found that the said rent is partly enhanced and partly increased rent, as it was held by the Munsif, the plaintiff would not be entitled to recover [786] the increased rent as was allowed by that officer; for the contract as evidenced by the *kabuliat* could not be divided into two parts, one part referable to a valid transaction, and the other part to an invalid transaction. See in this connection the case of *Kristo Dhone Ghose* v. *Brojo Govindo Roy* (1).

There is one other matter which arises in this appeal, and that is with reference to the admission of the defendant in his deposition as to the rent he has been paying for some years, *i. e.*, for more than three years. He admits this rent to be Rs. 50, and having regard to proviso (1) of s. 29, as also the provisions of s. 27 of the Act, we think that there is no reason why the plaintiff should not, at any rate (*i. e.*, failing the *kabuliat*), recover rent at the rate of Rs. 50 as admitted by the defendant.

We accordingly set aside the decrees of both the Courts below, and send the case back for retrial upon the question which we have already referred to, and with reference to the observations we have just made, costs to abide the result.

The judgment that we have just delivered will be applicable to appeals Nos. 1119, 1120, 1121 and 1124 of 1896.

No. 1116.—The judgment that we have delivered in appeal No. 1082 is also applicable to this appeal, with this exception, that the defendant in this case has made no admission in his deposition on oath that he had been paying any higher rent than that which is stated in his written statement, and, therefore, the observations that we have made in appeal No. 1082 as regards the effect of the admission of the defendant in that case are not applicable here. The case will, however, be remanded for retrial with reference to the other remarks that we have made in that case. The judgment in this appeal will be applicable to appeals Nos. 1117 1118 and 1122 of 1896. These cases will also be remanded for retrial and the costs will abide the result.

S. C. G. *Appeal allowed; case remanded.*

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25 C. 787.

[787] APPELLATE CIVIL.

Before Mr. Justice O'Kinealy and Mr. Justice Rampini.

NILMADHUB PATRA AND OTHERS (*Defendants*) *v.* ISHAN CHANDRA SINHA HIKIM AND OTHERS (*Plaintiffs*).* [14th April, 1898.]

Land Registration Act (Bengal Act VII of 1876), s. 78—Registration in regard to a share—Right to receive rent.

When some out of several proprietors of an estate, who collect the rent jointly, have registered their names under the Land Registration Act, all the proprietors are entitled to join in an action for the whole rent, but a decree will be made only in respect of the rent proportionate to the share registered. Under s. 78 of the Land Registration Act, the penalty of non-registration is the forfeiture, not

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* Appeal from Appellate Decree No. 990 of 1896, against the decree of B. G. Geidt, Esq., District Judge of Bankura, dated the 7th of April 1896, affirming the decree of Babu Upendra Nath Dutta, Munsif of Katra, dated the 15th of July 1895.

(1) 24 C. 895.

of the whole rent, but of the rent of the share in regard to which the landlord is unregistered.

[R., 12 C.L.J. 1=14 C.W.N. 788=6 Ind. Cas. 193; 5 C.W.N. 360.]

THE facts of the case, so far as they are necessary for the purposes of this report, are shortly as follows: The plaintiff sued to recover arrears of rent in respect of 14 annas share of a *jama* held by the defendants under them; some of the plaintiffs had registered their names under the Land Registration Act with regard to their respective shares amounting to 8½ annas; the shares of the other plaintiffs were not registered. It was found that the rent of the 14 annas was collected jointly. The Munsif dismissed the suit on the ground that the plaintiffs were not entitled to a decree for the entire rent under s. 78 of the Land Registration Act, nor were they entitled to a decree for the registered share, as that would amount to an apportionment of the rent. Upon appeal, the District Judge reversed this judgment, and decreed the claim proportionate to the share registered. The defendants appealed to the High Court.

Babu *Dwarkanath Chakravarty*, for the appellants.

Dr. *Asutosh Mookerjee*, for the respondent.

The judgment of the High Court (O'KINEALY and RAMPINI, JJ.) was as follows:—

JUDGMENT.

The plaintiffs in this suit sued for the rent of the years 1296 [788] up to the 12 annas kist of 1299. The plaintiffs are 14 annas co-sharers. The defendants Nos. 1 to 5 are tenants of the land. They are also the owners of the remaining 2 annas of the landlord's interest. The matter is, however, immaterial, as the plaintiffs have been found to have been hitherto in separate collection of their 14 annas share of the rent. The plaintiffs are registered under Bengal Act VII of 1876 to the extent of 8½ annas only. They are unregistered as to the remaining 5½ annas. The lower Courts have given them a decree for 8 annas share of the rent claimed by them, except as respects the rent of 1296, which has been held to be barred by limitation. It is not clear why the plaintiffs have not got a decree for the remaining ½ anna with regard to which they have been registered. But no question as to this arises in this appeal.

The defendants appeal and contend that the plaintiffs are not entitled to any rent at all, inasmuch as to give them a decree for 8 annas of the rent, it is said, is to apportion the rent to this extent, which they do not ask and are not entitled to ask should be done in this suit. We think there is no force in this contention. There cannot be held to be in this suit any apportionment of the rent, which has been found to be Rs. 74-10 per annum. The suit has been perfectly rightly framed for the whole of the rent due to the plaintiffs. All the co-sharers are parties to the suit. The plaintiffs' claim to the amount of rent not decreed to them has been dismissed. The defendants cannot be sued for it again, which is greatly to their advantage. The next time the plaintiffs sue for their rent, they will have to sue again for the rent of their 14 annas share. There is nothing in the decree in this suit which will justify them in suing in future for the 8 annas share for which they have got a decree. The decree must be regarded as in favour of all the plaintiffs and not in favour of those only who have been registered. It is true that the Munsif in calculating the amount due to the plaintiffs has specified the plaintiffs whose names have been registered and the extent of the shares for which they have been

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registered. But he has done so for arithmetical purposes only, and not for the purpose of apportioning the rent among the plaintiffs.

[789] To hold that the defendants are entitled to have the suit entirely dismissed because the plaintiffs have not registered their names for the whole of their 14 annas share would be to enable the former to evade the payment of their just debts on a most technical plea. If this be the law, it will always be possible for a tenant to escape payment of the whole of his rent by showing that some fractional share of his landlord's interest is unregistered.

But it does not seem that Act VII of 1876 ever intended that such should be the case. On the contrary, the 2nd para. of s. 78 of Bengal Act VII of 1876 appears expressly to provide that a proprietor is entitled to recover his rent for the share for which he is registered, while being refused his rent only for the share for which he is unregistered. The 2nd para. of s. 78 runs thus: "No person being liable to pay rent to two or more such proprietors, managers or mortgagees holding in common tenancy shall be bound to pay to any one such proprietor, manager or mortgagee more than the amount which bears the same proportion to the whole of such rent as the extent of the interest in respect of which such proprietor, manager or mortgagee is registered bears to the entire estate or revenue free property." The penalty of non-registration is therefore the forfeiture, not of the whole rent, but of the rent of the share in regard to which the landlord is unregistered. For these reasons, we affirm the decree of the lower appellate Court and dismiss the appeal with costs.

S. C. B. *Appeal dismissed.*

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25 C. 789.

APPELLATE CIVIL.

Before Mr. Justice Trevelyan and Mr. Justice Banerjee.

GUNESSAR SINGH (*Defendant*) *v.* GONESH DAS (*Plaintiff*).*
[30th March, 1898.]

Public Demands Recovery Act (Bengal Act VII of 1880), s. 2—Revenue Court—Sale under certificate—Jurisdiction—Limitation—Appeal to Commissioner for setting aside sale—Suit to set aside sale—Order of Revenue Court setting aside sale—Powers of the Civil Court.

A sale was held on the 9th September 1893 in execution of a certificate under the Public Demands Recovery Act (Bengal Act VII of 1880). On the [790] 2nd January 1894, an appeal was preferred to the Commissioner under s. 2 of Act VII of 1868 for setting aside the sale after the expiry of sixty days prescribed for appeal. The Commissioner ordered an inquiry into the question whether the appellants before him were prevented from taking steps in consequence of fraud. The purchaser complained against this order before the Board of Revenue, who acting under their powers of revision set aside the certificate, and the Commissioner subsequently set aside the sale without hearing the purchaser.

In a suit brought in the Civil Court for the same object during the pendency of the appeal before the Commissioner, and decided by the lower Court after the orders of the Board and the Commissioner setting aside the certificate and sale were passed. *Held* by the High Court on appeal:—

1. The plaintiff was entitled to proceed simultaneously in the Civil Court and in the Revenue Court. If the sale be validly set aside by the Revenue Courts, a decree must follow in the suit.

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* Appeal from Original Decree No. 163 of 1896, against the decree of Babu Chundi Charan Sen, Officiating Subordinate Judge of Tirhoot, dated the 15th of April 1896.

2. Section 2 of the Public Demands Recovery Act (Bengal Act VII of 1868) applied to a sale under the Certificate Act (Bengal Act VII of 1880), and the appeal to the Commissioner was rightly made under that section. *Sadhusaran Singh* v. *Punchdeo Lall* (1), followed.

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3. As regards the contention that the Commissioner had no jurisdiction to entertain the appeal as it was barred by limitation, the question of limitation cannot be held to be one of jurisdiction, and the grounds of the Commissioner's finding on that point cannot be discussed in the High Court. *Mahomed Hossain* v. *Purender Mahto* (2) and *Mungal Pershad Dichit* v. *Grija Kant Lahiri* (3), referred to.

4. The Civil Court has no authority to reverse the order of a Revenue Court, which sets aside a sale.

5. The reason for overruling the objection on the ground of limitation applied to the objection that the Commissioner had not heard the purchaser, and that objection also could not be entertained.

[**Affr.**, 33 C. 1178 (**P.C.**) = 4 C.L.J. 177 = 3 A.L.J. 698 = 8 Bom. L.R. 719 = 4 C.L.J. 177 = 10 C.W.N. 969 = 16 M.L.J. 365 ; **R.**, 6 C.L.J. 472.]

THIS was a suit to set aside a sale held in execution of a certificate made under s. 5 of the Public Demands Recovery Act (Bengal Act VII of 1880). The facts were these: The Road Cess Deputy Collector of Darbhanga called upon the plaintiff in this case to furnish jammabandi papers in respect of mouzah Subhankerpur, of which plaintiff was the proprietor. The papers were not furnished, and a daily fine was imposed, which amounted to more than Rs. 400 in the course of several months. A **[791]** certificate was then made for the realization of the fine on the 23rd June 1893, and in execution of that certificate, mouzah Subhankerpur was sold on the 9th September 1893, and purchased by the defendant. The delivery of possession to the purchaser was made on the 5th of December 1893. The plaintiff thereupon, on the 2nd January 1894, preferred an appeal to the Commissioner of the Patna Division for setting aside the sale on the grounds, among others, that all the proceedings had been held without his knowledge; that the mouzah in question was not liable to pay road cess, as it was included within a Municipality and as it was also exempted from liability to pay cess under a Government notification; and that the proceedings were fraudulent and collusive.

While this appeal to the Commissioner was pending, the plaintiff instituted the present suit in the Civil Court on 4th December 1894.

On the 12th December 1894, the Commissioner passed an order directing the Collector to enquire into the question of fraud; the purchaser appealed to the Board of Revenue against that order, and the Board on the 9th May 1895, in the exercise of its revisional power, set aside the certificates in execution of which the sale was held. The Commissioner, also, by his order dated 4th February 1896 set aside the sale.

Nine issues were originally raised in this suit, of which it is necessary to mention the following :—

"1*st*. Whether the appeal to the Commissioner was filed within time? If not, is the suit barred?

"2*nd*. Whether the Civil Court has jurisdiction to entertain the suit?

"3*rd*. Whether the suit is barred by limitation? When did the plaintiff's cause of action arise?

"7*th*. Whether the present suit was maintainable before the disposal of the appeal by the Commissioner?" * * *

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(1) 14 C. 1. (2) 11 C. 287. (3) 8 C. 51 = 8 I.A. 123 = 11 C.L.R. 113.

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An additional issue was fixed after the order of the Board of Revenue dated 9th May 1895, was received by the lower Court; that issue was as follows:—

[792] "Whether the order of the Board of Revenue, dated 9th May 1895, is valid, and how it affects the sale?"

The order of the Commissioner, dated 4th February 1896, setting aside the sale was also filed by the plaintiffs in the lower Court.

In the judgment of the lower Court, the Subordinate Judge held:—

"In this altered state of things brought about by the order of the Board of Revenue as well as that of the Divisional Commissioner, I find that defendant is not entitled to retain possession of the property purchased by him, and consequently plaintiff is entitled to a decree for possession after a declaration of his right to it as well as for mesne profits.

The defendant appealed to the High Court.

Sir *Charles Paul* (Advocate-General) and Babu *Tarak Nath Palit*, Babu *Ram Charan Mitra* and Babu *Baldeo Singh*, for the appellant.

Babu *Lal Mohan Das* and Babu *Nalini Ranjan Chatterjee*, for the respondent.

The judgment of the High Court (TREVELYAN and BANERJEE, JJ.) was as follows:—

JUDGMENT.

In this case the learned Subordinate Judge of Mozufferpore has set aside a sale held in execution of a certificate for the recovery of public demands given under s. 5 of the Public Demands Recovery Act.

The decree has been made on the ground that the Revenue authorities have set aside the certificate and sale since the institution of this suit. The only question argued before us, and the only question which arises in this appeal is, whether under the circumstances the Commissioner of Patna had authority so to do.

The following are the only facts to which it is necessary for us to refer. The certificate is dated the 23rd of June 1893.

On the 9th of September 1893 the sale was held.

On the 5th of December 1893 possession was given to the purchaser by the Revenue authorities.

[793] On the 2nd of January 1894 the proprietor preferred an appeal to the Commissioner of the Patna Division, alleging that he had no knowledge of any of the proceedings and asking him to set aside the sale.

On the 4th of December 1894 this suit was filed with the object of setting aside the sale.

On the 12th of December 1894 the Additional Commissioner of Patna dealt with the appeal. The objection had been taken that the appeal was barred by limitation. This had been met by a charge of fraud. The Commissioner held that fraud would be an answer to such objection, and directed the Collector to enquire and report as to the charge of fraud.

The purchaser then applied to the Board of Revenue to reverse the order of the Additional Commissioner. Although his appeal was confined to a complaint against the action of the Commissioner, the Board of Revenue on the 9th of May 1895 set aside the certificate on the ground that the fine in respect of which it was issued was unjust.

On the 4th of February 1896, the Additional Commissioner set aside the sale. He held that the sale was brought about fraudulently and without legal justification, but curiously enough, although he came to this conclusion, he considered it unnecessary to hear the purchaser, who was the

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person against whom he was making the order. This order, whatever may be our conclusion as to its validity, violates the elementary principle which is binding upon all persons who exercise judicial or quasi-judicial powers, namely, that an order should not be made against a man's interest without there being given to him an opportunity of being heard. This really concludes the facts which are necessary for our decision.

On the 15th of April 1896, the learned Subordinate Judge decreed this suit on the footing of the action taken by the Revenue authorities. We have to determine whether the action of those authorities was within their powers.

The plaintiff was entitled to proceed simultanously in the Civil Court and in the Revenue Courts. The more ample and easier remedy was available to him in the Revenue Courts. If the [794] sale be validly set aside by the Revenue Courts a decree must follow in the suit.

The first question arises as to whether the appeal to the Commissioner could have been entertained by that officer.

This appeal could only have been made under s. 2 of Act VII (B.C.) of 1868. It has been contended that *that* section has no application to sales under the Certificate Act, VII (B.C.) of 1880. This contention is concluded by the authority of the decision of a Division Bench of this Court in *Sadhusaran Singh* v. *Panchdeo Lall* (1) with which we see no reason to differ.

It has also been contended that Mr. Bolton had no jurisdiction to entertain the appeal as it was barred by limitation. In the view which we take of this question it is not necessary for us to determine whether the appeal was barred by limitation. If we had to dertermine it we would have great difficulty in holding that it was not barred. But although we might hold that Mr. Bolton ought to have refused to entertain the appeal, yet we cannot hold that the question is one of jurisdiction, and that we can discuss the grounds of his finding.

It was in our opinion for Mr. Bolton, and for him alone, to construe the section and to determine whether the appeal was barred by limitation. We are not a Court of Appeal or Revision from his decision except in cases where the law allows the Civil Court to interfere. The law allows the Civil Court to reverse a sale under certain circumstances, but there is nothing in the law authorising a Civil Court to reverse the order of a Revenue Court which sets aside a sale. We cannot question his decision on this question of limitation any more than it would be possible for us in a suit to determine that a decree made in another suit was barred by limitation, and that the decree was therefore without jurisdiction. If authority were required for this last proposition, we would refer to the decision of a Division Bench of this Court—*Mahomed Hossain* v. *Purunder Mahto* (2). The [795] well known case of *Mangal Pershad Dichit* v. *Grijakant Lahiri* (3) also supports the proposition that an erroneous decision on a question of limitation cannot be treated as invalid unless it be set aside in a way provided by law.

A similar reasoning would prevent our entertaining any objection to the Commissioner's order on the ground that he had not heard the purchaser. If the purchaser was aggrieved on this account, there is no doubt that he could have found an appropriate remedy in the procedure of the Revenue Court; but whether that be so or not, we cannot treat as invalid an order made by the tribunal to which the Legislature has

(1) 14 C. 1. (2) 11 C. 287. (3) 8 C. 51=8 I.A. 123=11 C.L.R. 113.

1898 MARCH 30. — APPELLATE CIVIL. — 25 C. 789.

entrusted the power of making such order. We have no power to enquire into the circumstances under which the order was made or into the propriety of the order.

Having given this case our most careful consideration we are unable to disagree with the view taken by the Court below, and accordingly we dismiss the appeal with costs.

S. C. C. *Appeal dismissed.*

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25 C. 795=2 C.W.N. 349.

APPELLATE CIVIL.

Before Mr. Justice Trevelyan and Mr. Justice Banerjee.

GANJESSAR KOER AND ANOTHER (*Appellants*) *v.* THE COLLECTOR OF PATNA (*Respondent*).* [2nd February, 1898.]

Letters of Administration—Court of Wards—"Person."

The Court of Wards is not a "person" and letters of administration cannot under the law be granted to it.

THE facts of this case, so far as they are material for the purpose of this report, are given in the judgment of the High Court. There were two applications for letters of administration before the District Court, one by the Court of Wards and another by Ganjessar Koer and Mohan Koer, and the applicants in one case were objectors in the other. The District Court decreed the application of the Court of Wards and dismissed that of [796] Ganjessar Koer and Mohan Koer, who preferred two appeals to the High Court, Nos. 27 and 28 respectively, against the orders of the lower Court.

Mr. *W. C. Bonnerjee*, and Babu *Basant Kumar Bose* and Babu *Saligram Singh*, for the appellants.

Sir *Charles Paul* (Advocate-General) and Babu *Ram Charan Mitra*, Babu *Lal Mohan Das* and Babu *Karuna Sindhu Mukerjee* for the respondents.

The judgment of the High Court (TREVELYAN and BANERJEE, JJ.) was as follows:—

JUDGMENT.

These two appeals arise out of an order made by the learned District Judge of Patna.

The facts, so far as they are material for the purpose of these cases, are very shortly these: A man named Mahadeo Pershad died in December 1894 leaving a will, probate of which was given to his widow, who died on the 29th August 1896. Mahadeo Pershad left a son who was then and is still a minor. The Court of Wards has obtained possession of the estate under the powers given to it by the Court of Wards' Act. At one time it seems that the Collector on behalf of the Court of Wards obtained an order appointing him Manager of the Estate under Act VIII of 1890. But under s. 42 of that Act he was subsequently discharged, so the matter is at present quite free from the effect of that order. The Collector has now applied to the Judge for letters of administration. An application has also been made by two ladies. Ganjessar Koer and Mohan Koer, who

* Appeals from Original Decrees Nos. 27 and 28 of 1897, against the decree of J. Knox-Wight, Esq., District Judge of Patna, dated the 5th of December 1896.

claim to be relations of the minor, and as such entitled to administer the estate of which the minor is the heir, namely, the estate of his father.

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The learned District Judge has granted letters of administration to the Court of Wards and dismissed the application made by the ladies.

It is admitted by the learned Advocate-General that the Court of Wards is not a person, and that letters of administration cannot, under the law, be granted to it. It is obvious that the powers of the Court of Wards are limited by the terms of the [797] Court of Wards Act. It is not necessary for us to go at any length into that question, as it has not been contested. It follows, therefore, that the order granting letters of administration to the Court of Wards cannot stand and must be set aside. The result is that the petition of the Collector must be dismissed with costs in both Courts.

With regard to the application made by the ladies, the learned Advocate-General suggests to us that there is no necessity for granting letters of administration at all, the property being in the hands of the Court of Wards. But we think that it is clear from the judgment of the learned District Judge that the ladies' application has not been considered independently and apart from the application of the Collector. It was only because the learned Judge thought that administration should be given to the Court of Wards that he dismissed the application of the ladies. Inasmuch as, in our opinion, the application of the Collector was a wrong one, the ladies are entitled to a consideration of their application. It may be that on such consideration being given to it, it might appear that there is nothing to administer, nothing but the interest of the heir, and that *that* interest is in the hands of the Court of Wards. But if there be anything to administer, then the question arises who is to be appointed administrator. The ladies are entitled to be heard on that question. There is a provision in s. 31 of the Probate and Administration Act for granting of letters of administration with the will annexed where a minor is the sole residuary legatee. In that case letters may be granted to the legal guardian of such minor or to such other person as the Court shall think fit. The learned Judge will have to act under that section if he finds that there is property which ought to be administered according to law. It must be understood that in all that we have said we are not expressing any opinion as to whether it is possible for the Collector in any way to acquire a sufficient status to oppose the application of the ladies. With regard to costs in the case in which the ladies are the applicants, we think that the proper order is that the costs of the appeal to this Court do abide the result.

S. C. C. *Appeals allowed.*

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JUNE 3.

CRIMINAL REVISION.

25 C. 798.

25 C. 798.

[798] CRIMINAL REVISION.

Before Mr. Justice Banerjee and Mr. Justice Stevens.

DRIVER (*Petitioner*) *v.* QUEEN-EMPRESS (*Opposite Party*).*
[3rd June, 1898.]

Criminal Procedure Code (Act X of 1882), *ss.* 107 *and* 118—*Wrongful act likely to occasion a breach of the peace—Practice—Rule issued upon the Magistrate—Right to appear of a party interested in the result.*

The granting of leases to tenants of land not in one's possession does not constitute a wrongful act such as s. 107 of the Criminal Procedure Code (Act X of 1882) contemplates.

Where the notice directs a person to show cause why he should not be bound down to keep the peace, it is improper to make an order directing him to execute bonds for his good behaviour.

When a rule is issued upon the Magistrate to show cause, and the order sought to be set aside is one that is only intended to secure the peace of the District by binding down the petitioner, the Magistate is the only party entitled to be heard. Any other party interested in the result of the order cannot appear.

THE petitioner is the Manager of the Estate of Rai Kashi Prasad Singh and his brothers, who are the proprietors of certain mouzas in Begusarai, of which twenty-six were held by the Manjoul Indigo Concern for a long period under divers leases, the last of which expired in September 1896. The petitioner, as Manager of the Estate, leased out the mouzas to other tenants, who gave *kabuliyats*. The District Magistrate in his judgment stated as follows: "I find that J. C. M. Driver (the petitioner) is doing and is likely to do wrongful acts, *viz*., the giving of leases of land not in his possession and thereby instigating the lessees to commit criminal trespass on the land, and otherwise wrongfully dispossess the rightful occupiers, and that these wrongful acts are in the highest decree likely to give rise to breaches of the peace in the village of Manjoul and the neighbouring villages, and I therefore order under s. 118 of the Criminal Procedure Code that he give a bond with sureties for the [799] amounts noted below for their good behaviour for one year." The petitioner moved before the High Court against the above order.

Mr. *Garth* and Mr. *P. L. Roy*, for the petitioner.

Mr. *Jackson*, for the opposite party.

The judgment of the High Court (BANERJEE and STEVENS, JJ.) is as follows:—

JUDGMENT.

This is a rule calling on the Magistrate of the District to show cause why the order of the Magistrate of Monghyr, dated the 15th February 1898, calling upon the petitioner to execute bonds with sureties, should not be set aside, on the following grounds, namely, *first*, that the order is not warranted by the finding arrived at by the Magistrate; *second*, that it is inconsistent with the notice which he was called upon to answer; and, *third*, that it is not warranted by law, and is otherwise not a fit and proper order under the circumstances of the case.

The learned Magistrate has submitted a written explanation, and Mr. Jackson appeared to show cause on behalf of the Manjoul Factory between the proprietors of which and the petitioner the dispute that has given rise to these proceedings is said to exist.

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* Criminal Revision Nos. 264 and 265 of 1898, against the order passed by F. Roe, Esq., District Magistrate of Monghyr, dated the 15th of February 1898.

1898 JUNE 3. — CRIMINAL REVISION. — 25 C. 798.

As the rule is issued only upon the Magistrate to show cause, and as the order that is sought to be set aside is one that is only intended to secure the peace of the district by binding down the petitioner, and does not and cannot determine any question of disputed possession between the petitioner and any other party with whom he may have disputes, the Magistrate in our opinion is the only party entitled to be heard in a case like this; and we have accordingly held that Mr. Jackson, who appears only for the Manjoul Factory, is not entitled to be heard in this rule.

It is true that the learned Magistrate in the last paragraph of the explanation submitted by him says that the first party should be given an opportunity of showing cause against the rule, as they are very considerably interested in the result, and the Magistrate requests that a postponement be granted to admit of their doing so. But we can only express our regret that the learned District Magistrate should have taken this view of the **[800]** matter. He was called upon to show cause. He has submitted a written explanation which we have duly considered; and if he wished that cause should be shown on his behalf by any one appearing before us, it was quite competent to him to have instructed the Legal Remembrancer to appear and show cause before us. But he has gone a little out of the way in saying that the persons whom he calls the first party should have an opportunity given them of showing cause, because they have a very considerable interest in the result.

As we have said above, the party interested in the result is the Magistrate of the District. Proceedings under s. 107 of the Criminal Procedure Code are only intended for the security of the public peace, and not for the purpose of enabling one of two contending parties to help themselves in recovering or retaining possession of immoveable property, after having their adversary's hands tied down by an order under that section. If it was thought necessary that an order should be made relating to the possession of any immoveable property, which is the subject-matter of dispute between contending parties, the proper course was to have instituted proceedings under s. 145 of the Criminal Procedure Code; and then the parties would have had due notice of the case they had to meet, and each party could have put forward evidence to prove his possession of the land in dispute.

We were then referred to a permission granted by the Legal Remembrancer to Mr. MacNair, authorizing him to show cause in this case. We do not think that such permission is equivalent to instructing that gentleman to appear on behalf of the Magistrate; nor were we asked to allow the learned counsel to appear on behalf of the Magistrate. We do not think that a mere permission of this sort by the Legal Remembrancer is equivalent to an authority to appear for the Magistrate or for the Crown.

That being so, now let us see how the case stands on the merits with reference to the first ground. We observe that what the learned Magistrate has found is that the petitioner before us is doing wrongful acts which may lead to a breach of the peace. To quote the learned Magistrate's own words, he says: "I find, **[801]** therefore, on enquiry that J. C. M. Driver, Baiju Lal and Damri Lal, are doing, and are likely to do, wrongful acts, *viz.*, the giving of leases of lands not in their possession and thereby instigating the lessees to commit criminal trespass on these lands, and otherwise wrongfully dispossess their rightful occupiers, and that these wrongful acts are in the highest degree likely to give rise to breaches of the peace in the village of Manjoul and

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neighbouring villages, and I therefore order under s. 188 of the Criminal Procedure Code that they give each a bond, with sureties, for the amounts noted below for their good behaviour for one year."

Now this finding and the conclusion based thereon are, in our opinion, clearly wrong. In the first place the giving of leases to tenants by a party who is not in possession is not necessarily a wrongful act. If a party is rightfully entitled to immoveable property and has been wrongfully kept out of possession thereof, there is nothing wrong in his giving a lease of such property to another party. If the party taking the lease goes to take possession peaceably, there is nothing wrong in that act. It is only where a party goes to take possession by force that any wrong is done.

The mere fact, therefore, of the petitioner before us having given leases to parties of land, not in the possession of his employer, cannot in our opinion constitute a wrongful act such as s. 107 of the Code of Criminal Procedure contemplates, and if that is not a wrongful act, the whole foundation for the proceeding is gone. It may be that ryots taking leases from, or executing *kabuliats* in favour of, a lessor who is not in possession may feel induced to commit a breach of the peace in their attempt to take possession. If they attempt to do so, they may be bound down; but that can be done only if it is found that they are going to take wrongful measures to recover possession.

We may observe that the taking of *kabuliats* from tenants by a landlord who may not be in actual possession is by no means such an uncommon thing as to give rise to any apprehension such as the Magistrate in his judgment refers to.

[802] The learned Magistrate observes in his judgment that, as by law (s. 108 of the Transfer of Property Act) a lessor is bound on the lessee's request to put him in possession of the property, the fact of a lease being given by a party out of possession must be taken to amount to an instigation or an attempt on his part to take forcible measures for obtaining possession. We can only say that the reasoning is a far-fetched one, and that it does not follow that, because a lessee in such a case can ask the lessor to put him in possession, the lessor will necessarily go the length of resorting to force to put his lessee in possession.

The first ground, therefore, on which this rule has been issued, namely, that the facts found are not sufficient to warrant the order, ought, in our opinion, to succeed.

The second ground, namely, that the order made is inconsistent with the notice by which the petitioner was called upon to show cause, is also well founded; for whereas the notice directed him to show cause why he should not be bound down to keep the peace, the order is one directing him to execute bonds for his good behaviour under s. 118 of the Criminal Procedure Code.

The Magistrate says in his explanation that this must be a clerical error. Perhaps it is a clerical error as the terms of the bond subsequently taken would go to show.

We are also of opinion that the third ground, namely, that the order made in this case is not a fit and proper order, is well founded. The effect of the order, as we have already observed, is to bind down one of two contending parties whilst it leaves the other party free. That is hardly fair in any view of the case.

For all these reasons we are of opinion that this rule must be made absolute, and the order complained of set aside.

S. C. B.

25 C. 803.

1898 JAN. 2.

CIVIL RULE.

25 C. 803.

[803] CIVIL RULE.

Before Mr. Justice Tottenham and Mr. Justice Ameer Ali.

TILAK CHANDRA DASS (*Plaintiff*) *v.* FATIK CHANDRA DASS AND OTHERS (*Defendants*).* [2nd January, 1898.]

Decree—Possessory decree—Specific Relief Act (*I of* 1877), *s.* 9.

Where a decree was passed under s. 9 of Specific Relief Act (I of 1877) giving the plaintiff possession, and also directed that the costs of removing huts and filling up excavations should be paid by the defendant under this decree :

Held, that the latter portion of the decree was beyond the scope of a possessory decree under s. 9 of the Specific Relief Act and must be set aside.

[D., 8 A.L.J. 910 = 11 Ind. Cas. 38.]

THE facts of this case sufficiently appear from the following judgments.

Babu *Jadav Chandra Seal* and Babu *Chandra Kant Sen*, for the petitioner.

Babu *Baikanta Nath Dass*, for the opposite party.

The judgment of Dinesh Chandra Roy, Munsif of Madaripur, Zillah Faridpur, was as follows :—

In this summary suit for possession of land the only points for decision are :—

1*st*. Whether the plaintiff was in actual possession of the land, and 2*nd* whether the defendants have taken possession of the land and thereby dispossessed plaintiff within six months before this suit.

From the depositions of the plaintiff and of five witnesses I find that the plaintiff was actually in possession of the eastern bank of the *dighi* (large tank) and the *chattan* (*i.e.*, disputed land No. 1) by cutting and taking away trees, bamboos, &c.

From the depositions of these witnesses, and also a copy of the *fouzdari* complaint of the defendants, it appears that actually the plaintiff was in possession of those portions of the disputed land by cutting *Hijul* trees and canes in 1886. It does not appear at all that after the *fouzdari* complaint had become unsuccessful the defendant did ever take proper legal remedy to recover the trees and canes, &c., or their prices from the [804] plaintiff, or to recover possession of the disputed land by suing in a Civil Court. The defendant has produced some witnesses, but I see that they are not worthy of belief against the strong evidence of the plaintiff. The witnesses do not appear independent and impartial. The defendant cannot show by good and reliable evidence that before the alleged time of dispossession, and after the defendant's *fouzdari* complaint the defendant was in actual possession of the land by taking trees, bamboos and canes, &c., or by doing any other act of possession. The witness (5) for the plaintiff proves that even in *Augran* last the plaintiff did cut the trees of the portion of the disputed land. After all I hold that the plaintiff was in possession of those portions of the disputed land before the alleged date of dispossession. There is no good evidence of the plaintiff's possession of half of the *dighi* or any other portion of the disputed lands.

2*nd*. The plaintiff says that in last *Falgoon* the defendant took possession of the land by erecting new houses thereon and doing such other acts. The defendant in the last portion of his depositions admits that in *Falgoon*

* Civil Rule No. 1323 of 1889.

1898 JAN. 2.

CIVIL RULE.

25 C. 803.

last he raised new huts and did such other acts on the disputed land. So it is ordered—

That this suit be thus decreed partly, that the plaintiff do get *khas* possession of the disputed land (No. 1), which is called *chatan* and shown in the maps of both parties as lying on the north-east of the *dighi* and also of the eastern bank of the *dighi*. The costs of taking *khas* possession by removing houses, &c., will be settled in execution of this decree. Each party will bear his own costs.

The judgment of the High Court (TOTTENHAM and AMEER ALI, JJ.) was as follows :—

JUDGMENT.

This is a rule to show cause why the decree passed by the Munsif of Madaripur, ostensibly under s. 9 of the Specific Relief Act, should not be set aside. The grounds upon which the rule was obtained were that upon the face of the plaint it was clear that, although s. 9 of the Specific Relief Act was cited in the plaint as the law under which relief was sought, the prayers contained in the plaint clearly do not all come under that section ; and that the decree passed by the Munsif went beyond a mere possessory decree sanctioned by that section.

We think that this is so. The plaintiff sued to recover possession of a certain portion of land of which he said he was dispossessed by the defendants, and he went on to ask that the defendants might be ordered to pay over to him the cost of removing certain huts erected by them, and of filling up excavations [805] made. These prayers are beyond the scope of s. 9 of the Specific Relief Act ; and the decree passed by the Munsif, providing that the costs of removing the huts and filling up excavations should be ascertained in execution of the decree and be made payable by the defendants, is also in our opinion beyond the scope of a decree under s. 9.

It seems to us, therefore, that the decree of the Munsif must be set aside, and the case be remitted to him to be tried as a regular suit on title. It will, of course, be open to the plaintiff, either to amend his plaint or to file a written statement, disclosing what his title really is.

This rule is made absolute. The costs of this rule will abide the result. We fix the hearing fee at one gold-mohur.

Rule made absolute.

25 C. 805.

CIVIL RULE.

Before Mr. Justice Prinsep and Mr. Justice Stevens.

SARAT CHUNDER ROY CHOWDHRY AND OTHERS (*Defendants*), *Petitioners v.* CHUNDRA KANTA ROY (*Plaintiffs*), *Opposite-party.**
[23rd June, 1898.]

Legal Practitioners' Act (XVIII of 1879), *ss.* 27, 28, 29—*Suit by a pleader to recover fee from his client—Contract Act,* s. 70—*Provincial Small Cause Courts Act,* s. 25.

The Legal Practitioners' Act (Act XVIII of 1879), s. 28, debars a pleader from recovering a fee from his client when no contract in writing is made—*Rama* v. *Kunji* (1) and *Krishnasami* v. *Kesava* (2), dissented from.

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* Civil Rules Nos. 1111, 1112, 1113 to 1118 of 1898, from the decision of the Judge of Small Cause Court of Rungpore.

(1) 9 M. 375. (2) 14 M. 63.

[**Diss.**, 27 M. 512 (515)=14 M.L.J. 274 ; **F.**, 15 C.LJ. 690=15 C.W.N. 681=11 Ind. Cas. 382 ; **R.**, 28 A. 764=3 A.L.J. 579=A.W.N. (1906) 235=1 M L.T. 242 (**F.B.**) ; 15 C.L.J. 660=17 C.W.N. 45=13 Ind. Cas. 43 ; **Cited**, 20 Ind. Cas. 47 ; **D.**, 1 P.R. 1909=21 P.L.R. 1909=8 P.W.R. 1909=1 Ind. Cas. 393.]

1898 JUNE 23. — CIVIL RULE. — 25 C. 805.

A SMALL CAUSE COURT having decreed a suit brought by a pleader to recover from his client a fee claimed for the conduct of a criminal action on the ground that it was based on an oral agreement and for work and labour done, the High Court granted the petitioners a rule under s. 25 of the Provincial Small Cause Courts Act, calling upon the other side to show cause why the decree of the Small Cause Court of Rungpore in suit No. 589 of 1898 should not be set aside.

[806] On the rule coming on for hearing, Babu *Rash Behari Ghose*, with him Babus *Girish Chunder Chowdhry*, *Mohini Mohan Chakravarti* and *Hara Chundra Chackravarti*, submitted that the case came within the terms of s. 70 of the Indian Contract Act and the agreement need not have been in writing, and referred to *Rama* v. *Kunji* (1), *Krishnasami* v. *Kesava* (2), *Raziuddin* v. *Karimbakhsh* (3).

The Advocate-General (Sir *Charles Paul*) (with him Babu *Nalini Ranjan Chatterjee*) contended that the judgments of the High Court of Madras could not be followed, as they had lost sight of s. 28 of the Legal Practitioners' Act and considered only s. 70 of the Indian Contract Act.

JUDGMENT.

The judgment of the High Court (PRINSEP and STEVENS, JJ.) was delivered by

PRINSEP, J.—The plaintiff sued before the Subordinate Judge of Rungpore exercising the powers of a Small Cause Court for certain fees for appearing and acting as a pleader for the defendants.

There was no written agreement within the terms of s. 28 of the Legal Practitioners' Act, 1879, and the fees claimed are not within s. 27. The Judge of the Small Cause Court has referred to two judgments in I.L.R., 9 Mad., 375, and I.L.R., 12 All., 169, and upon these he has held that the plaintiff's suit, without a written agreement, is maintainable notwithstanding s. 28 of the Legal Practitioners' Act.

It seems to us that the Allahabad case is decidedly against that view. The Act, as we read it, contemplates that legal practitioners shall be entitled to receive under s. 27 the amount payable under certain rules prepared within the terms of that section, and that they shall not be entitled to claim anything further, unless the terms of s. 28 are observed. Section 28 requires that there should be a written agreement signed by the client and that it should be filed **[807]** within a certain specified time in a particular Court. The sections that follow all refer to s. 28, and, as we understand it, to nothing else, for they all refer to "*such* agreement," which is an agreement within the terms of s. 28. It seems to us that in enacting these provisions the Legislature deliberately intended in respect of agreements between such parties to provide definitively for them, and even to go so far as to rescind anything in the Contract Act or any previous legislation relating to the subject. We agree with the learned Judges of the Allahabad Court that the intention appears to be as stated by them in the judgment reported in I. L. R., 12 All., 169 (see p. 174).

We have had cited to us several decisions of the Madras Court, in which that Court, notwithstanding the express terms of the Legal

(1) 9 M. 375. (2) 14 M. 63. (3) 12 A. 169.

1898 JUNE 23. — CIVIL RULE. — 25 C. 805.

Practitioners' Act, has applied s. 70 of the Indian Contract Act. We are unable to follow those decisions for reasons already stated. The judgment of the Small Cause Court Judge, therefore, is, in our opinion, contrary to the terms of the Act and must be set aside.

This order will apply to Rule No. 1118. We make no order as to costs in either of these cases.

Nos. 1111, 1113 to 1117 and 1119. The learned Advocate-General who appears for petitioners abandons these Rules on its being shown that the fees given are only such as can be legally obtained under s. 27. These Rules will be discharged. We make no order as to costs.

N. C. *Rules discharged.*

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25 C. 807 (P.C.) = 25 I.A. 117 = 2 C.W.N. 566 = 7 Sar. P.C.J. 358.

PRIVY COUNCIL.

PRESENT:

Lords Watson, Hobhouse and Davey and Sir R. Couch.

[*On appeal from the High Court at Fort William in Bengal.*]

AKIKUNNISSA BIBI (*Defendant*) *v.* RUP LAL DAS AND ANOTHER (*Plaintiffs*). [21st and 22nd April and 14th May, 1898.]

Pardanashin *Lady—Execution of document by a pardanashin lady—Refusal of her application, as defendant, for the issue of a commission to take her evidence—Civil Procedure Code (Act XIV of* 1882), *ss.* 393, 390—*Irregularity not affecting merits of case—Civil Procedure Code (Act XIV of* 1882), *s.* 578.

The Court of first instance rejected an application made under chap. XXV of the Civil Procedure Code for the issue of a commission to take the [808] evidence of a Mahomedan *pardanashin* lady, the defendant in the suit, which was brought against her on a mortgage bond, the execution of which she had denied in her written statement. The Courts below concurred in finding that there was sufficient evidence of the execution of the document by the *pardanashin* with full knowledge of its contents. From their judgments it appeared that if the defendant had been examined on commission, and had given her testimony in support of her written statement, it would not have been believed, and in their Lordships' opinion it could not reasonably have prevailed.

Held, that the error alleged by the appellant to have occurred in the refusal of the Court to issue the commission (whether or not it would have been better to have issued it) was, at all events, no valid ground of appeal. The evidence taken on the commission could not have affected the merits of the case within s. 578 of the Civil Procedure Code.

[D., 28 C. 37 (52).]

APPEAL from a decree (4th May 1894) of the High Court affirming a decree (26th May 1892) of the first Subordinate Judge of Dacca.

The appellant was a Mahomedan widow residing at Dacca. The respondents were *mahajuns* carrying on business there. They brought this suit against her on the 9th April 1891 to recover Rs. 30,000, and interest thereon at 11¼ per cent. per annum, due on a registered mortgage bond purporting to have been executed by the appellant at Dacca on the 3rd February 1882. By her written statement, dated the 3rd July 1891, she denied receipt of the money and the execution of the alleged bond, stating that she lived in seclusion and was unable to conduct her affairs in person, entrusting her transactions to her son, Dewan Imdad Ali, who, joining one Reza Karim Meah in a fraud upon her, had fabricated the mortgage bond in question. She alleged that she was not in Dacca,

1898 MAY 14.

PRIVY COUNCIL.

25 C. 807 (P.C.)= 25 I.A. 117= 2 C.W.N. 566=7 Sar. P.C.J. 358.

but was at Gaghra in Maimensingh, at the time when the bond bore date, and that she was not in fact indebted to any of the persons whose names were mentioned in the bond as her creditors save to one of them, and that to him she had paid the debt due out of the income of her landed property.

On the 21st August 1891 the issue of two commissions under s. 383 of the Civil Procedure Code was ordered by the Court for the examination of witnesses named by the defendant; and on the 2nd April 1892 her application for the issue of a commission to take her own testimony in the district of Maimensingh was [809] rejected. Another petition to the same effect was rejected afterwards; as to which all the proceedings are stated in their Lordships' judgment.

The principal questions were, whether the first Court had materially erred in refusing to issue a commission to take the evidence of the defendant, then in another district and alleging herself to be too ill to travel; and also whether the defendant's position as a *pardanashin* had been sufficiently regarded by the Court in the requirement of proof of her having executed the document with knowledge. The Subordinate Judge found that the mortgage bond had been read and explained to her; that the whole consideration alleged in it, with the exception of Rs. 300, had been paid by the plaintiffs in accordance with her directions; that she was not absent from Dacca at the time of the alleged execution, and that she could not have been personated behind the *parda* without her having become aware of it. He pointed out that her execution of the document was seen, and attested, by a number of witnesses of whom three knew her personally, including her son Imdad Ali and two others, these three having before acted for her in business shown to have been transacted. He added: "The defendant cannot complain that she could not get competent advice; she executed the bond at her own house, amongst her servants, friends, and relatives, who were quite competent to advise her in the matter." He, therefore, decreed the claim less the said sum of Rs. 300, which he found to have been paid away without the consent of the defendant.

On an appeal by the defendant, the High Court (PETHERAM, C.J., and RAMPINI, J.) gave judgment as follows:—

"The defence made here is that the mortgage deed was not executed by this defendant at all, but that her name was forged by other people, and that she was not answerable. It is also suggested that, even if this is not shown, the plaintiff has not proved that the transaction was explained to her, so as to make her, under the circumstances of her being a *pardanashin* lady, answerable upon it; and Dr. Rash Behary Ghose further argues that, whether she is answerable for the principal or not, she is not answerable for compound interest, because there is no evidence that the meaning of compound interest was explained to her; and he asks that the case may be sent [810] back in order that she may be called as a witness and give her statement, she never having given her evidence in the case at all.

"The plaintiff's case is a straightforward one. His witnesses prove that his document was executed at the house where this lady lived, and it was registered on or about the same date. His account is, that the Rs. 30,000 was actually produced at the time the mortgage was executed, but that, at the request of the defendant herself, it was taken away by him and was paid by him from time to time to her son and another person, as it was required for the purpose of discharging old liabilites of this very defendant.

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"The plaintiff has produced his books which are kept in a perfectly regular way, and which show satisfactorily, that the whole of this Rs. 30,000 was paid by him to the persons who are named by the defendant, and that as to Rs. 24,000 and odd of it, it was applied in the actual payment of pre-existing debts of the defendant.

"Then it appears that the only person who was called to identify the defendant as the person who executed this mortgage was a person of the name of Reza Karim. Reza Karim says that he was present at the time, that he knew this lady, that he recognized her voice, and that she was the person whose hand he saw sign this document. On the other hand, it appears from his cross-examination that he was actively interested in the preparation of the defence; and another witness for the plaintiff says that on some occasion he said that this woman had not signed this document at all. That fact, taken with the fact that this lady was not called as a witness, raised a doubt in my mind as to whether we should not comply with Dr. Rash Behary Ghose's request and allow her to be examined. Now, the Subordinate Judge was of opinion that she was keeping out of the way, and that the reasons given for her not being examined, when opportunities were afforded her, were untrue; and having heard the whole case discussed by the Advocate-General, I think the Subordinate Judge was right; and I think so more particularly for this reason, that this document is witnessed by her son Imdad Ali and her man of business Chundra Kishore, and execution was admitted for her before the Sub-Registrar by her cousin, the witness Reza Karim. It is said that the reason why Imdad Ali was not called by the defendant was, that he was the person who forged his mother's name and made away with tho money, and therefore he was keeping out of the way. But that remark does not apply to Chunder Kishore; and if there had been anything in this point which is now taken, that this lady wished to give her evidence and was unable to do so, it appears to me that this person would have been called, and he would have shown that, though the document was signed by him, he being her man of business, the document was not properly explained to her or that she was not aware of its contents.

"Under these circumstances we cannot say that we think that the learned Subordinate Judge has not come to a proper conclusion upon the whole [811] case; and we do not think that the interests of justice would be served by our sending this case back in order to have this evidence taken, which no doubt would involve the parties in considerable further costs. On the whole, this appeal must be dismissed with costs."

From this decision the defendant appealed.

Mr. *J. D. Mayne*, for the appellant, argued that there was material error in the judgment of the High Court. The law relating to the execution of documents by *pardanashin* ladies had been declared many times; but this judgment proceeded as if it had been for the defendant to show that the document had not been explained to her. The burden of proof was on those who made claims against secluded women to show affirmatively that their execution of documents had not been obtained without due and sufficient explanation and competent advice given to them. There had also been material error in the refusal to issue a commission to take the defendant's evidence. The Code of Civil Procedure, in chap. XXV, gave to the parties to a civil suit the right to have evidence taken on a commission to be issued by the Court upon grounds shown. The discretion to be exercised in the grant of a commission by the Court was not an arbitrary one, but a judicial one. Here the Judge's discretion had

not been rightly exercised. The permissive words in s. 383—"Any Court may in any suit issue a commission"—were designed to give effect to a right legally established, where, as in this case, there was evidence that the person, whose testimony was required, could not from illness, or other sufficient cause, attend the Court for the purpose. Enabling words were always compulsory when they were words to effectuate a legal right. Reference was made to *Julius* v. *The Bishop of Oxford* (1), and to some of the cases cited in the judgment in that case of the L. C. (Earl Cairns), and to *Haridas Baisakh* v. *Moazam Hossein* (2).

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Mr. *J. H. A. Branson*, for the respondents, referred, first, to s. 587 of the Civil Procedure Code, and contended that the ground of the present appeal was untenable, in regard to the merits of the case, which had not been affected by the refusal to issue the [812] commission. Next, he adverted to the direct concurrence of the two Courts below on the fact of intelligent execution by the *pardanashin*. At this stage, in regard to the burden of proof, the question was more as to what was the true effect of all the evidence that was before the appellate Court than as to the adjustment of the burden at an earlier stage in the original Court. Although it had not been made out that there had been any error there, it was enough to refer to the result of the whole body of evidence. The fact was apparent that, after all the evidence that had been given, the denial of the defendant would not have prevailed, with either Court, as against the evidence for the respondents. The only question relating to the refusal of the commission was whether, or not, injustice had been done by such refusal having excluded evidence that ought to have been before the Court, and that might (had it been before it) have altered its conclusion. Here that had not been the case. Reference was made to *Ross* v. *Woodford* (3) and to *Doucett* v. *Wise* (4).

Mr. *J. D. Mayne* replied.

JUDGMENT.

On the 14th May their Lordships' judgment was delivered by

SIR R. COUCH.—The respondents in this appeal brought a suit against the appellant on a mortgage bond dated a native date corresponding to the 3rd February 1882, and alleged to be executed by her to secure Rs. 30,000, money borrowed with interest at 15 annas per cent. per month ($11\frac{1}{4}$ per cent. per annum) and compound interest on default to be paid at the end of three years. The appellant in her written statement denied the execution of the bond and the receipt of the consideration. She also said that she is a *pardanashin* Mahomedan lady of respectable family not able to manage and superintend all her affairs, and on many occasions her son Dewan Imdad Ali, *alias* Nawab Meah, transacts her business with her permission; that Imdad Ali and his intimate friend and relative Reza Karim Meah and others had previously created certain loans for their own purposes, and afterwards under the pretext of repaying them had fabricated the mortgage bond. The suit was heard before the Subordinate Judge of Dacca on the 21st April 1892. The mortgage bond [813] was produced and appeared to be signed by the appellant by mark, her name being written "By the pen of Imdad Ali." It was endorsed by the Sub-Registrar as presented for registration on the 4th February 1882 and the execution admitted by the appellant at her residence,

(1) (1880) L. R. 5 Ap. Ca. H. L. 214
(2) 8 B.L.R. Ap. 16.
(3) (1893) L. R. 1 Ch. D. 38.
(4) 1 Ind. Jur. 397.

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she being identified by Reza Karim. There were eight witnesses to the execution, two of them being Chunder Kishore Roy and Imdad Ali. The first witness for the plaintiff was Reza Karim. He deposed that the defendant is his cousin, that he saw her and talked to her, and identified her before the Sub-Registrar for registration of the bond which was produced; he put his signature on the back of the bond, and the defendant having put a mark on it he wrote her name on the back on the bond by his own pen; that the defendant made the impression of the seal on the back in the presence of the Sub-Registrar, and admitted the execution of the bond and receipt of the money covered by it. He also said that Chunder Kishore is the mokhtar of the appellant and had been so more than ten years, and Hara Kishore Roy is her *dewan*. The next witness was Dwarka Nath Chuckerbutty who was in the service of the plaintiffs. He deposed that the bond was executed and registered in his presence; he presented it at the Registry office, the appellant put her seal on it and made her signature by mark, her name was written by her son Nawab Meah, he and Chunder Kishore fetched the Rs. 30,000 from the plaintiffs' house; it had been arranged that the money should remain in deposit with the plaintiffs, and after the execution of the bond it was taken back and kept in deposit on the appellant's account to pay her debts with it; that after that Nawab Meah and Chunder Kishore paid off her debts and got evidence thereof and gave them to the plaintiffs; that the appellant was behind a *parda* at first when he read over the bond to her from a little distance. She said: "I could not clearly understand it." Afterwards her son Nawab Meah read over the document to her and explained it to her. The next witness was Mohini Mohun Basak, an attesting witness. He said he had known the appellant for 14 or 15 years or for a longer period; that he had talked to her and knew her voice; that he saw her put her seal and signature to the bond by mark; the money was fetched and shown to her; he was [814] seated in the room on the west of the room where she was seated; there was a *purda* on the door between the two rooms, when she executed the bond the *purda* was lifted a little on one side and he saw through that opening; the appellant had told him to procure a loan of the money and said that she would give him brokerage at 1 per cent.; he acted as a broker and procured the loan.

The appellant met this case by witnesses who deposed that at the time of the execution of the bond she was not at Dacca, and others who deposed that she was on bad terms with Imdad Ali. The Subordinate Judge disbelieved these witnesses and said there could not be any doubt Reza Karim's evidence was fully true. He accordingly made a decree that in default of the principal money and interest and costs being deposited in Court on or before a day named, the mortgaged property, or a sufficient portion thereof, should be sold and the proceeds thereof applied in payment. The defendant appealed from this decree to the High Court at Calcutta which dismissed the appeal, but it is in her favour that they said not without a doubt.

Chunder Kishore Roy and Imdad Ali, who, it has been mentioned, are witnesses to the execution of the bond, were not called by the plaintiffs. The reason for this appears in the judgment of the Subordinate Judge and ought not to affect their case. He says that the plaintiffs did their best to produce them as witnesses but without success; that Chunder Kishore and Hara Kishore, who had been proved to have been present when the

bond was executed, although not discharged from the defendant's service, had mysteriously disappeared some time after the institution of the suit, and it seemed to him "very likely that the defendant had screened them with the object that the plaintiffs might not avail themselves of their evidence. Imdad Ali, in spite of all the efforts of the plaintiffs, will not appear to give his evidence."

The reasons given for the present appeal in the appellant's case and in the argument before their Lordships are: (1) That the first Court committed a material error in refusing to allow the evidence of the defendants to be taken on commission; (2) **[815]** that the same Court misunderstood and misapplied the law relating to documents executed by *pardanashin* ladies.

The facts relating to the first reason can be briefly stated. The plaint was filed on the 9th April 1891 and the written statement on the 13th July 1891. On the 4th August 1891 the defendant applied that the evidence of certain witnesses in the list filed by her and her own evidence might be taken by commission, some of the witnesses being females and others residing beyond the jurisdiction of the Court. It appears on the order sheet of the Court in the record that on that day orders were made for commissions to take the evidence of the female witnesses and the witnesses who were out of the jurisdiction. No order was made as to the defendant's evidence.

On the 2nd April 1892 the defendant applied to be examined by commission at her present residence at Itna in the district of Maimensingh beyond the jurisdiction of the Court, to which the plaintiffs objected that she should be examined at her permanent residence in the town of Dacca. The Judge refused to issue a commission for her examination at Itna saying that he was not satisfied that she was ill or in such state of health that she could not be removed to her own residence at Dacca without danger to her life. On the 6th May 1892, the defendant made another application to be examined at Itna supported by an affidavit, which application was refused, the Judge saying that he had on previous occasions disbelieved the defendant's plea of illness and still adhered to that opinion; that he was further inclined to believe that the defendant did not mean to comply with the Court's order, but was simply trying to put off the disposal of the suit.

By s. 578 of the Code of Civil Procedure (Act XIV of 1882) it is enacted that no decree shall be reversed or substantially varied nor shall any case be remanded on account of any error, defect or irregularity, whether in the decision or in any order passed in the suit or otherwise not affecting the merits of the case or the jurisdiction of the Court. It is apparent in the judgment of the Subordinate Judge that if the defendant had been examined and had given evidence in support of her written **[816]** statement he would not have believed it, and in their Lordships' opinion it could not reasonably have prevailed against the evidence given by the plaintiffs. The High Court also appears to have thought so, for it says at the end of its judgment it does not think the interest of justice would be served by sending the case back to have the evidence taken. Whether the Subordinate Judge properly exercised his discretion when he refused to issue the commission need not be determined. Possibly it would have been prudent to issue it, but their Lordships are of opinion that the want of the defendant's evidence has certainly not affected the merits of the case.

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As to the second ground of appeal they think the law has been neither misunderstood nor misapplied. They will humbly advise Her Majesty to dismiss the appeal. The appellant will pay the costs of it.

Appeal dismissed.

Solicitors for the appellant: Messrs. *T. L. Wilson & Co.*
Solicitors for the respondents: Messrs. *Lattey & Hart.*

C. B.

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PRIVY COUNCIL.

PRESENT:

Lords Hobhouse, Macnaghten and Morris and Sir R. Couch.

[*On appeal from the Court of the Judicial Commissioner of Oudh.*]

FAIZ MUHAMMAD KHAN (*Plaintiff*) *v.* MUHAMMAD SAID KHAN (*Defendant*). [18th February and 1st April, 1898.]

Will—Construction of will—Construction of the will of a talukhdhar—Quantity of estate devised—Unlimited gift of share of profits in a tulukhdari estate.

The will of a *talukhdar*, who left daughters, declared that in respect of his estate, in its entirety and without division, the engagement for the revenue should be in the name of his eldest daughter's son and so continue. Besides this grandson, another, the son of his second daughter, as well as two other daughters of the testator, were to be equal sharers entitled to the profits of the estate. Of this estate the will said: "The profits may be divided equally among all the four persons."

The *talukh* had been included in the first and third of the lists prepared in conformity with the Oudh Estate's Act, 1869.

On a question whether under the will the son of the second daughter took a heritable interest, or only a life-estate, to which, it was argued, the gift was confined by reason of its being only of the profits:—

[817] *Held*, that, in order to show that an unlimited gift of the profits was less than a gift of the *corpus*, some evidence should be found in the context, or in the circumstances affecting the property, tending to show restriction of the interest given.

No such evidence having been found here, the interest given by the will was declared to be heritable in the case of the testator's grandson, who was the son of his second daughter. This grandson dying soon after the testator, had bequeathed his interest to the present appellant, his father.

APPEAL from a decree (3rd June 1892) of the Judicial Commissioner of Oudh, affirming a decree (9th October 1888) of the District Judge of Rae Bareli.

The plaintiff, appellant, brought this suit on the 14th January 1888, claiming title to a share in the profits of a *talukh*. This share had been bequeathed to him by his son, Sultan Khan, who died on the 4th July 1879. Sultan Khan's share in the profits of the *talukh* had been derived under the will, dated 21st February 1873, of his maternal grandfather Abdul Hakim Khan, who died on the 23rd February 1878, the *talukhdar* of one moiety of *talukh* Amawan in the Rae Bareli District. The plaintiff had married Abdul Hakim's second daughter, and Sultan Khan had been his son by this marriage.

In 1858, at the second summary settlement, Abdul Hakim obtained settlement with the Government in respect of his moiety of Amawan. Afterwards a *sanad* was granted to him, and his name was entered in the

first and third of the lists prepared under the 8th section of the Oudh Estates' Act, 1869. In virtue of the latter entry the descent of the estate of the *sanad*-holding *talukhdar* was thereafter to be regulated by primogeniture. 1898 APRIL 1. — PRIVY COUNCIL.

This appeal related only to the claim of the father and devisee of Sultan Khan, deceased, in 1879, to a one-fourth share, on the ground of its having passed by the will of Abdul Hakim whom Sultan Khan had survived. Another claim had been at one time put forward in this suit to a fourth share, which Abdul Hakim had devised to his daughter Shabhan. This share, by reason of that daughter having died before the testator, had lapsed into the *talukhdari* estate. That claim, which had reference to rights under s. 22 of Oudh Estates' Act, 1869, depended on facts which both the Courts in India had concurred in negativing, **[818]** and was not further urged. The appellant's right, however, to the one-fourth share which had been Sultan's, depended on questions of law. These were, in effect, whether or not the will of Abdul Hakim conferred upon him a heritable interest in the profits of the *talukhdari* estate, or only an interest during his life. 25 C. 816 (P.C.)= 25 I.A. 77=2 C.W.N. 385= 7 Sar. P.C.J. 320.

Besides this will of 1873 Abdul Hakim had previously made three other testamentary documents, dated respectively the 29th January 1861, the 5th October 1861, and the 9th September 1870. The material contents of all appear in their Lordships' judgment.

Muhammad Said Khan, in whose name as *talukhdar*, on the death of Abdul Hakim, the estate was held, having been a minor in 1878, the Court of Wards had charge until 1887, when Said, on obtaining possession, refused to recognize the claim of the plaintiff, who now sued for the share that had been devised to his son, and by his son to him.

The defence was that the interest conferred upon Sultan Khan by the will of his maternal grandfather was a personal right to maintenance, which came to an end on his death.

The District Judge held that no proprietary right in the share given by the will to Sultan Khan was conferred by it. There was a remedy prescribed by the will, in case Said should fail to distribute, that each co-sharer should thereupon have a part set aside for him. The present suit had been brought before the end of the first year from the time when Said attaining his majority had obtained possession. The will, directing that the whole estate should remain in the name of Said, entire and undivided, afforded no ground for this suit, which, as claiming a share of the profits, was premature. He dismissed the suit.

The Judicial Commissioner, on appeal, was of a different opinion. He considered that the bequest to Sultan Khan was absolute, and that the son's will in favour of the father must take effect, conveying to him all the rights to the four annas share bequeathed. Accordingly the suit was remanded, as regarded that part of the claim, for findings, as to the amount of the profits in question, under s. 566 of the Civil Procedure Code.

[819] On the return made by the District Judge the appeal came before a Court constituted under s. 8 of Act XIV of 1891. Another Judicial Commissioner who had succeeded the former in office was of opinion that the gift made by the fourth will to Sultan Khan was merely a life-estate for his maintenance. No words of inheritance accompanied it. The gift was one to him personally, in which he had no power to bequeath any interest. On the other hand, the defendant took the

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talukhdari estate unrestricted by there having been to Sultan Khan a gift of a varying sum unaccompanied by any words of inheritance.

In this judgment the Additional Judicial Commissioner concurred. The appeal from the first decision of the District Judge was dismissed, and the dismissal of the suit affirmed.

The plaintiff appealed.

Mr. *J. D. Mayne*, for the appellant, argued that the Courts were wrong in holding that the share given to Sultan Khan by the will of the 21st February 1873 was only a life-interest in the profits, terminating on his death. Under the will the interest given was not merely for maintenance. The interests of the four sharers were all equal and absolute. The special provision for Said only entitled him to be the sharer responsible to the Government in engagements for the revenue. The remedy given to the other sharers for enforcing their claims, should that course be necessary, was not inconsistent with the provision that the estate should remain in the name of Said entire and indivisible. If it would be inconsistent that certain portions of the estate should be set apart, where distribution might have been withheld, and yet that the estate should remain entire, this remedy might fail; but this would not invalidate the bequest. That the *talukh* should be possessed by one person, himself a sharer, with others equally with him entitled to share the profits, were provisions that could take effect, and they were not inconsistent with one another.

Mr. *Lawson Walton* and Mr. *C. W. Arathoon*, for the respondent, contended that the *talukh* being held subject to the rule of primogeniture, the whole scheme of the will, according as it did with that rule, required that the *talukhdari* estate should remain undivided and entire; the result being that the bequest [820] in favour of Sultan Khan would be a life-interest only. The words of the will of the 21st February 1873 had been rightly construed by the appellate Court on this point. The gift, as limited to a share of the property, was a gift for maintenance for the life of the grantee and not an estate of inheritance of which Sultan Khan could dispose by his will. As a suit for the share of the profits the suit was premature. As to the general restriction on the power of a testator to give more than one-third of his property in legacies without the consent of the heirs, reference was made to Macnaghten's Mahomedan Law, chap. VI, para. 2, and to the judgment in *Khajooroonissa* v. *Rowshan Jehan* (1).

Mr. *J. D. Mayne* replied.

JUDGMENT.

On 1st April their Lordships' judgment was delivered by

LORD HOBHOUSE.—The sole question in this appeal is whether Sultan Khan, the grandson of Abdul Hakim Khan, took under the will of his grandfather a heritable interest in his grandfather's *talukhdari* estate. Sultan is dead, and the plaintiff, who is now appellant, claims to represent him. The estate is one of those which were entered in List III of Act I of 1869; which means that, not being one in which the custom of primogeniture had previously prevailed, the *talukhdar* elected that it should so descend in future. The defendant and respondent Said is another grandson of the testator.

(1) 2 C. 184 (198) = 3 I. A. 291 (307).

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The plaintiff claimed a further share in the estate, being that which was devised to Shabhan, a daughter of the testator, who died in his lifetime. That claim has been decided against him, and is not revived in this appeal. At the hearing the District Judge wholly dismissed the suit, holding that Sultan took no more than a life interest under his grandfather's will. The plaintiff appealed, when the Acting Judicial Commissioner, Mr. Dyson, held that Sultan took an absolute interest; and he remanded the suit for trial of the question (among others) to what share of profits is the plaintiff entitled in the 4-anna share of profits inherited by Sultan Khan.

On remand the District Judge found "that two persons have equal rights to this item; one of them is Mussammat Aziz-un-nissa, and the other is plaintiff as representative of Sultan Khan." [821] With that finding the appeal came again before the Judicial Commissioner's Court for final disposal. The Court then consisted of the Judicial Commissioner, Mr. Burkitt, and the Additional Judicial Commissioner Mr. Howell. Those learned Judges held that they were not bound by Mr. Dyson's decision; and, considering that Sultan took only a life-interest, dismissed the appeal with costs. That had the effect of affirming the District Judge's original decree which dismissed the suit with costs.

The testator was a Mahomedan gentleman who married two wives and had children by both of them. His will, which is now to be construed, takes notice that a daughter has just been born to him by his second wife and then proceeds—

"I do execute this will, in modification of my will, dated 19th September 1870, and got the same duly registered, so that after my demise the engagement in respect of the *ilaka* (estate) in its entirety and without division may be made in the name of Muhammad Said Khan son of Mussammat Shahzadi Bibi, my eldest daughter by my first wife and that Muhammad Sultan Khan, son of Mussammat Umrao Bibi, my second daughter, by my first wife and Mussammat Moti Bibi, my third daughter by my first wife, and Mussammat Shabhan Bibi my fourth daughter from my second wife, may be as equal sharers (with him) entitled to appropriate profits, and that the profits of the said estate after deducting therefrom the Government revenue, *talukhdari*, and *ahl-i-biradri* (members of brotherhood) expenses may be divided equally among all the four persons.

"Let no one act contrary to this. Should any one do so, his act shall be null and void both before the authorities for the time being and the member of the brotherhood. If in case Muhammad Said Khan fail to distribute the profits, or raise a dispute over the distribution, each sharer shall be competent to have with the help of the Government set apart for him lands yielding his share of profits; but the estate shall continue in the name of Muhammad Said Khan entire and undivided."

This will was made on the 1st February 1873, and it is not now disputed that all former wills were revoked by it, or that it is the only instrument now to be construed. But it is not unimportant, especially with reference to the argument founded on the testator's preference of primogeniture for his *talukh*, to see how he had dealt with it by former wills, and what were his actual dispositions immediately before the will of 1873.

The Government of India thought it important for the quiet of titles in Oudh that *talukhdars* should be advised to make wills, [822] and Abdul Hakim was so advised as early as October 1860. In January 1861 his only issue was three daughters by his first wife, and he provided that Shahzadi, his eldest daughter, should be *lumbardar* in his place, and that

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his daughters, Umrao and Moti, should be subordinate co-sharers in equal shares. In the course of that year Umrao give birth to Sultan; and on the 5th October 1861 the testator made a second will giving the estate to Sultan according to the custom of primogeniture. He directed that this two other daughters, then childless, should get maintenance from Sultan; but with a proviso that if they should not remain on terms of peace and concord, his three daughters should be proprietors in equal shares, Sultan being only *lumbardar*. When the eldest daughter Shahzadi gave birth to Said, the testator made a third will, dated 9th September 1870. By it he gave his estate to Sultan and Said in equal shares and made them joint *lumbardars*. Also he directed that his third daughter Moti should get maintenance. The fourth and last will was, as stated, made upon the birth of another daughter, Shabhan.

Their Lordships have heard no reason founded on the language of the will of 1873 for confining the interest of Sultan to a life-estate except that the gift is only of profits. But in order to show that an unlimited gift of profits is less than a gift of the *corpus* some evidence should be found in the context or in the circumstances affecting the property. It appears to their Lordships that the context, so far from favouring the restriction of the gift, bears the other way. The testator does not give the estate to Said, but directs that the engagement shall be made in his name. When he disposes of the surplus after deducting revenue and expenses, he puts all four takers on the same footing, equal shares of profits are given to each. Finally comes the provision that in case of dispute each sharer shall have land set apart for him, only the estate is to continue in the name of Said (clearly as *lumbardar*) entire and undivided. It may be that such a setting apart would be difficult, as the Court below observes; but the testator clearly contemplated it and it seems more consistent with a permanent than with a limited interest.

The will then, read alone, must be construed as giving a heritable interest to Sultan, and it is not shown from any of his [823] former dispositions that the testator was in the habit of using any of its expressions in any but their ordinary sense, or that he looked upon the gift of the *lumbardari* as carrying the whole beneficial interest, or that he leant in favour of the rule of primogeniture. On the contrary, in the will of January 1861, he gives the *lumbardari* according to primogeniture, and the surplus in equal shares. In the will of October 1861 he provides for equality of proprietorship in case of dispute; and in the will of 1870 he gives the proprietorship, *lumbardari* and all, to his two grandsons equally.

Their Lordships' attention was called to the fact that the plaintiff is not entitled to the whole of Sultan's share. The District Judge found that Aziz-un-nissa is equally entitled. She is not a party to the suit, and would not be bound by any decree made in it. But their Lordships prefer to confine themselves to a construction of the will on the points argued in this appeal. The plaint, which is rather confused both in its statement and in its prayer, sues for possession of an 8-annas share in the *talukh*. A declaration of the nature of the devise to Sultan will enable the Courts to put him in enjoyment of so much of the share of Sultan as has devolved on him, in the mode appropriate to the circumstances of the *talukh*. Their Lordships think that the proper course will be to discharge the decrees of the Judicial Commissioner's Court and of the District Judge, to declare that according to the true construction of the will Sultan Khan took a heritable interest in 4-annas of the profits of the estate after deducting Government revenue, *talukhdari* and *ahl-i-biradri* expenses;

to dismiss the suit so far as it seeks relief in respect of the share devised to Shabhan; and to order that neither party shall pay or receive costs either in the District Judge's Court or in that of the Judicial Commissioner; in both of which Courts the plaintiff was right as to one half of his claim, and wrong as to the other half. They will therefore humbly advise Her Majesty to this effect. On this appeal the appellant is wholly right, and the respondent wholly wrong; therefore the respondent must pay the costs.

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Appeal allowed.

Solicitors for the appellant: Messrs. *T. L. Wilson & Co.*
Solicitor for the respondent: Mr. *J. F. Watkins.*

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25 C. 824 (P.C.) = 25 I.A. 109 = 2 C.W.N. 321 = 7 Sar. P.C.J. 298.

[824] PRIVY COUNCIL.

PRESENT:

Lords Hobhouse, Macnaghten, and Morris and Sir R. Couch.
[*On appeal from the High Court at Fort William in Bengal.*]

RASH MOHINI DASI (*Appellant*) *v.* UMESH CHUNDER BISWAS (*Respondent*). [9th and 10th February, and 5th March, 1898.]

Will—Execution of will—Testamentary Capacity—Evidence—Burden of proof.

As to the testamentary capacity of a person who was alleged to have executed his will while suffering from paralysis and in his last illness, the Courts below had differed.

The proponent's case was that the will had been signed for the testator in his presence by another person authorized by him, and that he was of sound and disposing mind at the time, though unable to write his name. Against this, there was affirmative, oral, evidence tending to show that he was not then capable of making a will. Other circumstances supported the latter view.

On the weight of the evidence the Judicial Committee decided that the proponent had not discharged the burden of proving him to have been capable.

The present case did not resemble one where a testator, near death, might with the requisite decree of knowledge, have executed a disposition of his property, for which previously and while his mind was still in vigour, he might have given instructions.

[R., 11 C.W.N. 824 (826); 12 Ind. Cas. 393 = 10 M.L T. 304 = (1911) 2 M.W.N. 330.]

APPEAL from a decree (19th August 1893) (1) of the High Court, reversing a decree (10th August 1892) of the District Judge of Nuddea, dismissing a suit which originated in an application for probate of a will under Act V of 1881.

On the 5th May 1891 Rash Mohini Dasi, the appellant, widow of Mohim Chunder Biswas of Babanipur, in Meherpur, Zilla Nuddea, who died on the 18th March 1891, petitioned under the Probate Act, 1881, for probate of his will dated the 25th Falgun 1297, corresponding to the 8th March 1891 Khettermohun Chowdhry, a cousin, and manager of the estate of the deceased, having joined in the petition, withdrew from it, on the 18th May following. The deceased left a minor daughter, and the next of kin after her were his two uncles, Tara Chand Biswas and Umesh Chunder Biswas. The latter of these entered a caveat on the 11th June 1891. The proceedings were then conducted as a suit.

[825] According to the case of the widow, proponent, Mohim Chunder having had a paralytic stroke, was unable to use his hand to sign his name

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(1) 21 C. 279.

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but directed Troilokya Nath Biswas to sign his name for him. Umesh Chunder filed a written statement, denying that the will had been duly executed, and averring that the deceased was not in a state of body or mind to be able to make it. An issue was framed to raise the question, and thereupon the Officiating District Judge found it to be substantially true that Mohim Chunder had had at the time consciousness enough to authorize Troilokya Nath to sign his name for him, and that he had made the will, which accordingly was admitted to probate.

The High Court (PIGOT and BANERJEE, JJ.) on the appeal of Umesh Chunder, after deciding that the issue of due execution raised the question of the alleged testator's testamentary capacity, found on the balance of the evidence that he had not possessed it; and that there had been no proof that he had known, and approved of, the contents of the will.

They reversed the decision of the original Court, and refused to admit the will to probate.

The judgment of the High Court is reported at length in I.L.R. 21 Calc., 279.

On this appeal—

Mr. *A. Cohen*, Q. C., and Mr. *C.W. Arathoon*, argued that the decision of the first Court should be maintained. *Parker* v. *Felgate* (1) was referred to, in which case it had been decided that where a testatrix had previously given instructions for her will, and at the time of the execution recollected that she had given those instructions, and believed, as was the fact that the will accorded with them, that state of things was sufficient for probate to be allowed.

Mr, *J.D. Mayne*, for the respondent, contended that the dispositions of the will could not have been originated with the alleged testator in the state in which he was. There was no evidence that the first draft emanated from him; and there was a blank period between the time when the draft was made and the alleged execution of the will.

[826] Mr. *A. Cohen*, Q. C., replied.

JUDGMENT.

Afterwards, on March 5th, their Lordships' judgment was delivered by

LORD MACNAGHTEN.—In this case the appellant Rash Mohini Dasi propunded a document as the will of her late husband Mohim Chunder Biswas, who died on the 18th of March 1891. The District Judge of Nuddea admitted the document to probate. The High Court on appeal reversed his decision and dismissed the appellant's petition with costs.

The sole question in issue before the High Court was the testamentary capacity of the alleged testator.

After a very careful review of the evidence from which nothing is omitted, and in which nothing seems to have been unduly pressed, the learned Judges of the High Court state the result of their opinion as follows: "We think that the evidence of Dr. Bepin"—Dr. Bepin was a duly qualified doctor who attended Mohim during the latter part of his illness—"aided by the admissions of the plaintiff's witnesses, the history of the illness and the circumstances of suspicion which arise in the case, lead to the conclusion first that Mohim is not shown to have had due testamentary capacity; secondly, that the balance of evidence in this difficult case is on the whole to the effect that he had not testamentary capacity; and that there is no adequate proof whatever that he knew or approved of the contents of the will."

(1) (1883) L.R. P.D. 171.

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Their Lordships agree so entirely with the conclusions at which the learned Judges have arrived and with their estimate of the evidence that it will not be necessary for them to go through the facts in any detail.

Mohim died at the age of 29. Besides his widow he left an infant daughter and two uncles, the younger of whom Umesh Chunder Biswas, the present respondent, opposed the grant of probate. Mohim had a paralytic stroke on the 24th of January 1891. A native doctor named Rakhal was called in and attended him for about five or six days. Then he was treated by a *kobiraj* or native practitioner whose name does not appear. On the 2nd of March he had another seizure. Two doctors were then called in, Dr. Bepin and a native practitioner called Jasoda. [827] They attended him constantly until his death. It seems to have been determined rather against the advice of the doctors that if possible Mohim should be moved to Calcutta on the 9th. However, as preparations were being made for his removal, and as he was being carried through the house he had another seizure, which after a few days proved fatal.

The story of the preparation of the will is told by Khetter Chowdry Khan, a cousin of Mohim and his manager and trusted adviser. He was the principal, if not the sole, actor in the drama.

It seems that Dr. Bepin, either on the first day of his attendance or a day or two afterwards, said something about a will. It is not very clear what was said. Khetter states that the doctor said that considering Mohim's state there should be a will made. Dr. Bepin himself asserts that what he said was that "considering Mohim's condition they should be ready to get a will executed in case he became at all better." Whatever it was that Dr. Bepin said Khetter acted on the hint and set about getting a will made at once. He says he told the patient "Bepin Babu is saying that you should make a will." . . . Mohim said "Let a will be made and then I shall go to 'Calcutta.'" . . . I and Mohim consulted together that night. I drew out a list of the properties which were to be included in the will. No one was present there at that time. Neither his wife nor his mother-in-law was asked at the time about it. I did not tell him to ask either his wife or mother-in-law about it. He did not forbid me to speak of it to anyone except his uncle and his enemies. I did not speak of it to Mohim's sister, and one of his aunts. I did not also tell his wife. I did not speak of it to Mohim's wife and family or anyone else, but Mohim spoke of it to his sister and wife on the 24th and 25th Phalgoon (7th and 8th of March). There were five executors. I did not let them know before the will. I did not tell Umesh or his sons. They do not speak to me. I made a draft from the note. This was on the 21st or 22nd (4th or 5th of March). I have a draft. I handed over the list to Bhusan to keep it with the miscellaneous papers. I made the draft sitting in a corner of the cutchery. Mohim saw the draft on the morning of the 23rd (6th of March) after washing his mouth and his hands. [828] No one was present at the time. The doctor went daily from the 20th to the 25th. Jasoda and Bepin used not to go together. I did not tell Bepin Babu because Mohim forbade me. He forbade me from the 20th. He forbade me saying 'Let no one know.' On one occasion he named the doctors and told me not to tell them. He said to me 'I do not know whether what you have done will be according to law, go and get it revised by the pleader of Meherpur.' I sent it on the 24th through Taruck Biswas. . . . The draft came from Meherpur on the night of the 24th Phalgoon. It contained just an alteration here and there. What I wrote was there but two conditions were added. Besides Abinash Babu

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I tried to get a draft drawn up by Narahurri Babu, also I tried to do so by means of a letter purporting to have been written by Mohim Babu on the 21st or 22nd. In it I put down paragraphs of the will. Narahurri Babu's draft came by post a day or two after Mohim's will had been executed. It is with Bhusan. Narahurri Babu sent a letter. It is in the *serishta*. . . . After Mohim had determined who should be executors and said 'These persons are to be the executors.' I did not say anything. He said that on the night of the 20th when we consulted together. Bepin doctor came that day. I do not remember whether I or Mohim spoke about the terms of the will. Mohim spoke about the terms. I gave my opinion. I did not myself suggest any of the terms. . . . It took ten or twelve minutes to read Mohim's will. That was on the night of the 24th. He read it to himself. He read it in a low voice." The story told on behalf of the petitioner further was that Khetter's draft was sent to Abinash the pleader at Meherpur on the morning of the 7th of March by the hand of Taruck, a *gomashta* in Mohim's employ. Taruck says that Khetter gave him a letter along with it addressed to Abinash. Then he adds "Mohim said 'Take this letter and get the draft corrected by Abinash Babu and bring it back.' He said 'There are four executors and my wife will also be an executrix.' He further said Rs. 300 is set apart for my wife's pilgrimage, it has to be made Rs. 600.' He further told me to ask Abinash to keep this secret that there may be no row."

Putting aside for the moment this alleged conversation with [829] Taruck, and Khetter's statement that Mohim spoke of the will to his wife and sister on the 7th and 8th of March, it will be observed that up to this point no one was in the secret but Khetter. Everything took place between Khetter and Mohim alone. It is not very clear whether Taruck intended to represent that he had a conversation with Mohim in person or whether he was only repeating what Khetter told him. Either way the story is incredible. When Khetter was sending written instructions to Abinash why should he have entrusted part of the testator's wishes verbally to a messenger? If we are to take it that Taruck had a conversation with Mohim about the will in Khetter's presence how is it that Khetter says nothing about it?

The will is said to have been executed on the following day, the 8th of March, between 4 and 5 P.M. There seems to be no doubt that on that day there was an assemblage of persons hastily collected by Khetter. All were servants of Mohim except Shama Churn who was Khetter's brother-in-law, and Rakhal, the doctor who attended Mohim on the first attack. A person was stationed at the door to keep out 'enemies' or to give warning of their approach. Mohim was propped up in bed. The will which had been copied out by one Troilokya was put into his left hand over which he still had some power. Troilokya signed for him. He touched the pen. Then Shama Churn signed and read the will aloud. The other witnessess signed and the ceremony was over. Khetter put the will in his own box. After Mohim's death "he made known the fact of the will having been made." He handed over the will to the appellant. The appellant and Mohim applied jointly for probate. But Khetter afterwards withdrew his application at the instance apparently of the appellant's maternal uncle. There were other reasons he said. He was forbidden to act by Umesh, the respondent.

The will itself is fairly simple and not very long. The testator begins by stating that Umesh and his son had not behaved well to him: they

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were behaving so that if he did not appoint any executor in respect of his estate his family would suffer for want of food. Then he gives his wife permission to adopt. He [830] appoints five executors, but no work was to be done otherwise than in accordance with the views of two of them. Then the testator directs that if a son is adopted his infant daughter and the adopted son should share his property between them, but until he or she came of age the estate was to remain in the hands of the executors. In default of an adoption the daughter was to take all. In the event of the daughter's death the entire estate was to go to the adopted son. In the absence of both adopted son and daughter the entire estate was to vest in his widow, and failing her in the testator's nephew or any full brothers that he might have. Then there were provisions for poor relatives of the testator and of his widow.

It is only fair to observe that under the will Khetter took no benefit directly. He had no interest except as executor. What his motive was it is difficult to see unless he hoped to secure his position as manager of the estate by becoming an executor. And it may be that he was anxious to exclude Umesh from all hope of succession. He and Umesh seem to have been on much worse terms than Mohim and Umesh. Umesh and his son did not even speak with Khetter. Umesh constantly visited Mohim during his illness, and Mohim according to Khetter was very anxious that his visits should not be discontinued.

The oral evidence as to Mohim's testamentary capacity may be summed up shortly. Putting aside the statements of Khetter and Taruck, to which attention has already been called, the witnesses for the appellant state generally that the testator was in full possession of his senses. "That," as the learned Judges of the High Court say, "is very unsatisfactory evidence of the patient's condition." "The question," they add "is what mental state he was in in reference to the making of a will, his capacity for which is challenged by the defendant's evidence and is rendered at least a matter for careful inquiry from the facts of his illness in the plaintiff's evidence itself. Paralysis on 24th January, an increase of illness on 23rd February, another and severe fit on the 2nd March, indistinct speech as stated by all the witnesses, increased by the 8th March according to Shama Churn so greatly that according to Rakhal Kobiraj he had to be asked two or three times before his words could be [831] understood. . . . . The evidence of some of the plaintiffs just referred to would if read by itself convey the impression that Mohim's mind was quite alert and his speech practically free, although a little indistinct, and although he was physically weak and paralysed. If anything approaching this was the truth some proof of this might have been adduced apart from the story common to all those witnesses in which almost the same things are represented as said about the execution and about going to Calcutta, and nothing else whatever. The obvious comment on it is that they did not venture to leave this common ground, because they were not stating what they remembered, but what it had been agreed should be said—a short story containing some easily remembered incident of a kind which, if not closely inquired into by the defendant, would lead to a belief on the part of the Court trying the case in Mohim's capacity."

On the other hand, the witnesses on behalf of the respondent deposed clearly and positively to Mohim's incapacity. The most important witness of course is Dr. Bepin. He seems to be a person of some position. Khetter himself says "Bepin is regarded as a good doctor." He is positive that at no time during his attendance could Mohim have made a will. He says:

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"I used to go and visit him daily for 15 or 16 days. Before I went there Mohim was under the treatment of a *kobiraj* of Mankar. I sometimes used to stop at Mohim's house for 24 hours. When I went on the first day Mohim had but little consciousness. For the first day or two he replied to questions with great difficulty. After that he could not speak at all, but used to try and make sounds. He did not always try to do even this. After I had repeatedly shouted to him he used to try and make a sound. I saw Mohim on the morning of the day before that on which it was proposed to take him to Calcutta. I went in the morning of the day before that on which it was proposed to take him to Calcutta. As regards Mohim's senses on that day I only say this that he could taste food and he used to weep and again to wipe the tears from his eyes as he looked at people. He could take down the first part of each spoonful, and the latter part of it had to be withdrawn. I did not hear him speak, and he did not speak to me. He used to be made to sit up in order to [832] be fed. I came away at 10 or 11 that day. I was against his being taken to Calcutta. The reason was that the whole of the brain had become diseased, and if he received any shock the probability was that he would get apoplexy. The next day at 9 or 9½ in the morning I found the patient almost in a moribund condition."

As regards the testamentary capacity of the alleged testator their Lordships agree with the High Court in thinking that the oral evidence on behalf of the respondent outweighs the evidence on behalf of the appellant. And in this connection it must be borne in mind that Mohim does not seem to have had any intention of making a will before his illness. It is not like a case in which a testator executes a disposition of his property for which instructions have been given or preparations made while the mind was in vigour.

Apart, however, from the oral evidence there are several matters which in their Lordships' opinion tell heavily against the appellant. What reason was there for keeping in the dark the two doctors who were in daily attendance on the patient? If it be true, as Khetter says, that Dr. Bepin suggested that a will should be made by Mohim in the state in which he was when he paid his first visit, it would only have been natural that he should have been consulted. No doubt Khetter says that Mohim forbade him to tell the doctors. He looked upon them as people of the other party because they were friends with Umesh and attended his family. But then Shama Churn was on good terms with Umesh, and yet Khetter called him in to witness the will, and he was permitted to read it aloud. It is suggested that Mohim was afraid that something would happen if Umesh were told. But what is it that the testator is said to have been afraid of if Umesh had known of the will? Not that there would have been a row, as some of the witnesses said, but according to Khetter's evidence only this that Umesh would discontinue his visits. Then again why were not the wife and sister called to speak to Mohim's mental condition at the time the will was made? Khetter says that the testator himself told them about the will on the 7th and 8th of March It is true that when the plaintiff's evidence was [833] closed the District Judge was asked to let them be examined, but then it was too late. Lastly, it is a very important fact that Khetter does not produce the draft which he says was sent to Abinash and returned by him, nor was Abinash himself called though he might have thrown some light upon the case.

On the whole, their Lordships are of opinion that the High Court came to a right conclusion. The making of the will from first to last was

Khetter's doing, and there is no satisfactory evidence to show that the alleged testator understood the business in which Khetter engaged him. The burden of proof rests on the appellant and she has not discharged it.

Their Lordships will therefore humbly advise Her Majesty that the appeal should be dismissed. The appellants will pay the costs of this appeal.

Appeal dismissed.

Solicitors for the appellant: Messrs. *T. L. Wilson & Co.*
Solicitors for the respondent: Messrs. *Lattey & Hart.*

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25 C. 833 (P.C.) = 25 I.A. 151 = 2 C.W.N. 513 = 7 Sar. P.C.J. 363.

PRIVY COUNCIL.

PRESENT:

Lords Watson, Hobhouse and Davey and Sir R. Couch.

[*On appeal from the High Court at Fort William in Bengal.*]

BALKISHEN DAS AND OTHERS (*Plaintiffs*) v. SIMPSON (*Defendant*).
[22nd April, and 14th May, 1898.]

Act XI of 1859 (*Bengal Revenue Sale Law*), ss. 3, 8, *and* 33—*Bengal Excise Act* (*Bengal Act VII of* 1868), s. 2—*Unauthorised sale by Collector—Jurisdiction of Civil Court*—Res judicata—*Parties—Secretary of State for India.*

Act XI of 1859, the Bengal Revenue Sale law, providing for the sale of estates in arrear of payment of revenue, does not sanction, and by plain implication forbids, the sale of any estate which is not at the time in arrear of such payment. The whole clauses, in so far as they relate to sales, or to their challenge, as well as the proviisons of Bengal Act VII of 1868, are framed upon the express footing that they are to be applicable to the sale of estates which are in arrear of duty.

A Collector had sold an estate, purporting to act under Act XI of 1859, for a supposed arrear of revenue. There was, however, only an erroneous debit in the collectorate books against the estate, in excess of the revenue actually assessed upon it chargeable against it, and due from it.

[834] *Held*, that the sale was without authority; that the Civil Court had jurisdiction to declare the sale void; and that the provisions of s. 33 of Act XI of 1859, relating to an appeal to the Commissioner of Revenue, did not exclude that jurisdiction.

The enactment in s. 8 had no application to such a case. This was not a question about a transfer from the account of one revenue-paying estate to that of another, nor was it a claim for remission or abatement, which had not been duly allowed by the Government. Section 8 has no application, except there be, (1) default in payment of the revenue, and (2) possession by the Collector of money of the defaulter not indisputably placed to his credit. But here there was no default. All moneys paid by the appellants were credited, and their alleged default was based upon erroneous debit entries to which they were not parties.

In this suit, in the Courts below, the Government had been made a co-defendant, but was not a respondent on this appeal; and the objection was taken on the argument of this appeal, and by previous petition, that they should be made a party respondent.

Held, that it was a mistaken view that a decree annulling the sale in this suit would be *res judicata* in any future question or proceeding, as between the Government and the unsuccessful purchaser. The Secretary of State for India, therefore, was not a necessary respondent. His position was correctly explained in *Bal Mokoond Lal* v. *Jirjudhan Roy* (1), in the judgment of MITTER, J.

[F., 32 C. 111 (116) = 8 C.W.N. 757; 37 C. 107 = 11 C.L.J. 254 = 13 C.W.N. 710 = 1 Ind. Cas. 871; **Rel.**, 15 C.L.J. 54 = 13 Ind. Cas. 959; 7 C.W.N. 377; 19 C.L.J.

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(1) 9 C. 271 (276).

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388 = 20 Ind. Cas. 337 ; **Appl.**, 32 C. 229 = 9 C.W.N. 300 ; **R.**, 34 C. 811 (817) = 5 C.L.J. 696 = 11 C.W.N. 756 (762); 39 C. 981 (**P.C.**) = 39 I.A. 177 = 10 A.L.J. 452 = 14 Bom. L.R 1063 = 16 C.L.J. 620 = 16 C.W.N. 842 = 23 M.L.J. 206 = 12 M.L.T. 385 = (1912) M.W.N. 1005; 13 C.L.J. 404 = 16 C.W.N. 805 = 10 Ind. Cas. 90 ; 12 Ind. Cas 627 ; 26 M.L.J. 358 = 1914 M.W.N. 236 = 22 Ind. Cas. 826 ; **D.**, 31 C. 159 = 8 C.W.N. 657 ; 18 C.L.J. 505.]

APPEAL from a decree (19th July 1895) of the High Court, reversing a decree (27th July 1892) of the Subordinate Judge of Mozufferpore in Tirhoot.

The appellants, plaintiffs in the suit, were the owners of a *mehal* described in the books of the Collector of Tirhoot as the separate 5 annas share of the village Shazadpur Anderkilla, entered on the register of revenue-paying *mehals*, or *tauzi*, under the number 3592. This share had been purchased by Balkishen Das, and a brother whom he had survived, in 1883, and belonged to the appellants, the *jumma* having then been Rs. 89-8-7. Part of the plot having been taken up by the Government for a State purpose, the revenue payable was reduced to Rs. 82-14-9. From the beginning of the ownership of the appellants, down to March 1891, the payments which they made amounted to Rs. 691-14-9, but the instalments due with the above abatement amounted only to Rs. 663-6-0 ; and there **[835]** should have been a credit entry, to the account of the *mehal* No. 3592, after payment of the March 1891 instalment of Rs. 44-15-3. By a mistake in the debit entries against that *mehal*, it was represented as in debt for revenue to the amount of Rs. 7-15-5 in March 1891 ; and for this arrear it was sold by order of the Collector on the 5th September 1891. The respondent on this appeal was the purchaser.

Against this an appeal by petition to the Commissioner of Revenue was preferred on the 25th February 1892, but having been filed after the period fixed by s. 2 of Bengal Act VII of 1868 without any extension of that period having been ordered for the petitioners, the appeal was rejected.

The facts are stated in their Lordships' judgment :—

The main questions were : (1), whether s. 33 of Act XI of 1859, and s. 2, Bengal Act VII of 1868, did not exclude the present objection from the jurisdiction of the Civil Courts, in consequence of there not having been an appeal upon it to the Commissioner : (2), whether it had not been necessary for the plaintiffs, in order to rely on remission of revenue, to proceed in conformity with s. 8 of Act XI of 1859, which enacts that the plea that money belonging to the defaulter sufficient to pay the revenue was in the Collector's hands shall not bar a sale unless, after application in due time made, the Collector shall have neglected to transfer the money in payment of the arrear of revenue due : (3), whether the Government should not have been made a respondent on this appeal, having been a successful defendant in the Court below.

The present suit was brought on the 27th July 1892, alleging that at the time of the sale there was nothing due to the Government in respect of the estate sold, and that the sale was contrary to law.

The Government, under their statutory style, were made defendants, as well as the purchaser Mr. C. F. R. Simpson. The defence filed by the Collector on behalf of the Secretary of State for India was first, that as no appeal under s. 2 of Bengal Act VII of 1868 or s. 33 of Act XI of 1859 had **[836]** been perferred to the Commissioner, the suit was not cognizable under the latter section : secondly, that the remission was not entered in favour of this estate in the Collectorate books. The defence filed by the other defendant was the same, but he expressed it that, as to the remission

of revenue and over-payment upon it, these matters did not affect the liability of the plaintiffs, as they had not taken steps in conformity with s. 8 of Act XI of 1859 to have the abatement made effective. 1898 MAY 14.

The Subordinate Judge, Babu Jadu Nath Das, with regard to s. 2 of Bengal Act VII of 1868, and to s. 33 of Act XI of 1859, and to the fact that no appeal had been preferred in due time to the Commissioner of the Division, did not consider himself empowered to decide upon irregularities alleged to have taken place in the proceedings of sale. But that, in his opinion, was not the main ground on which this case rested. He found that on the true account of what had been paid as *jumma* for *mehal* No. 3592, more than was sufficient to cover the revenue due had been paid in March 1891; so that there was no arrear upon which a sale could be based. He therefore decreed that the sale was null and void, and that the plaintiffs were entitled to possession. PRIVY COUNCIL. 25 C. 833 (P.C.) = 25 I.A. 151 = 2 C.W.N. 513 = 7 Sar. P.C.J. 363.

His judgment, and this decree, were reversed by the High Court on appeal. A summary of the reasons stated by the latter Court appears in their Lordships' judgment on this appeal.

Mr. *J. H. A. Branson*, for the appellants, argued that there was error in the judgment of the High Court. The Subordinate Judge was right in deciding that this sale was not authorized by the Revenue Sale Law of 1859, because there had been no arrear. The Collector had had no authority to sell the estate, as if for default in payment of the revenue, for default had not taken place. It was not denied that the appellants' payment into the Collectorate covered all existing demands at the time of commencing the process of sale for default. The estate had been put up to sale for an arrear which had no existence. The High Court had taken an erroneous view in considering this to be the case of a demand on the part of an owner of a revenue-paying estate to have an entry in account carried to the credit of his estate which would otherwise be in default. **[837]** For such a case the procedure under s. 8 of Act XI of 1859 would have been necessary. But here there was no question that the money belonging to, or due and paid in respect of this very *mehal*, was in the Collectorate at the time. Neither s. 8, nor any other part of that Act, had been called into operation. The fact that there was no arrear governed the question whether the omission to appeal to the Commissioner had the effect of barring the suit under s. 32 of Act XI of 1859. The High Court had held the appellants precluded from taking objections not stated in such an appeal. But whatever application s. 2 of Bengal Act VII of 1868 might have had to a suit relating to irregularities, or illegalities, in the sale proceedings, the plaintiffs' case had a foundation altogether different. These enactments one and all were inapplicable. For that reason there was an entire mistake in the High Court's observation that, "in order to comply with s. 8 of the Revenue Sale Law of 1859, it was necessary for the plaintiffs to have made an application, before the revenue fell due, to have a transfer made to their credit of any amount to which they might be entitled by reason of the abatement ordered by Government, which had not been properly carried to their credit in the Collector's Register." For the proposition that there was no application of the Revenue Sale Law unless there was an actual arrear, reference was made to *Baijnath Sahu* v. *Sital Prasad* (1), *Sreemunt Lall Ghose* v. *Shama Soonduree Dasi* (2), and *Thakoor Churn Roy* v. *Collector of the 24-Pergunnahs* (3).

(1) 2 B.L.R. F.B. 1. (2) 12 W.R. 276. (3) 13 W.R. 336.

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Mr. *A. Phillips*, for the respondent, contended that the appeal should not proceed without the Secretary of State, who was a defendant in the suit below, being made a party respondent. The present respondent was entitled to claim, under s. 35 of Act XI of 1859 that, if the sale should be declared void, the Government should be ordered to refund to him the purchase-money, with interest. The Subordinate Judge had ordered that the defendant, now respondent, should jointly with the Government pay the plaintiffs' costs. If the High Court's judgment should be reversed, the plaintiffs would have that order in their favour; while, as regarded the Government, the decree of the High Court [838] would still remain, and would remain a final decree. It was submitted that the sale could not be set aside, or declared void unless it should also be declared void as against the Secretary of State. At present, whatever might be the result on this appeal, as things now stood, the decree which the present respondent supported, would remain final as regarded the Secretary of State; and it followed that the latter should be treated as a party necessary to any complete decree on this appeal.

In any view, however, it was submitted that the suit was not maintainable, inasmuch as no appeal in conformity with s. 33 of Act XI of 1859, and s. 2 of Bengal Act VII of 1868, had been duly preferred to the Commissioner. It was a matter of the due construction of the Revenue Regulations and Acts. For the purposes of sales in default, the Collectorate books were the guide; and there were special proceedings, by way of remedy, to secure proprietors. It was sufficient to support a sale that there was an arrear of revenue within the meaning of s. 2 of Act XI of 1859. Credits to estates had to be entered in the books, and an abatement was not credited unless upon application made. This was apparent from the requirements of s. 8 of Act XI of 1859. There had not been any such application in reference to estate No. 3592. The sale was made for arrears appearing due in the Collectorate books, and that appeared there with the acquiescence of the appellants: and it was valid so far as the purchaser at the auction sale, now respondent, could discover. Reference was made to *Baijnath Sahu* v. *Sital Prasad* (1); *Gobind Lal Roy* v. *Ramjanam Misser* (2); *Lala Gauri Sanker Lal* v. *Janki Pershad* (3); *Lala Mobaruck Lal* v. *Secretary of State for India* (4); and *Bal Mokoond Lal* v. *Jirjudhan Roy* (5).

Mr. *J. H. A. Branson* was not heard in reply.

JUDGMENT.

Afterwards, on the 14th May, their Lordships' judgment was delivered by

[839] LORD WATSON.—The appellants, plaintiffs in the present suit, were, until the 5th September 1891, proprietors and in possession of a separate 5-annas share of the village of Shahzadpur Anderkilla, situate within the Collectorate of Mozufferpore.

Down to the year 1884, the *jumma* or annual revenue payable to the Government in respect of the said 5-annas share was Rs. 89-8-7. In the beginning of 1884, the Board of Revenue sanctioned a reduction of the revenue annually payable, to the extent of Rs. 6-9-10, thus fixing the *jumma* for the future at Rs. 82-14-9 instead of Rs. 89-8-7; and their decision to that effect was duly communicated to the Collector of Mozufferpore by

(1) 2 B.L.R. F.B. 1. (2) 21 C. 70 = 20 I.A. 165. (3) 17 C. 809 = 17 I.A. 57. (4) 11 C. 200. (5) 9 C. 271 (276).

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a letter dated the 3rd March 1884. From that date until the year 1891 the owners for the time being of the 5-annas share continued to make yearly payments to the Collector to account of the *jumma*.

It now appears, and it is not disputed, that in 1884 the Collector, on receipt of the decision of the Board of Revenue, erroneously entered in his books the abatement of *jumma* which they had granted, as applicable to another estate in which the owners of the 5-annas share of Shahzadpur Anderkilla had and have no interest. The mistake which was thus committed by the Collector, or some of his staff, must have been due to their ingnoring or disregarding the plain terms of the decision of the Board of Revenue which had been sent to them. It has been suggested, in both Courts below, that the error may have been induced by the fact that, in the letter which enclosed the decision of the Board, there was a clerical error in giving the *tauzi* number of the 5-annas share in question; but that explanation, if it be correct, can afford no excuse for failure to give effect to the decision itself.

The result of the mistake was that, during a period of eight years, from 1884 to 1891, whilst the proprietors of the 5-annas share were duly credited in the books of the Collector with the full amount of the payments annually made by them on account of revenue, they were wrongly debited in each year with Rs. 89-9-10, being the amount of the *jumma* before its reduction. In consequence of that error in the debit side of the account, the books of the Collector showed a balance as due by the appellants, in March 1891, being the end of the revenue year 1890-91, in [840] respect of the revenue payable for the preceding year; whereas if the annual *jumma* had been charged at its reduced rate, in terms of the order of the Board of Revenue, the books would have shown a balance of Rs. 44-15-3 at their credit.

The Collector then proceeded to sell the 5-annas share in question, as for arrears of *jumma* due by the appellants, in supposed compliance with the provisions of Act XI of 1859. The property was sold by auction on the 5th September 1891, when it was purchased by Charles F. R. Simpson, who is the sole respondent in this appeal.

The appellants thereafter presented an appeal against the sale to the Commissioner of Tirhoot, under s. 2 of Bengal Act VII of 1868, which was rejected by the Commissioner as being out of time. On the 27th July 1892, they brought this suit before the Subordinate Judge of Tirhoot, against the auction-purchaser, the respondent in this appeal, and also against the Collector of Mozufferpore, as representing the Secretary of State for India, praying to have the sale set aside, and other relief. The defendants appeared and lodged written statements, in both of which it was pleaded that the action was not cognizable by the Civil Court, by reason of the plaintiffs having failed to appeal in due time, under the provisions of s. 2 of Bengal Act VII of 1868. The present respondent asserted that the suit was "based upon false allegations;" and the other defendant alleged that the plaintiffs had taken no steps to have the abatement taken into consideration, and had for several years continued to pay the original Government revenue. It has not been shown that there are any false allegations in the plaint, or that the plaintiffs, after the abatement was granted, continued to pay the old *jumma*. They made payments to account of revenue, which in the third of the eight years already mentioned was of the same amount as the old *jumma*, in three of them were in excess of it, and in four of them were

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below its amount. There is nothing to show that any of these payments were made on account of the old *jumma*, with the exception of the erroneous entries in the Collector's books, for which he alone was responsible. It was not within the right, and it certainly was not the duty, of the appellants to examine and check these entries.

[841] The Subordinate Judge, on the 1st September 1893, held that the suit was not excluded by the failure of the plaintiffs to present an appeal within due time, under s. 2 of Bengal Act VII of 1868; that in point of fact there was no arrear of revenue due by the appellants at the time when their property was sold; and that the sale was illegal and injurious to the appellants. He accordingly declared the sale to be inoperative, and decreed possession of the property sold to the plaintiffs, with costs.

The respondent in this appeal brought that judgment under the reveiw of the High Court at Fort William, when two of the learned Judges, Sir Henry Prinsep and Chunder Madhub Ghose, JJ., reversed the decree of the Subordinate Judge and dismissed the appellants' suit, with costs to the present respondent in both Courts.

The following were the grounds assigned for their decision by the learned Judges of the High Court. They held, in the first place, that, inasmuch as there had been no adjudication by the Commissioner upon the objections stated to the sale by the appellants, these objections were excluded from the cognizance of the Civil Courts by s. 33 of Act XI of 1859. If that course were permitted, the learned Judges observed that it would " permit a defaulter in the payment of Government revenue, who desired to set aside a sale for irregularity with substantial injury resulting therefrom, practically to do so without any appeal to the Commissioner at all." In the second place, they held that the appellants were debarred, in the present suit, from obtaining "any re-adjustment of account " by reason of s. 8 of the Revenue Sale Law of 1859, because, " in order to comply with that law, it was necessary for them to have a transfer made to their credit of any amount to which they might be entitled, by reason of the abatement ordered by Government and which had not been properly carried to their credit in the Collector's Register." They were accordingly of opinion that the appellants were without a remedy, although they indicated that the mistake was unfortunate, " and may also be said to be due to carelessness on the part of the office of the Collector." **[842]** Their Lordships do not think that the decision of the learned Judges can be maintained upon either of these points, which they will proceed to notice separately.

Section 3 of the Act XI of 1859 provides that, in default of payment of revenue, within the time appointed for each district by the Board of Revenue, the " estates in arrear " in those districts "shall be sold at public auction to the highest bidder." The Act does not sanction, and by plain implication forbids, the sale of any estate which is not, at the time, in arrear of Government revenue. The whole clauses of the Act of 1859, in so far as these relate to sales, or to their challenge at the instance of the proprietor, as well as the provisions of s. 2 of Bengal Act VII of 1868, are framed upon the express footing that they are to be applicable to the sale of estates which are in arrear of duty. The enactments of 1859 and of 1868 are obviously intended to apply to cases in which, if the irregularity or illegality of the sale proceedings alleged by the objector be negatived, the sale will remain valid. But the chief and substantial objection upon which the appellants' plaint is based is, that at the time when their 5-annas share

of the village Shahzadpur Anderkilla was sold, there were no arrears of revenue due by them in respect of it. It does not appear to their Lordships to admit of dispute that the objection is founded in fact. In their opinion a stupid blunder made by the Collector or his staff in his own books cannot deprive the appellants of their right to claim, and have effect given to, the permanent abatement which was allowed by the Board of Revenue in March 1884. The result is that the whole proceedings of the Collector, with a view to the sale of the 5-annas share, were beyond his jurisdiction, and are not entitled to the protection given him by the Act in cases where sale is authorised, although it may be attended with some irregularity or illegality. Their Lordships accordingly of opinion that it was rightly held by the Subordinate Judge that he had jurisdiction to entertain the objection to the sale to which he gave effect, although the point had not been considered and disposed of by the Commissioner.

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The observations made by the learned Judges in regard to the second point upon which their decision is rested do not appear to their Lordships to be strictly accurate either in fact or law. There [843] is no question in this case about a transfer from the account kept by the Collector for the mehal 10,313, to the credit of the account kept by him for the 5-annas share of Shahzadpur Anderkilla. The only error in the latter account consists, as already stated, in annually entering Rs. 89-8-7, instead of Rs. 82-14-9, to the debit of the appellants. The payments made by the appellants are correctly credited. In that state of the facts their Lordships are unable to conceive what possible application the provision of s. 8 of Act XI of 1859 can have to the present case. The clause contemplates two cases only. Appellants are not within the first of these, which relates to a defaulter to revenue, who claims a remission or abatement which has not "been allowed by the authority of the Government." In the second case, it is enacted that the Collector's possession of money belonging to the defaulter, shall afford no answer to the default, unless the money stood in the defaulter's name alone and without dispute, or the Collector has failed, after application by the defaulter, to impute his money towards payment of the revenue. The enactment has no application, except there be (1) default in payment of the revenue, and (2) possession by the Collector of money of the defaulter not indisputably placed to his credit. But the appellants were not in default. All monies paid by them have been correctly credited; and their alleged default, which is a pure fiction, is based upon erroneous debit entries, to which they were not parties.

Although the Secretary of State for India had been represented in the Courts below by the Collector of Mozufferpore, the appellants did not join him as a party to the present appeal. Upon that ground the respondent pleaded, *in limine*, that the appeal taken to this Board was incompetent; and at all events that the hearing of the appeal ought to be delayed until the Secretary of State for India had been made a party to it. Their Lordships rejected the contention, which was maintained upon the mistaken view that a decree obtained by the appellants in this suit against the Secretary of State would constitute *res judicata*, in any question or proceeding between that Minister and the respondent. In their opinion, the possession of the Indian Secretary, in cases [844] like the present, is correctly explained by Mr. Justice Mitter in *Bal Mokoond Lal* v. *Jirjudhun Roy* (1).

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(1) 9 C. 271 (276).

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The appellants, with the view of obviating the preliminary objection stated by the respondent, presented an incidental petition for an order making the Secretary of State for India a party to the appeal. The application was opposed by the Secretary of State, and was refused by this Board with costs. The respondent, notwithstanding, persisted in his preliminary objection at the hearing of the appeal.

Their Lordships will humbly advise Her Majesty to reverse the judgment of the High Court, to restore the decree of the Subordinate Judge of Tirhoot, and to order the respondent to pay to the appellants the costs incurred by them before the High Court. The respondent must pay to the appellants their costs of this appeal, including their costs of the incidental petition already referred to.

Appeal allowed.

Solicitors for the appellants : Messrs. *T. L. Wilson & Co.*

Solicitors for the respondent : Messrs. *Sanderson, Adkin & Lee.*

C. B.

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25 C. 844 (P.C.) = 25 I.A. 95 = 2 C.W.N. 402 = 7 Sar. P.C.J. 294.

PRIVY COUNCIL.

PRESENT :

Lords Hobhouse, Macnaghten and Morris and Sir R. Couch.

[*On appeal from the High Court at Fort William in Bengal.*]

SUKHAMONI CHOWDHRANI (*Defendant*) *v.* ISHAN CHUNDER ROY (*Plaintiffs*). [9th February and 1st April, 1898.]

Contribution—Joint debtors—Limitation Act (XV of 1877), sch. II, ss. 19 *and* 20 *and art.* 61*—Acknowledgment of Liability—Interest paid on debt.*

By a payment into Court under an order on account of decrees for rent and revenue in arrear, due to the landlord zemindar from the joint owners of an under-tenure, their estate was saved from sale. In respect of a proportionate share of liability for money raised for this purpose one of the joint owners became liable to be sued by another of them for contribution ; and a question arose as to the application of art. 61 of sch. II of the Limitation Act, 1877.

[845] More than three years before this suit all the joint owners had filed in Court a petition for the appointment of a Manager of their estate, who should, out of its profits, pay debts and interest to creditors from whom had been borrowed the money for the payment into Court.

Held, that this was an acknowledgment of the joint debt by the co-owner who had not contributed, within s. 19 of the Limitation Act; whence had followed the legal consequences, one of which was her liability to be sued within due time for contribution. Whilst the three years from the date of that acknowledgment were running, and at a date less than three years before this suit, interest on part of the money borrowed had been paid by the Manager whom the appellant, jointly with the other co-owners of the estate, had authorized, as her agent, to pay it.

Held, that this interest, being clearly a payment in exoneration, *pro tanto* of the plaintiff's liability, was such a payment as was contemplated by s. 20, and gave a new departure for the period of limitation.

[F., 3 Ind. Cas. 19 = 19 M.L.J. 650 = 6 M.L.T. 155 ; **Rel.**, 26 B. 562 (569) = 4 Bom. L. R. 447 ; 4 Ind. Cas. 902 = 14 P.L.R. 1909 = 79 P.W.R. 1909 = 43 P.R. 1910 ; 12 A.L.J. 674 = 24 Ind. Cas. 104 ; **R.**, 6 C.L.J. 141 (142) ; 5 Ind. Cas. 440 = 13 O.C. 23 ; 3 Ind. Cas. 34 ; 25 M.L.J. 264 (267) ; **Expl.**, 33 C. 613 = 3 C.L.J. 576 = 10 C.W.N. 551: **Appl.**, 52 P.R. 1909 = 78 P.W.R. 1909 = 2 Ind. Cas. 102.]

APPEAL from a decree (18th August 1893) of the High Court reversing a decree (28th March 1892) of the Subordinate Judge of Tippera on a preliminary point, and remanding the suit for trial on the merits.

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The appellant was the widow of Tilak Chunder Roy, deceased, who, with his brothers Ishan Chunder Roy, the present respondent, and Abhoy Chunder Roy, also since deceased, formed a Hindu family owning a joint estate. Abhoy Chunder was represented by his widow Kalitara, a formal defendant, not appearing on this appeal.

The surviving brother, Ishan Chunder, and the widows were joint debtors for money borrowed to be paid into Court to prevent the sale of their joint estate, which was a *shikmi taluk* in Tippera, held under the superior zemindar, Nawab Khaja Ahsan Ulla Khan, through whom the Government revenue was paid.

This suit arose out of a claim for contribution between the co-owners in respect of a debt due for money raised to pay arrears of rent and other dues, the plaintiff respondent having paid the proportion due from the defendant, appellant.

The principal question was whether the suit was barred under art. 61 of Sch. II of the Limitation Act, 1877. Two matters were in dispute on this appeal. One was, whether a [846] petition, in which the appellant had joined, stating joint indebtedness, was an acknowledgment within s. 19 of that Act. The other was, whether payment within three years before suit brought, of interest on a loan taken by the parties jointly, had effect within s. 20 to give a new starting point for limitation.

The zemindar landlord had in 1885 obtained four decrees against the joint owners for arrears amounting to about Rs. 80,000. The *taluk* was attached in execution, and the 2nd February 1885 was fixed for the sale of it, objections to the order for sale having been disallowed.

Ishan Chunder appealing to the High Court applied for a stay of execution, which was granted only upon condition that the judgment-debtors should deposit in Court Rs. 50,000. This sum, Ishan Chunder, with the help of Kalitara, raised, and paid into Court on the 3rd February 1885, whence it was taken out by the zemindar on the 3rd April following. The whole amount of the decrees was afterwards paid. Ishan Chunder having executed a bond to Kalitara in respect of her contribution, on which bond she obtained a decree, now commenced this suit against Sukhamoni, claiming Rs. 20,999, for her proportion of the liability, on the 24th February 1891. The plaint stated that in 1885 when Ishan Chunder was about to sue Sukhamoni for her proportionate share of the money, she joined in executing, on the 18th March 1885, an *ikrarnama* referring it to arbitrators to ascertain the debts, and agreeing to the appointment of a Manager. This contained a recital of the borrowing of the Rs. 50,000 upon bonds, and declared that the Manager should pay the debts with interest. The plaint also stated that, on the 22nd July 1887, the three co-owners petitioned the Court to appoint such a Manager; that he was appointed, and that to him a *mukhtearnama* was executed on the 4th January 1888. That he remained in office till November 1888, during which period he made payments of interest on the debt.

On the defence of limitation the Subordinate Judge dismissed the suit. He found nothing to show that the liability for the contribution claimed by Ishan Chunder was identical as a debt, with liability on the part of Sukhamoni to pay her share of the [847] joint-indebtedness of the co-owners as acknowledged by them in the petition of the 22nd July 1887. Also he was of opinion that the debt on which interest was paid in 1888, to creditors named, was not a debt acknowledged to be due to Ishan Chunder, and that payment of interest could not operate under s. 20 to give a new starting point.

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On an appeal by the plaintiff to the High Court, a Division Bench (NORRIS and BANERJEE, JJ.) was of opinion that there was not in the agreement of the 18th March 1885 any admission that the appellant was liable for any part of the joint debt, nor was there any promise by her to pay, nor could such promise be inferred from the proviso in the agreement that the Manager should pay off any debt of the appellants out of the income.

They were further of opinion that the suit was not one for compensation for breach of an agreement in writing and registered such as was provided for in art. 116 of Act XV of 1877; but was a suit for money paid to the use of the defendant, and, therefore, under art. 61, would have been barred, but for what followed, in three years from February 3rd, 1885, the date on which the money was paid. They also decided that the petition of the 22nd July 1887, with its accompanying schedule, was a clear acknowledgment of liability on the part of Sukhamoni for the money due to the plaintiff for which he sued. They referred to expl. 2 of s. 19 of the Limitation Act, 1877, adding:

Under the provisions of that section the plaintiff, therefore, got a fresh start from the date of this petition, and became entitled to bring his suit within there years from that date. The suit, however, was brought more than three years even from that date, and it becomes necessary to see whether there was any further acknowledgment of liability, or any payment of interest within three years from the date of this acknowledgment, and also within three years before the date of the suit. We find an entry, dated the 12th Sraban 1295, corresponding to the 26th July 1888, showing a payment of Rs. 200 on account of interest to the Tippera Loan Office, due on a bond of the 22nd Magh 1291, executed in favour of the Loan Office. The entry recites that the payment was made on the 31st Assar. This entry is corroborated by an endorsement on the bond of the 22nd Magh 1291 for Rs. 5,000, and by the deposition of Bipro Churn Das, the joint [848] manager, who says he paid the whole of the interest due on the bond for Rs. 50,000 to the Tippera Loan Office. The payment is entered in the books of the debtor-defendant No. 1, as one on account of interest, and it is shown to have been made by the joint manager of the plaintiff and the defendant who was expressly authorized by the petition of the 21st July 1887 to make payments on account of the debts contracted for raising the sum of Rs. 50,000 for satisfaction of the Nawab's decrees. That being so, we think it is a payment of interest within the meaning of s. 20 of the Limitation Act, and it gave the plaintiff a fresh start; and reckoning from the 31st Assar 1295, that is, 14th July 1888, the suit was brought within three years.

"It might be said that this interest that was paid was paid, not as interest due to the plaintiff on account of his claim against the defendant Sukhamoni, but was paid as interest due to one of the creditors from whom money had been borrowed for raising the sum of Rs. 50,000, which formed the basis of the plaintiff's present claim. But seeing that the plaintiff's claim in this suit arises by reason of his having been compelled to borrow money and pay off the debt due, not only from himself, but also from the defendant, and seeing also that the interest which the plaintiff would be entitled to recover from the defendant would be the interest that he had to pay on the sums borrowed by him, the payment of any interest on account of the sums borrowed by him would in reality be payment of interest on account of his claim. Under none of the bonds executed by the plaintiff could the defendant have been rendered

liable directly, and payment by her of interest to the creditors of the plaintiff must be regarded as payment by her of interest to the plaintiff indirectly, through his creditors. That being so, we think the payment of interest in question is sufficient to save the claim from being barred by limitation.

"The decision of the learned Subordinate Judge in this case, that the suit is barred by limitation, must therefore be set aside; and as the Court below has not gone into the merits of the case the case must be remanded to that Court for trial on the merits.

On this appeal,—

Mr. *J. M. Paterson*, for the appellant, argued that the dismissal of the suit by the Subordinate Judge was right under art. 61 of sch. II of the Act of 1877. The principal contention was: *first*, that the High Court had been in error in deciding that the petition of the 21st July 1887 was an acknowledgment by the defendant within s. 19, giving a fresh start to the three years' period of limitation. In that petition there was authority to the Manager, to be appointed, to apply surplus income "to the payment of the *ijmali* debts" of the three co-owners, with a schedule appended. But, though the [849] petition may have admitted the debt to the creditors, it contained no admission by the appellant that she owed her proportionate part to Ishan Chunder. It was a question whether his claim could be brought into this acknowledgment, as contained, or implied in it, or could be taken as referred to, without supplementing the writing by oral evidence as to the transaction. But it was clear that oral evidence for that purpose was inadmissible, as shown by the decision in *Lutchumanan Chetty* v. *Mutta Iburaki Marakkayer* (1).

Section 19 of the Act of 1877 intended an acknowledgment of an existing liability, or legal relation, to a certain person. A mere admission of indebtedness, that might not include the debt to the party suing to recover it, was insufficient. That section did not give its effect to an admission made without knowledge, and without specification, of what particular debt was admitted. And, to constitute an acknowledgment operating within the Act, the liability must be acknowledged as incurred to the person claiming. Reference was made to *Dharma Vithal* v. *Govind Sadvalkar* (2); *Mylapore Iyasawmy Vyapoory Moodliar* v. *Yeokay* (3); and *Venkata* v. *Partha Saradhi* (4).

The petition of 1887 was only an admission of liability to the creditors, without specifying a debt to Ishan Chunder; and, therefore, it gave no new starting point for limitation in this case:

Secondly, the payment of interest, Rs. 200 on the 26th July 1888 to the Tippera Loan Office, was not a payment of "interest on a debt as such," to the respondent, within s. 20 of the Act of 1877. The authority to the Manager was to pay interest on debts due to the creditors named in the schedule: *Mohalakshmibai* v. *Nageshwar Parshotam* (5) showed that entry in the debtor's books was insufficient. *Ichha Dhanji* v. *Natha* (6), and *Kollipara Pullamma* v. *Maddula Tatayya* (7) were also cited. Even if this [850] payment of interest had been effective within the Act it could only be so as to the Rs. 5,000, the debt to the Bank that lent it; and it could not be taken to be a payment of interest on the one-third of Rs. 50,000, that one-third being the proportionate part owed by Sukhamoni.

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(1) 5 M.H.C. 90. (2) 8 B. 99. (3) 14 C. 801. (4) 16 M. 220.
(5) 10 B. 71. (6) 13 B. 338. (7) 19 M. 340.

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There was no evidence of appropriation of this payment by the debtor in respect of all the debts referred to in the petition.

Mr. *J. H. A. Branson*, for the respondent, mainly relied on the effect of the payment of interest on the 26th July 1888 by the appellant's authorized agent, the Manager, as giving a new starting point for limitation. That payment of interest had been made before the expiration of the period of three years then current in consequence of the filing of the petition of the 22nd July 1887. The High Court were correct in holding the suit on the 24th February 1891 to have been in time.

Mr. *J. M. Paterson*, in reply, referred to *Sunkur Pershad* v. *Goury Pershad* (1) as to liability in a joint family, for the debt of a managing member, barred by the Limitation Act IX of 1871; and to *Raman Lalji Maharaj* v. *Gopal Lalji Maharaj* (2) as to the application of art. 61 of sch. II of Act XV of 1877, to a suit for contribution.

JUDGMENT.

Their Lordships' judgment was delivered on the 1st April 1898 by

LORD HOBHOUSE.—The appellant and respondent are two co-owners of lands subject to payment of rent. The owner of the rent obtained decrees for a large sum in arrear, and to save the estate from sale the respondent and another co-owner raised a sum of Rs. 50,000 by borrowing from various persons. That sum was deposited in Court, and on the 1st April 1885 was paid to the judgment-creditor. The respondent is plaintiff in the present suit and is suing the appellant for contribution to the extent of her share in the estate. The only question before their Lordships is whether or no his suit is barred by lapse of time.

The cause of action arose on the 1st April 1885. The suit was brought in February 1891. If the limit of time is three [851] years it would be barred in April 1888 unless saved by acknowledgment or payment. Both Courts below have considered that the case falls within art. 61 of Act XV of 1877, and the argument here has proceeded on that footing. Without further examining the point their Lordships will take it, in the defendant's favour, that the limit of time is three years.

It is not necessary to discuss more than two of the transactions between the parties. In July 1887 the co-owners, three in number, presented a petition to the District Judge of Tippera, which was in effect an appointment of one Bhipro as Manager for (among other things) the protection of their *ijmali* (joint) property by the payment of their debts. One of the directions given to him was to apply surplus income "to the payment of the *ijmali* debts of us three co-owners of which a list is given below." The list contained the names of twelve persons from whom the money used to pay the judgment-creditor was borrowed; the amount due to each being set opposite to his name, and the total brought to the amount of Rs. 56,750.

That is a distinct acknowledgment that the total of the debts comprised in the list is a joint debt. The Subordinate Judge held that the defendant did not thereby admit any liability to the plaintiff, nor promise to pay him anything. But it is not required that an acknowledgment within the statute shall specify every legal consequence of the thing acknowledged. The defendant acknowledged a joint debt. From that follow the legal incidents of her position as joint debtor with the plaintiff, one of which is that he may sue her for contribution.

(1) 5 C. 321. (2) 19 A. 244.

This acknowledgment is still more than three years prior to the suit. To gain a later starting-point of time the plaintiff alleges payments, of which it is only necessary to examine one. On the 14th July 1888 Bhipro, the Manager, paid Rs. 200 for interest on one of the loans constituting the total joint debt. This is proved by his deposition, and by regular entries in his books and by endorsements on the creditors bond. The Subordinate Judge thought that the date of payment was not proved; but it is difficult to see how proof can be more clear or precise. Then he held that the payment was not made for interest on a debt due to [852] the plaintiff, but was made to a third party, a creditor of the plaintiff, and not by his request. Section 20 of the Limitation Act says that a new starting-point of time shall be gained when interest on a debt is paid as such by the person liable to pay the debt or by his agent. It does not specify any particular mode or form of payment, and there are many modes in which payment may be made. In this case the common agent of the joint debtors paid interest on the joint debt out of joint funds under express instructions contained in the instrument of his appointment. That is clearly a payment in exoneration *pro tanto* of the liability of the plaintiff, and such as is contemplated by s. 20 of the Limitation Act.

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The Subordinate Judge dismissed the suit on the grounds above indicated. On appeal the High Court reversed his decree, and remanded the case to be tried. As their Lordships agree with the High Court they will humbly advise Her Majesty to dismiss this appeal. The appellant must pay the costs.

Appeal dismissed.

Solicitors for the appellant: Messrs. *Tatham & Lousada.*
Solicitors for the respondent: Messrs. *Barrow & Rogers.*
C. B.

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25 C. 852 = 2 C.W.N. 593.

CRIMINAL REFERENCE.

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, and Mr. Justice Banerjee.

QUEEN-EMPRESS *v.* PRATAP CHUNDER GHOSE.* [20th June, 1898.]

Nuisance—Criminal Procedure Code (Act X of 1882*), s.* 144*—Order regulating boat traffic at a landing place—High Court's power of Revision when order cannot be made under that section.*

An order regulating the boat traffic at a certain landing place of a river in the manner directed by the order passed in this case held to be not an order that is authorised by s. 144 of the Criminal Procedure Code.

If the order be one that cannot be made under s. 144 of the Criminal Procedure Code, the mere fact of the order purporting to have been [853] made under that section does not prevent the High Court from interfering with it in revision.

Abhayeswari Debi v. *Sidheswari Debi* (1) and *Ananda Chundra Bhuttacharjee* v. *Stephen* (2), followed.

[F., 26 C. 188 (193); 15 Cr.L.J. 513 = 24 Ind. Cas. 601; R., 21 A. 391 (400) (F.B.) = 19 A.W.N. 138; 12 Bom.L.R. 1029 = 11 Cr.L.J. 705 = 8 Ind. Cas. 747; 14 Cr.L.J. 589 = 21 Ind. Cas. 381 = 25 M.L.J. 370.]

THE District Magistrate of Jessore passed the following order purporting to be made under s. 144 of the Criminal Procedure Code (Act X

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* Criminal Reference No. 144 of 1898, made by L. Palit, Esq., Sessions Judge of Jessore, dated the 10th of June 1898.

(1) 16 C. 80. (2) 19 C. 127.

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of 1882) : " Whereas it appears from the report of the Civil Surgeon of Jessore that the crowding of boats in the river Kabadak opposite the town of Kotechandpur above the Fakirpur Ghat is dangerous to the health of the residents of the town, and should be stopped, with this exception, that three or four boats containing altogether not more than twenty-five men in them may be allowed to come up above the said Ghat to discharge their cargo for a period of three days at a time and then return to a place opposite to or not above the said Fakirpur Ghat : It is accordingly hereby ordered that all persons having charge of or any control over boats on the river Kabadak, which are now moored above the said Fakirpur Ghat, do within three days of receipt of this order remove their boats down the river to a place opposite to or not above the said Ghat, and that after such removal any three or four boats containing not more than twenty-five persons in all may be allowed to come up above the said Ghat at a time and stay for not more than three days, and then return being succeeded in turn by others to the same number for a similar period. In order to determine which boats should have preference for the three days stay above the said Ghat, and in what order they should go, it is further directed that a list of the boats affected by this order be sent to the Sub-divisional Officer of Jhenida, who will decide in what order they should go, taking all the circumstances of the case into consideration, and it is directed that, except in the order prescribed by the Sub-divisional officer, no boats shall proceed above the said Ghat. This order is addressed to the crews, lessees, proprietors or any other persons having control over the movements of the said boats, and is passed under s. 144 of the Criminal Procedure Code. It extends [854] to all boats not being mere *dinghis*, and will have effect for two months from the date of publication. The Fakirpur Ghat is the Ghat situated below Mr. Macleod's house and above the Solemanpur Ghat."

The petitioner, who is the owner of the Ghat mentioned in the above order, moved before the Ssssions Judge of Jessore, praying for the setting aside of the order or for a reference to the High Court. The Sessions Judge referred the matter to the High Court under s. 438 of the Criminal Procedure Code (Act X of 1882). The material portion of the letter of reference was as follows :—

"This is a matter in which the petitioner moves this Court to refer an order under s. 144 of the Criminal Procedure Code made by the District Magistrate of Jessore, with the recommendation that the order in question be set aside on grounds which amount to the general contention that the order was made illegally and without jurisdiction.

"The order complained of begins as follows : 'Whereas it appears from the report of the Civil Surgeon of Jessore that the crowding of boats in the river Kabadak opposite the town of Kotechandpur above the Fakirpur Ghat is dangerous to the health of the residents of the town.' This is all that is contained in the order regarding the necessity for making such an order. The petitioner has not been supplied with a copy of the report of the Civil Surgeon referred to in the order. Now according to the provisions of paragraph 2 of s. 144 of the Code of Criminal Procedure the Magistrate making an order under that section is required to state therein the material facts of the case. The Magistrate in this case does not appear to me to have in any way complied with that requirement. The grounds on which danger to the health of the town was apprehended, the nature of the danger, etc., are not at all mentioned. The Civil Surgeon's

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report on which the order has been based should, I think, have been annexed as a part of the order.

"The next point is that the order was passed *ex parte*. Paragraph 3 of s. 144 provides that, in cases of emergency, or in cases where the circumstances do not admit of the serving in due time of a notice, the order may be passed *ex parte*. No doubt the order was directed to boatmen generally; and it may be argued that that being so, the circumstances did not admit of a notice being served. But it is quite clear that the petitioner was a person who would be very greatly affected by the order, and as it cannot be said to have been a case of emergency a notice should, I think, have been served upon him, in order that he might appear and show cause why the order should not be made.

[855] "The most important and vital point in the case, however, is that the order itself is of a nature not justified by the provisions of s. 144 of the Criminal Procedure Code. The heading of the chapter, which consists only of this section, shows the nature of this provision of the law as contemplated by the Legislature. The heading is "Temporary orders in urgent cases of nuisance," and the first paragraph which sets forth the circumstances which would justify an order under s. 144 of the Criminal Procedure Code uses the phrase, 'In cases . . . . where immediate prevention or speedy remedy is desirable.' Thus it is clear that the section is intended only to apply to urgent cases of nuisance where immediate prevention or speedy remedy is desirable, and where a temporary order would meet the requirements of the case. Now, in the present case, the Magistrate appeared to have been of opinion that the health of the town was likely to be endangered by the crowding of boats opposite the town of Kotechandpur. And he accordingly passed this order regulating the number of boats which were to be allowed to proceed to the place and the length of time they were to be allowed to stay. I do not see how an order of this nature can be said to be one passed to provide for an urgent case of nuisance in which immediate prevention or speedy remedy is desirable. The question of providing for the general health of a town by regulating the boat traffic is not a question which can in any way be considered one concerning an 'urgent case of nuisance' making 'immediate prevention or speedy remedy desirable.' It is not a question of the kind intended to be dealt with by an order under s. 144 of the Criminal Procedure Code. I say nothing as to the wisdom of passing such an order affecting the trade of a whole locality. I say nothing as to the propriety of seeking to secure better health for a town by passing such an order (which, it must be remembered, can only be in force for two months), and as to other and better methods being applicable. I say nothing as to these questions because it appears to me that the Legislature never intended s. 144 of the Criminal Procedure Code for such a purpose, and it is on this ground, along with the other grounds mentioned by me, that I would refer the case to the High Court. The order itself as to only, '3 or 4 boats containing altogether not more than 25 men in them' being allowed to come up above the said Ghat to discharge their cargo 'for a period of three days at a time' seems to be so worded that difficulty might well be felt in obeying it. It presupposes that every boat that comes up must acquaint itself with the number of boats already at the ghat and with the number of men these boats contain. I need not, however, go on to criticise the mode in which the order has been framed. The order itself appears to me to be illegal and *ultra vires* on the grounds (1) that the order does not state the

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material facts of the case justifying the order; (2) that it was passed *ex parte* when circumstances did not justify the passing of such an order without notice being served; and (3) that the order is of a nature not justified by the provisions of s. 144 of the Criminal [856] Procedure Code. On these grounds I refer the matter to the High Court and recommend that the order be set aside."

No one appeared in support of the reference.

The judgment of the High Court (MACLEAN C.J., and BANERJEE J.) is as follows:—

JUDGMENT.

We agree with the learned Sessions Judge in thinking that an order like the one made in this case regulating the boat traffic at a certain landing place, in the manner directed by the order, is not an order that is authorized by s. 144 of the Code of Criminal Procedure. The very terms of the order go to show that it is not one directing "any person to abstain from a certain act or to take certain order with certain property in his possession or under his management" within the meaning of the section. That being so, the order is not authorised by the provisions of the law under which it purports to have been made, and there is no other law that we are aware of, under which the Magistrate could make such an order, nor does the mere fact of the order purporting to be made under s. 144 of the Criminal Procedure Code prevent this Court from interfering with it in revision, if the order is one that cannot be made under that section. The view we take is amply supported by the case of *Abhayeswari Debi* v. *Sidheswari Debi* (1) and *Ananda Chundra Bhuttacharjee* v. *Stephen* (2).

We, therefore, set aside the order complained of as not authorized by law.

S. C. B.

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25 C. 856.

TESTAMENTARY JURISDICTION.

Before Mr. Justice Sale.

IN THE GOODS OF W. H. COLLETT (DECEASED).
[17th and 28th February, 1898.]

Practice—Official Trustee. Appointment of—Official Trustees' Act (XVII of 1864), *s.* 10—*Consent of Beneficiaries—Evidence Act (I of* 1872), *s.* 85—*Affidavit, Sufficiency of.*

On an application under s. 10 of the Official Trustees' Act (XVII of 1864), where the petition was not signed by one of the beneficiaries, the [857] Court held, upon other evidence, that such beneficiary was desirous of having the Official Trustee appointed as trustee of the will.

THIS was an application for the discharge of Samuel Cramer, the sole surviving trustee of the will of William Henry Collett, deceased; and for the appointment in his stead of the Official Trustee under s. 10 of the Official Trustees' Act (XVII of 1864).

The petition was signed by Samuel Cramer, by the Official Trustee, and by all the beneficiaries except A. S. Collett, who was resident in London. He, however, signed two documents, one an informal agreement to the appointment, the other a power of attorney. The power was not sufficiently proved, nor authenticated in the manner contemplated by s. 85

(1) 16 C. 80. (2) 16 C. 127.

of the Evidence Act (I of 1872), but was attested only in the presence of a solicitor. **1898** FEB. 28.

Mr. *Caspersz*, who appeared for the petitioners, submitted that there was here sufficient evidence that all the persons beneficially interested were desirous of having the Official Trustee appointed. TESTAMENTARY JURISDICTION.

ORDER.

SALE, J.—I think it would be desirable to strike out the name of A. S. Collett. I do not think notice to him is necessary, inasmuch as he is shown to have knowledge of the application and to have approved of it, but there must be an affidavit showing that he is absent in England. **25 C. 856.**

Mr. *Caspersz* states that he will file an affidavit to that effect, and have the name of the person referred to struck out from the petition, and that he would mention the matter again upon the affidavit being ready.

[Mr. *Caspersz* subsequently mentioned the matter, and put in the affidavit required, with the original agreement and an office copy of the power of attorney annexed. Upon that his Lordship made the order prayed for.]

Solicitors for the petitioners: Messrs. *Sanderson & Co.*

H. W.

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25 C. 858=2 C.W.N. 577.

[858] CRIMINAL REVISION.

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, and Mr. Justice Banerjee.

PUNARDEO NARAIN SINGH AND ANOTHER (*Petitioners*) *v.* RAM SARUP ROY (*Opposite Party*).* [17th June, 1898.]

Jurisdiction of Criminal Court—Criminal Procedure Code (Act X of 1882), s. 182—Local area—Uncertainty as to the situation of the scene of offence—Marginal notes to sections of Act.

When there is an uncertainty as to whether a particular spot where an offence has been committed is situated within one district or another the case is governed by s. 182 of the Criminal Procedure Code (Act X of 1882), and the offence is triable in the Court of either district. The expression "local area" includes, and was intended to include, a "district."

Marginal Notes to sections of an Act do not form part of the Act. *Sutton* v. *Sutton* (1), and *Dukhi Mollah* v. *Halway* (2), followed.

[R., 28 B. 129 (142); 34 M. 29=11 Cr. L.J. 310=6 Ind. Cas. 313=20 M.L.J. 500=8 M.L.T. 22=(1910) M.W.N. 163; 13 C.L.J. 625=6 Ind. Cas. 392; 96 P.L.R. 1901.]

THE facts of the case appear fully from the judgment of BANERJEE, J.

Babu *Umakali Mukerji* on behalf of the petitioners.

Mr. *Jackson* and Babu *Dwarka Nath Mitter* on behalf of the opposite party.

The following judgments were delivered by the High Court (MACLEAN, C. J. and BANERJEE J.):—

JUDGMENTS.

MACLEAN, C. J.—This rule raises a short but somewhat interesting point. The question is whether the Diara known as the Mutier Diara lies

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* Criminal Revision No. 400 of 1898, against the order passed by G. W. Place, Esq., Sessions Judge of Sarun, dated 23rd of April 1898.

(1) (1882) L.R. 22 Ch. D. 511. (2) 23 C. 55.

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in the Balia or Sarun district. That depends upon what the boundary line of these two districts is. Now, we find that by a notification of the Government of India, dated the 5th of December 1888, it was declared: "That the deep stream of the Gogra is the boundary between the Balia distric in the North-Western Provinces and the Sarun district in Bengal, up to the point where the boundary line between mouzah Ibrahimabad Nanhara in Balia, and *mouzah* Shitab Diara in Bengal, meets that river."

[859] The Sessions Judge finds: "The Government have frequently notified that the deep stream of the Gogra is the boundary between the two districts. Now at present, and apparently for a year or two, Mutier Diara is an island with a deep stream north of it, and another south of it. This latter is both wide and deep, but the stream north is a trifle deeper and seems more like the main stream."

The contention of the learned vakil for the petitioner is that, inasmuch as the stream to the north is the deeper of the two streams, that is the deep stream" within the meaning of the notification of December 1888, in which case this island would be in the Balia and not in the Sarun district, and the Magistrate in the latter district would have no jurisdiction to entertain the complaint. But I think the "deep stream" spoken of in the notification of December 1888 must be the deep stream as it then existed, that is ten years ago. It is a matter of notoriety that the channels of Indian rivers change very materially, and often in a very short time. What was the deep stream in 1888 may not be the deep stream of 1897, and it is consequently difficult for us to say what really is the deep stream which forms the boundary between the two districts. There is an uncertainty in the matter, and if there is such uncertainty, what is the course to be pursued? In my judgment we can invoke the assistance of s. 182 of the Criminal Procedure Code, which lays down: "When it is uncertain in which of several local areas an offence is committed it may be inquired into or tried by a Court having jurisdiction over any of such local areas."

I ought to have stated that the alleged offence took place in April 1897 and that processes were applied for on the following day in the Sarun district.

It is urged by the learned vakil for the petitioner that the words "in which of several local areas" does not apply to any uncertainty as to the district, but uncertainty as to the particular spot upon which the alleged offence was committed. That would be a very narrow construction to put upon the section, and treats the term "local area" as synonymous with the term "spot." In my opinion the expression "local area" includes and was intended to include a "district," and this view is fortified by a **[860]** reference to the language of s. 531 of the Criminal Procedure Code.

In my opinion then, there is, for the reasons I have stated, sufficient uncertainty as to which is the true boundary between these two districts, and there being that uncertainty, s. 182 applies, and it is competent for the Court in the Sarun district to inquire into this matter.

I may make a passing allusion to an argument of the learned vakil for the petitioner that we must read into s. 182 the marginal note to that section: in other words, that we must construe the section with reference to the marginal note. I decline to accept that view. It has been decided in the English Courts, and I believe in this Court as well, that the marginal notes do not form part of the section, and cannot be referred to for the purpose of construing the section.

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For these reasons I think that the Court in the Sarun district is competent to inquire into this matter, and the rule will accordingly be discharged.

BANERJEE, J.—I am of the same opinion. We have been asked to set aside the order of the Court below directing that the case should be tried in the Sarun district in which it has been instituted, on the ground that upon the facts found by the learned Sessions Judge in his decision of the 23rd April last, it is the Court in the district of Balia, and not that in the Sarun district, that has jurisdiction to try this case under s. 177 of the Criminal Procedure Code.

It is not disputed that the offence complained of, namely, that of rioting, is alleged to have been committed in an island *chur* called Mutier Diara, and that the island *chur* is situated in the River Gogra in that part of it which forms the boundary between the districts of Sarun and Balia, according to the notification of the Government of India.

That notification, which is dated some time in the year 1888, is to the effect that the deep stream of the River Gogra is the boundary between the Balia and Sarun districts; and the learned Sessions Judge has found that of the two streams of the [861] River Gogra, running north and south of *chur* Mutier Diara, the one on the north is a little deeper than that on the south. This would at first sight go to show that the Mutier Diara appertains to the district of Balia and not to that of Sarun. The learned Sessions Judge, however, is of opinion that in a matter like this, the question of convenience is to be taken into consideration, and upon that consideration he has held that the Sarun Court has jurisdiction to try this case.

I am unble to accept this view of the matter as correct. But at the same time I do not think that the jurisdiction appertains to the district of Balia as contended for by the learned vakil for the petitioner.

It is quite true that every offence, as provided by s. 177 of the Criminal Procedure Code, shall ordinarily be inquired into and tried by a Court within the local limits of whose jurisdiction it was committed. The offence here is alleged to have been committed in the island *chur*, Mutier Diara; and if that *chur* appertains to the district of Balia it is the Balia Court and not the Sarun Court which would be competent to try the case. But is it clear that Mutier Diara appertains to the district of Balia? It is at any rate open to doubt whether the notification of 5th December 1888 referred to above should bear the construction sought to put upon it by the learned vakil for the petitioner, namely, that the deep stream of the Gogra, the position of which may shift from time to time, is the boundary between Balia and Sarun. The notification may well be understood to mean that the boundary between Balia and Sarun would be the deep stream, as it existed at the date of the notification, and that this would continue to be the boundary until the Government thought fit to alter it by a further notification. Moreover, it is doubtful whether the notification was intended to meet a contingency like the present where two streams, one to the north and the other to the south, are both deep, with this difference that one is a trifle deeper than the other, as the learned Sessions Judge has found. Again, it is not certain what the position of this boundary was in 1888 with reference to the *chur* Mutier. In other words, it is not clear whether the *chur*, accepting the boundary to be the deep [862] stream of the river, as it existed in 1888, fell on the Balia or the Sarun side of the boundary. Nor would the Sessions Judge's finding, even upon the view of the notification which the learned vakil for the petitioner asks us to adopt, be enough to remove

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the uncertainty, for although the stream on the north may be the deeper of the two on the 23rd April 1898, or the time when the investigation was made, still that would not go to show which of the two streams was the deeper one in April 1897, the time when the alleged offence was committed.

Therefore in any view of the case the uncertainty remains as to whether this *chur* appertains to Balia or Sarun. That being so, the question is how is jurisdiction to be determined in a matter like this? I am of opinion that the question is answered by s. 182 of the Criminal Procedure Code, which says: "When it is uncertain in which of several local areas an offence is committed, it may be inquired into or tried by a Court having jurisdiction over any of such local areas."

The learned vakil for the petitioner contends that this section cannot apply to a case like the present, because the expression "local area" is not equivalent to district," and there is no uncertainty here as to the spot in which the offence was committed, the uncertainty being as to the district in which the case should be tried. In other words, the learned vakil's contention is that "local area" in s. 182 means a spot and not a district or province. He may be right so far that the expression "local area" may comprehend not only a district or province, but also a spot; but his contention is not right so far as it seeks to restrict the expression "local area" to the spot where the offence was committed. And that his contention is not right is evident from s. 531, that section clearly showing that a Sessions Division, District, or Sub-Division is, within the meaning of the Act, intended to be included in the term "local area."

Lastly, it was contended that the marginal note to s. 182 would militate against the view we take. The answer to that is that the marginal note is no part of the Act, as has been pointed out in *Sutton* v. *Sutton* (1) and *Dukhi Mullah* v. *Halway* (2). I, **[863]** therefore, hold that as there is an uncertainty in the matter, the case is governed by s. 182, and the offence is, therefore, triable in the Court having jurisdiction either over Sarun or over Bali.

The result is that as the Sarun Court has jurisdiction, this case will be tried there, and the rule will be discharged.

S. C. B.

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(1) (1882) L.R. 22 Ch. D. 511. (2) 23 C. 55.

25 C. 863=2 C.W.N. 465.

1898 MAY 12.

CRIMINAL REVISION.

CRIMINAL REVISION.

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, and Mr. Justice Banerjee.

GOMER SIRDA AND OTHERS (*Petitioners*) *v.* QUEEN-EMPRESS ON THE COMPLAINT OF ALI SHIEKH (*Opposite-Party*).*
[12th May, 1898.]

25 C. 863=2 C.W.N. 465.

Witness—Right of accused to have witnesses re-summoned and re-heard—Criminal Procedure Code (Act X of 1882), s. 350 (a), s. 357—Commencement of proceedings—Interlocutory orders—Trial, Meaning of—Right to have witnesses summoned and reheard—Irregularity—Refusal to recall witnesses.

An accused person does not lose the right of having the witnesses re-summoned and re-heard under proviso (*a*), s. 350, of the Criminal Procedure Code, because an interlocutory application for enforcing the attendance of certain witnesses had been made and granted not at the trial but before the trial and with a view to the trial. The proper time for making such application is when the trial commences before the Magistrate.

The expression "trial" means the proceeding which commences when the case is called on with the Magistrate on the Bench, the accused in the dock, and the representatives of the prosecutions and for the defence, if the accused be defended, present in Court, for the hearing of the case.

Section 537 of the Criminal Procedure Code cannot cure the defect in the proceedings by reason of the Magistrate's refusal to re-summon and re-hear the witnesses in contravention of proviso (*a*), s. 350.

[**Expl.**, 14 Cr. L.J. 230=19 Ind. Cas. 326=9 N.L.R. 42; **D.**, 3 P.R. 1903 (Cr.)]

THE facts of the case are fully set forth in the judgments.

Mr. *P. L. Roy* and Babu *Issur Chunder Chakravarti*, for the petitioners.

The Advocate-General (Sir *Charles Paul*) and Babu *Baikunto Nath Das*, for the Crown.

[864] The following judgments were delivered by the High Court (MACLEAN, C.J., and BANERJEE, J.) :—

JUDGMENTS.

MACLEAN, C. J.—It is only necessary to refer to one or two facts in the history of this case. The petitioners were convicted of rioting on the 15th of March 1897, from which conviction they appealed to the Sessions Judge, who upheld the conviction. An application was then made to this Court to have the conviction set aside, upon the ground, to put it shortly, that the Magistrate had not exercised a proper judicial discretion, in refusing to allow certain witnesses, whom the accused desired to call, to be called.

That application was successful, and on the 5th July 1897, this Court made the rule absolute, and to quote the language of the Judges, they "set aside the conviction and sentence and sent the case back for re-trial, the Magistrate commencing the investigation from the point at which it was left on the 15th March before he delivered judgment."

It is obvious that the Judges of this Court were under the impression that the same Magistrate would continue to hear the case. It appears,

* Criminal Revision No. 239 of 1898, against the order passed by H. Maxwell, Esq., Officiating Sessions Judge of Assam Valley District, dated the 7th of February 1898, affirming the order passed by G. Balthasar, Esq., Assistant Commissioner of Goalparah, dated the 15th of November 1897.

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however, that that Magistrate had left the District, and another Magistrate had taken his place. The observations of the Judges of this Court, as to the Magistrate taking up the case where he had left it could not apply, and I am satisfied were not intended to apply, to the second Magistrate, who had not heard any portion of the evidence.

Then what occurred was this: I ought to mention that during this time the accused were out on bail. On the 6th August 1897 a mukhtear, purporting to appear for the accused, and I will assume, though the accused swear the contrary, that he had authority from them so to do, applied to the second Magistrate that certain processes for the attendance of witnesses for the accused might issue, and on the 9th of the same month, apparently upon the application of the same mukhtear, an order, as appears from the order sheet, was passed directing that warrants should issue against the witnesses named. On the 27th August, which was the first day upon which the accused were ordered to attend to be tried, the case was called on, and the [865] accused at once demanded that the witnesses who had been previously examined before the other Magistrate should be re-summoned and re-heard. The second Magistrate had not heard any of his evidence. The Magistrate refused that application upon the ground that the accused were too late in making it. His view, as I understand it, was that he had commenced his proceedings in the trial when he acceded to the applications of the 6th and 9th August, and that the demand by the accused can only be made when he commences his proceedings in the trial. To my mind this view is not well founded, and is calculated to materially prejudice the accused. The question turns upon the construction of proviso (*a*) to s. 350 of the Code of Criminal Procedure, as to which I cannot think there can be any reasonable doubt. That proviso is in the following terms: "In any trial the accused may, when the second Magistrate commences his proceedings, demand that the witnesses or any of them be re-summoned and re-heard." It will be noticed that the primary and, in one sense, the governing words of the proviso are, "in any trial," and, in my opinion, when the proviso speaks of the second Magistrate commencing his proceedings it must mean his proceedings upon that "trial." Now what is the "trial"? The "trial" to my thinking means the proceeding which commences when the case is called on, with the Magistrate on the Bench, the accused in the dock, and the representatives of the prosecution, and for the defence if the accused be defended, are present in Court for the hearing of the case. That is, I consider, the proceeding which is intended by the term "trial," and in my opinion the proper time for the accused to ask for the re-summoning and re-hearing of the witnesses is as soon as that trial commences before the Magistrate, and that he is entitled to make the demand at that time. The view placed upon the proviso by the Magistrate is far too narrow, for it means that the accused has lost the right given him by the proviso because an interlocutory application, as in this case, for enforcing the attendance of certain witnesses may have been previously granted by the Magistrate. This interlocutory order was not made at the trial, but before the trial, and with a view to the trial. In his explanation the Magistrate appears to attach but little importance to seeing the witnesses, but this would scarcely [866] appear to be a view shared by the Legislature, which, in the interests of the accused, has passed the proviso in question. As a general rule I think the second Magistrate taking up the case would be well advised to hear the whole case *de novo*. I may add, though in the view I take it is not necessary

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to decide it, that I am by no means satisfied that under the circumstances we could not have interfered under proviso (*b*) to s. 350. It is unfortunate that both the Magistrates in this case should have miscarried in their procedure, as there must be a retrial, virtually a third trial, and after the lapse of time since the occurrence, if an offence have been committed, as to which I express no opinion, the difficulty of proving the case may be increased. The rule must be made absolute, and as I understand the second Magistrate has now left the district, the case must be retried before the Magistrate who has taken his place.

BANERJEE, J.—I am of the same opinion. We are asked to set aside the conviction and sentence in this case on the ground that the Magistrate has acted in contravention of s. 350 of the Code of Criminal Procedure in deciding this case upon evidence recorded by his predecessor and in disallowing the application of the petitioners for the re-summoning and re-hearing of the witnesses. The ground upon which the Magistrate appears to have disallowed that application was that it was not made when he commenced the proceedings within the meaning of proviso (*a*) of s. 350, but was made at the third hearing of the case before him. Now this is how the facts stand: The accused, the petitioner before us, who had been originally convicted, having moved this Court, this Court set aside the conviction and sentence and sent the case back for retrial.

The first order that was recorded after the remand was dated the 6th August, and was an order recorded before the accused had appeared in Court. It was recorded in the presence of the gentleman who had acted as their mukhtear at the previous trial, and directed the mukhtear to put in a list of witnesses against whom he wanted processes to issue.

The second order, which was recorded on the 9th August, [867] was simply to this effect that warrants should issue against the witnesses named. And it was not until the day on which the third order was recorded, namely, the 27th August, that the accused appeared before the Magistrate; and on the same day they made an application under s. 350 of the Code of Criminal Procedure for the re-summoning and re-hearing of the witnesses who had been examined for the prosecution at the previous trial; and the question is whether it can be said that the proceedings after remand, that is, the proceedings before the Magistrate, who subsequently took up the case, commenced before the 27th August.

I am clearly of opinion that the question must be answered in the negative. For, although two orders were recorded previous to the 27th August, there is nothing to show that the accused had notice to appear before that day.

I may here observe that the procedure ordinarily observed, and the procedure which ought to be observed, when a case is remanded by a superior Court, should be for the inferior Court to make a preliminary order calling upon the parties to appear on a certain day on which the proceedings should commence. This does not appear to have been done here.

In all probability what was done was to send for the person who had acted as the mukhtear of the accused, and to call upon him to put in his list of witnesses, as the order of the 6th August would go to show.

The petitioners in their affidavit deny that this mukhtear had any instructions from them before they had entered appearance, and there is nothing to show that the mukhtear had any instructions from them previous to that.

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That being so, as has been very fully and clearly shown by the learned Chief Justice, the retrial could not be held to have commenced before the 27th, which was the first day when the accused entered appearance after remand; and if the retrial had not commenced, it could not be said that the proceedings of the Magistrate had commenced before that day.

I am, therefore, clearly of opinion that the Magistrate acted in contravention of the provisions of s. 350 in refusing the [868] application of the petitioner for the re-summoning and re-hearing of the witnesses.

A point was discussed as to whether s. 537 of the Code may not have the effect of curing the defect in the proceedings by reason of the Magistrate's refusal to re-summon and re-hear the witnesses. I am of opinion that that section cannot cure the defect. For it is of the utmost importance that the first Court that has to try a case should have an opportunity of observing the manner and demeanour of the witnesses in order that it may form a correct estimate of their evidence.

The only exception that the Code of Criminal Procedure contemplates is that referred to in s. 360. That provision is made evidently to meet the exigencies of the public service; but even that section provides that where the accused demands that the witnesses should be re-summoned and re-heard by a succeeding Magistrate, who takes up a case before it is finished, the demand should be complied with. A trial held by a Magistrate presiding in the Court of first instance upon evidence not recorded by him, and upon evidence given by witnesses, whose manner and demeanour he had not the advantage of observing, must ordinarily be considered to be a trial held not according to law, and without one of the most important guarantees for a correct decision; and if that is so, we must say that there has been a failure of justice. Section 537 therefore cannot cure the defect in this case.

Before concluding I wish to make one observation with reference to what has been said by the Magistrate in his explanation, namely, that where an occurrence has taken place many months before a witness gives his evidence, the advantage of observing his demeanour is not of much value.

I do not think that the question of time has anything to do with the matter. The advantage to be derived from observing the demeanour of witnesses is one that ought never to be undervalued.

The conviction and sentences will be quashed, and there must be a fresh trial before another Magistrate.

S, C. B.

25 C. 869 = 2 C.W.N. 463.

1898 APRIL 27.

APPELLATE CIVIL.

25 C. 869 = 2 C.W.N. 463.

[869] APPELLATE CIVIL.

Before Mr. Justice Trevelyan and Mr. Justice Stevens.

KULDIP SINGH AND ANOTHER (*Plaintiffs*) *v.* KHETRANI KOER (1*st Party*), *Defendant*, AND L. MACDONALD AND ANOTHER (2*nd Party*) *Defendants*.* [27th April, 1898.]

Contract—Hindu Widow—Reversioners—Settlement of Dispute—Ikrarnamah—*Condition in restraint of lease—Transfer of Property Act* (*IV of* 1882), *ss.* 10 *and* 15.

In an *ikrarnamah* executed by a Hindu widow on the one side, and her husband's cousins on the other, in settlement of disputes regarding her husband's estate, one of the conditions agreed upon was that if either of the parties should want to execute a lease jointly or individually, "it would be executed and delivered by mutual consultation of both the parties," and if "the document be not signed and consented to by both the parties, it shall be null and void." In a suit brought on the basis of the *ikrarnamah* to set aside a lease granted by the widow :

Held, there is nothing in any statute law which renders such a provision inoperative ; neither ss. 10 and 15 of the Transfer of Property Act (IV of 1882) nor any principle underlying them is applicable to it ; it is not an unreasonable provision ; there was no absence of equity in the arrangement, and effect should be given to it.

[R., 14 C.L.J. 303 = 16 C.W.N. 99 = 11 Ind. Cas. 301; 15 M.L.T. 361 = 24 Ind. Cas. 120.]

THE defendant, first party, Mussummat Khetrani Koer, was the widow of one Udit Narain Singh, who was great-grandson of Teka Singh, while the plaintiffs were the grandsons of the same person, Udit as well as the plaintiffs being descended in the male line. The question in this appeal was whether a lease granted by the widow to the defendants, second party, in respect of the shares left by Udit, for a term of years, was invalid by reason of a certain condition in an *ikrarnamah* executed by the plaintiffs and the widow in settlement of a dispute regarding Udit's property. The facts and the conditions of the *ikrarnamah* on [870] which the plaintiffs based their claim are sufficiently stated in the judgment of the High Court.

The lower Court held that the condition which imposed restriction upon the widow was void and it therefore dismissed the plaintiffs' suit. The plaintiffs appealed to the High Court.

Babu *Umakali Mukerjee* and Babu *Baldeo Narayan Singh*, for the appellants.

Mr. *Hyde*, Mr. *G. B. McNair* and Mr. *C. T. Geddes*, for the respondent.

The judgment of the High Court (TREVELYAN and STEVENS, JJ.) was as follows :—

JUDGMENT.

In this case we regret that we are unable to agree with the learned Subordinate Judge in the view he has taken.

The case is a simple one.

It is alleged in the plaint that there were three persons, Kuldip Singh, Pardip Singh and Udit Narain Singh, who formed a joint-Hindu family. Udit Narain Singh was a first cousin once removed of the others. On Udit Narain's death his interest passed to Kuldip Singh and Pardip Singh. As a matter of fact, Udit left a widow by name Khetrani Koer. Disputes

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* Appeal from Original Decree No. 216 of 1896, against the decree of Babu Jaggaddurlabh Mozoomdar, Subordinate Judge of Tirhoot, dated the 1st of May 1896.

1898 APRIL 27. — APPELLATE CIVIL. — 25 C. 869 = 2 C.W.N. 463.

arose between the plaintiffs, Kuldip and Pardip and Khetrani Koer, and those disputes were settled by an *ikrarnamah*. The *ikrarnamah* gives the lady possession for her life on account of her maintenance of her husband's share of the property, and there is a provision in it which has given rise to the present question. That provision is this: "If I (that is Khetrani Koer) take and execute any sort of document then it will be null and void. And be it known that if any party out of the two parties be under the necessity of executing a simple *pottah*, *zarpeshgi pattah*, *mokarari* and *kashtkari*, jointly or individually, then it would be executed and delivered by mutual consultation of both the parties, and if it be signed by both the parties, then it would be valid and trustworthy, and the document not signed and consented to by both parties shall be null and void." The lady executed a lease for eleven years in favour of the proprietors of the Dooria Indigo Concern. The plaintiffs claim that the execution of that lease is a breach [871] of this covenant, and that they are entitled to a declaration to that effect and to have the lease set aside. There were other questions raised, which have not been determined.

The learned Subordinate Judge has held that this covenant is invalid and has no operation. He has therefore dismissed the suit.

We are unable to follow the reasoning upon which he comes to that conclusion. Admittedly there is nothing in any statute law which renders such a provision inoperative. Sections 10 and 15 of the Transfer of Property Act have no application here; and we are unable to see any principle underlying those sections which can be applied to the present case, or that there was any sort of absence of equity in an arrangement of this kind. This was a settlement of a dispute, and effect should be given, as far as possible, to every portion of it. It is not at all an unreasonable provision that reversioners giving up their claim and allowing a Hindu widow to remain in possession of their property should wish to retain supervision over it and to prevent any acts on her part which might cause injury to their reversionary rights. A provision of this kind is not only not contrary to law, but is one which might reasonably be made in common prudence by reversioners. There being admittedly nothing in law to show that this covenant is illegal, effect must be given to it.

This does not dispose of the case. There are other questions. The case must, therefore, go back to the Subordinate Judge to have those questions determined, the decree of the lower Court being set aside. The respondents who appeared must pay the costs of the appeal.

The Court-fee on the memorandum of appeal will be refunded to the appellant under s. 13 of the Court Fees Act.

S. C. C. *Appeal allowed. Case remanded.*

25 C. 872.

1898 MARCH 21.

APPELLATE CIVIL.

25 C. 872.

[872] APPELLATE CIVIL.

Before Mr. Justice Trevelyan and Mr. Justice Banerjee.

LALA KANDHA PERSHAD (*Judgment-debtor*) *v.* LALA LAL BEHARY LAL (*Decree-holder*).* [21st March, 1898.]

Second appeal—Suit of the nature cognizable in Court of Small Causes—Execution of decree—Transfer of decree for Execution—Civil Procedure Code (Act XIV of 1882), *ss.* 223, 224, 228, 586.

A suit not exceeding Rs. 500 in value was brought in a Court exercising jurisdiction as a Court of Small Causes, and that Court passed a decree and transferred it for execution to the Munsif under ss. 223 and 224 of the Civil Procedure Code: the Munsif passed an order in execution, and the order was confirmed in appeal.

Held, that the words "suit of the nature cognizable in Courts of Small Causes" in s. 586 of the Code is equally applicable, whether the suit be brought in a Court of Small Causes or in any other Court; that s. 586 controls s. 228 in a case of this kind, and no second appeal would lie from the Munsif's order.

Barakh v. *Ram Sarup* (1) cited and approved.

[Rel., 10 Ind. Cas. 412; R., 27 C. 484 (487) = 4 C.W.N. 269; 16 C.L.J. 96 = 16 Ind. Cas. 975; 8 O.C. 405 (407); 23 Ind. Cas. 939.]

THIS was an appeal from an order passed in execution of a decree for Rs. 365 payable by instalments, which was made by the Subordinate Judge of Arrah in the exercise of his jurisdiction for the trial of suits cognizable by a Small Cause Court, up to Rs. 500 in value. The decree was sent for execution under ss. 223 and 224 of the Civil Procedure Code to the Munsif of Arrah before whom the judgment-debtor raised an objection on the ground of limitation. The objection was overruled by the Munsif as well as by the District Judge on appeal.

The judgment-debtor preferred a second appeal to the High Court.

Dr. *Asutosh Mukerjee*, for the appellant.

Mr. *C. Gregory*, for the respondent.

Mr. *C Gregory* on behalf of the respondent raised a preliminary objection on the ground that no second appeal lay in this case.

[873] The arguments on both sides appear from the judgment of the High Court (TREVELYAN and BANERJEE, JJ.) which was as follows:—

JUDGMENT.

The first question, which we have to determine, is whether a second appeal, that is an appeal to this Court, lies.

The suit was brought in a Small Cause Court. The decree was, under the provisions of s. 224 of the Civil Procedure Code, sent for execution to the Court of the first Munsif of Arrah, and certain landed property has been attached by such Court.

The judgment-debtor objected to the decree being executed on the ground that the application for execution was barred by the law of limitation. The learned Munsif disallowed that objection. There was an appeal to the Judge, who has upheld the Munsif's decision. A second appeal has been preferred to this Court. The respondent has objected that

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* Appeal from Order No. 369 of 1897, against the order of F.H. Harding, Esq., District Judge of Shahabad, dated 23rd of September 1897, affirming the order of Babu Mohim Chandra Sarkar, Munsif of Arrah, dated the 22nd of May 1897.

(1) 12 A. 579.

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no second appeal lies. We have to consider such objection. This question depends, in our opinion, entirely upon the construction which should be placed upon ss. 228 and 586 of the Civil Procedure Code. The former section provides that where a decree is sent for execution by the Court which passed it to another Court, the orders of the latter Court shall be subject to the same rules in respect of appeal as if the decree had been passed by itself. Section 586 provides that no second appeal shall lie in any suit of the nature cognizable in Courts of Small Causes, when the amount or value of the subject-matter of the original suit does not exceed five hundred rupees.

It is quite clear to our minds that the construction of the words a "suit of the nature cognizable in Courts of Small Causes" does not depend upon the tribunal in which the suit is brought, and is equally applicable whether the suit be brought in a Court of Small Causes or in any other Court. It was contended that this expression only applied to cases where suits are brought in Courts other than Courts of Small Causes. The result of this construction would be that there would be no second appeal where the suit was brought in a Court other than a Small [874] Cause Court, and there would be a second appeal where it had been brought in a Small Cause Court. This would be anomalous.

The case comes within the plain words of the section; and in our opinion s. 586 in a case of this kind controls s. 228. There is express authority on this question, *Harakh* v. *Ram Sarup* (1). With that authority we agree and hold that no second appeal lies. It is therefore unnecessary to consider the other question in this case. We dismiss the appeal with costs.

Preliminary objection allowed.

S. C. C. *Appeal dismissed.*

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25 C. 874 = 3 C.W.N. 12.

APPELLATE CIVIL.

Before Mr. Justice Prinsep and Mr. Justice Stevens.

BARODA SUNDARI GHOSE (*Plaintiff*) *v.* DINO BANDHU KHAN AND OTHERS (*Defendants*).* [11th July, 1898.]

Benami *transaction*—Benami *purchaser*—*Right of* benamidar *to sue for possession of immoveable property.*

A *benami* purchaser of immoveable property has no right to sue for recovery of possession of the same.

Hari Gobind Adhikari v. *Akhoy Kumar Mazumdar* (2) and *Issur Chundra Dutt* v. *Gopal Chundra Das* (3) followed.

Nand Kishore Lal v. *Ahmad Ata* (4) referred to.

Gopi Nath Chobey v. *Bhugwat Pershad* (5) distinguished.

[**Diss.**, 21 A. 380 = 19 A.W.N. 130; **F.**, 7 C.W.N. 229 (238); 7 Ind. Cas. 218; **Rel.**, 30 C. 265 (273); **Appr.**, 30 M. 245 (247) = 17 M.L.J. 174; **Cited.**, 21 Ind. Cas. 979 = 19 C.L.J. 34 (39); **D.**, 13 C.P.L.R. 33 (36).]

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* Appeal from Appellate Decree, No. 830 of 1896, against the decree of R. H. Anderson, Esq., District Judge of Mymensingh, dated the 24th of March 1896, modifying the decree of Babu Biprodass Chatterjee, Subordinate Judge of that District, dated the 27th August 1894.

(1) 12 A. 579. (2) 16 C. 364. (3) 25 C. 98.
(4) 18 A. 69. (5) 10 C. 697.

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JULY 11.
APPELLATE
CIVIL.
25 C. 874=
3 C.W.N.
12.

THE facts of the case appear sufficiently from the judgment of the High Court.

Dr. *Rash Behary Ghose* and Babu *Dwarka Nath Chuckerbutty*, for the appellant.

Mr. *Hill* and Babu *Jogesh Chunder Roy*, for the respondents.

[875] The judgment of the High Court (PRINSEP and STEVENS, JJ.) was as follows :—

JUDGMENT.

Chunder Nath Dey Sarkar, defendant No. 1, and Puddo Lochan Dey Sarkar, the deceased husband of defendant No. 2, mortgaged certain properties to Harish Chunder Shaha, who obtained an *ex-parte* decree against them. In execution of that decree Sorosoti Dasi and Rutton Moni Dasi successfully objected to the sale of their shares in these properties, and accordingly their shares were exempted from sale, the sale being held of only the remaining shares. These ladies having died, their shares passed to the mortgagors as reversionary heirs, and on application made by the decree-holder these shares were sold in satisfaction of the balance of the mortgage debt. An attempt to obtain possession through the Court failed, and proceedings under s. 334 of the Code of Civil Procedure were instituted, but were afterwards withdrawn by the decree-holder purchaser, who subsequently sold to the plaintiff. The present suit has been brought by this purchaser to obtain possession as against the judgment-debtors and purchasers from them.

Of the several points raised at the hearing of this second appeal, the principal one relates to the finding of the District Judge, that the purchase by the plaintiff was a *benami* purchase for her husband, and next, to its effect.

The appellant's pleader contends that there is no evidence in support of the District Judge's finding that it was a *benami* transaction. We think, however, that facts disclosed by the evidence of the plaintiff's husband, as set out in the judgment of the District Judge, are in themselves sufficient to establish this.

It next becomes necessary to consider the right of the plaintiff as *benamidar* to sue to recover the lands purchased. As an authority against this we are referred to the case of *Hari Gobind Adhikari* v. *Akhoy Kumar Muzumdar* (1) which has been followed in *Issur Chundra Dutt* v. *Gopal Chundra Das* (2), and we understand also in another case which has not been reported. These cases proceed on the practice of this Court in the cases [876] referred to in the case of *Hari Gobind Adhikari* v. *Akhoy Kumar Mazumdar* (1), and there are no cases in this Court to the contrary. On the other hand, we observe that in *Nand Kishore Lall* v. *Ahmad Ata* (3), the learned Judges of the Allahabad High Court have expressed a dissent.

We can see no reason to doubt the correctness of the law laid down by this Court on the cases mentioned.

In *Gopi Nath Chobey* v. *Bhugwat Pershad* (4) the learned Judges have no doubt expressed themselves generally in favour of the right of the *benamidar* to sue, but that was not a suit in ejectment, so we do not feel pressed by it. In this view it is unnecessary to decide the other points raised in this appeal. The appeal is, therefore, dismissed with costs.

B. D. B. *Appeal dismissed.*

(1) 16 C. 364. (2) 25 C. 98. (3) 18 A. 69. (4) 10 C. 697.

1898
MARCH 14.

APPELLATE CIVIL.

25 C. 876 = 2 C.W.N. 360.

25 C. 876 = 2 C.W.N. 360.

APPELLATE CIVIL.

Before Mr. Justice Trevelyan and Mr. Justice Banerjee.

HARKHOO SINGH (*one of the Defendants*) *v.* BUNSIDHUR SINGH AND OTHERS (*Plaintiffs*).* [14th March, 1898.]

Jurisdiction of Civil Court—Sale for arrears of revenue—Revenue Sale Act (XI of 1859), s. 33—Sale for arrears not due—Suit to set aside sale—Appeal to Commissioner.

A suit may be brought in the Civil Court to set aside a sale held under Act XI of 1859, on the ground that no arrears were due, although such ground was not declared and specified in an appeal to the Commissioner as provided for in s. 33 of Act XI of 1859.

Baijnath Sahu v. *Lala Situl Prasad* (1) followed.

Gobind Lal Roy v. *Ramjanam Misser* (2) distinguished and explained.

[F., 37 C. 107 = 11 C.L.J. 254 = 13 C.W.N. 710 = 1 Ind. Cas. 871 ; Rel., 15 C.L.J. 54 = 13 Ind. Cas. 959 ; R., 1 C.L.J. 565 (567) ; 13 C. L. J. 404 = 16 C. W. N. 805 = 10 Ind. Cas. 90 ; 17 M.L.J. 469 (471).]

THE facts material to the report of this case and arguments on both sides appear in the judgment of the High Court.

The purchaser (defendant No. 1) appealed to the High Court.

[877] Dr. *Rash Behary Ghose*, Moulvie *Mahomed Yusuf*, Babu *Karuna Sindhu Mukerjee*, Babu *Saligram Singh*, and Babu *Mahabir Singh*, for the appellant.

Babu *Srinath Das*, Dr. *Asutosh Mukerjee*, and Babu *Ganendra Nath Bose*, for the respondents.

The judgment of the High Court (TREVELYAN and BANERJEE, JJ.) was as follows :—

JUDGMENT.

In this case the learned Subordinate Judge, from whose judgment the present appeal has been preferred, has set aside a sale purporting to be for arrears of Government revenue, on the ground that there were no arrears, and that, therefore, the Collector had no power to sell the property.

The first question which we have to determine is whether there were any arrears. If there were arrears, it would follow that the suit must fail. If there were no arrears, there remains the question whether, having regard to the fact that the absence of arrears was not declared and specified in an appeal to the Commissioner, the provisions of s. 33 of the Revenue Sale Law do not bar this suit.

With regard to the first question, we had at first some little difficulty in understanding the decision of the learned Subordinate Judge, but when we come to examine the evidence, we see no reason to differ from the conclusion at which he has arrived. There was a *butwara* of this property, and after partition the revenue and instalments of revenue were fixed by the Commissioner of Revenue. These instalments are shewn in Ex. 1, which is a copy of an extract from the revenue roll register. The *kists* are there specified ; the first of these being for April, Rs. 33-2-0, the last of these being the *kist* of March Rs. 16-9-0. By s. 2 of the Revenue Sale Law if the whole or any portion of a *kist* of any

* Appeal from Original Decree No. 262 of 1896, against the decree of Babu Upendra Chunder Mullick, Subordinate Judge of Patna, dated the 26th of August 1896.

(1) 2 B.L.R. (F.B.) 1 = 10 W.R. (F.B.) 66. (2) 21 C. 70 = 20 I.A. 165.

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month of the era, according to which the settlement and *kistbundi* of any mehal have been regulated, be unpaid on the first of the following month of such era, the sum so remaining unpaid shall be considered an arrear of revenue. We must take it that this register proves that the *kistbundi* was regulated according to the Christian era, and therefore the [878] instalment for March did not become an arrear of revenue until the 1st of April.

Under s. 3 of the Revenue Sale Law the Board of Revenue has to determine upon what dates all arrears of revenue shall be paid up, in default of which payment these estates shall be sold. The dates which have been fixed are admittedly the 28th of June, the 28th September, the 12th January and the 28th March. It would follow that as the March *kist* did not become in arrear until the 1st of April, the property could not be sold in respect of it unless default had continued until the 28th of June, which was the next fixed date after that instalment became in arrear.

The whole difficulty has here risen in consequence of the zemindari account register being kept with reference both to the Christian era and to the Fusli era, which is prevalent in the district. That register gives the *kists* of amounts corresponding to those described in the revenue roll register, but the months when these *kists* are payable are differently described.

An attempt was made by the learned vakil for the appellant to induce us to assimilate the month in the two registers, the effect of which would be to compel us to alter the amounts payable in respect of each *kist*. The sum total would, of course, be the same.

It is perfectly obvious, from a comparison of the two registers to which we have referred, that the course adopted by the officer who computed the zemindari account register has been to call the April *kist*, the *kist* for March or Cheyt; the May *kist*, the *kist* for April or Bysack; the June *kist*, the *kist* for May or Jeyt; the October *kist*, the *kist* for September or Assin; the November *kist*, the *kist* for October or Kartick; the December *kist*, the *kist* for November or Aughran; the January *kist*, the *kist* for December or Pous; the February *kist*, the *kist* for January or Magh; and lastly the March *kist*, the *kist* for February or Falgoon.

The inconvenience of mixing up the two eras is obvious, and [879] its practical effect has been to anticipate the due date of the several *kists*.

The next document of importance is the memorandum of demands, which shows how the sum of Rs. 3-8-2 for the non-payment of which this property has been sold, has been arrived at. According to that document, that sum is the balance after crediting all sums paid up to and including the 28th of March 1894, and after debiting the *kists* due, up to and including the *kist* of Rs. 16-9 which is described in the zemindari account as the *kist* of February or Falgoon, but which is in reality, as we have pointed out, the *kist* for March. If this *kist* of Rs. 16-9, which was due in reality on the 1st of April, had been omitted from the account, there would have been a surplus instead of a deficit, and, therefore, we must hold that there were no arrears for which a sale could take place.

Our attention has been drawn to a decision of a Division Bench of this Court, in which we are told that the circumstances are similar; but the learned Judges arrived at a conclusion different to that at which we have arrived. We need hardly remark that a conclusion of fact in another case can be in no way a precedent, and can be of little, if any, help to us.

Having found as a fact that there were no arrears, we have still to consider the only remaining question, namely, whether, having regard to

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the fact that the absence of arrears was not declared as a ground of appeal to the Commissioner, the provisions of s. 33 of the Revenue Sale Law bar this suit.

There is no doubt that this question was authoritatively determined by a Full Bench of this Court in the case af *Baijnath Sahu* v. *Lala Sital Prasad* (1), and has also been decided in several other cases.

It has, however, been argued that the Judicial Committee of the Privy Council in *Gobind Lal Roy* v. *Ramjanam Misser* (2) have expressed an opinion inconsistent with the decision of the Full Bench.

[880] In our opinion their Lordships did not express any intention of travelling beyond the points which arose in the particular case.

In that case there were arrears of revenue, and the sale was for such arrears, but it was held good in spite of an express prohibition in the Act.

The decision of their Lordships is to be found in the following words:—

"Giving, however, full weight to these considerations, their Lordships, having regard to the scheme of the Act and the express direction contained in s. 33, are of opinion that in every case where a sale for arrears of revenue is impeached as being contrary to the provision of Act XI of 1859, no grounds of objection are open to the plaintiff which have not been declared and specified in an appeal to the Commissioner.

" In the opinion of their Lordships a sale is a sale made under the Act XI of 1859 within the meaning of that Act, when it is a sale for arrears of Government revenue held by the Collector or other officer authorized to hold sales under the Act, although it may be contrary to the provisions of the Act either by reason of some irregularity in publishing or conducting the sale, or in consequence of some express provision for exemption having been directly contravened."

If there were no arrears, this was not a sale for arrears of revenue, and there is nothing in the decision of the Privy Council which can be in point in this case.

We dismiss the appeal with costs. No reference was made at the hearing to the cross-objection.

S. C. C. *Appeal dismissed.*

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[881] APPELLATE CIVIL.

Before Sir Francis William Maclean, K. C. I. E., Chief Justice, and Mr. Justice Macpherson.

MOKOOND LAL SINGH (*Petitioner*) *v* NOBODIP CHUNDER SINGHA AND ANOTHER (*Opposite-Party*).* [1st April, 1898.]

Guardian—Appointment of Guardian—Guardians and Wards Act (VIII of 1890), ss. 9 and 17—Application by a Christian father to be appointed guardian of his Hindu minor son—Matters to be considered by the Court in appointing guardian.

A, who was originally a Hindu, but afterwards became a Christian and abandoned his family residence, applied to be the guardian of the person of his minor son. On the objections of the paternal and maternal uncles of the boy that, under the circumstances of the case, the father was not a fit and proper person to be appointed the guardian of the minor,

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* Appeal from Order No. 236 of 1897, against the order of G. K. Deb, Esq., District Judge of Nuddea, dated the 3rd of April 1897.

(1) 2 B.L.R. (F.B.) 1 = 10 W.R. (F. B.) 66. (2) 21 C. 70 = 20 I. A. 165.

Held, although the father is *prima facie* entitled to the custody of his infant child, he can be deprived of such parental right if the circumstances justify it; therefore in a case where a child who was brought up as a Hindu, and who expressed a desire to remain a Hindu, and was living with his Hindu relation, who was maintaining him and was looking after his education properly, it would not be to the welfare of the child that he should be handed over to the father and brought up in the Christian faith, and that the Court below, under the circumstances of the case, was right in dismissing the application.

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[**Appr.**, 13 Ind. Cas. 453 = 22 M.L.J. 247 = 11 M.L.T. 53 = (1912) M. W. N. 53; **Cited.**, 21 Ind. Cas. 789 (807) = 15 M.L.T. 1 (33) = 25 M.L.J. 661 (708) = 1914 M. W. N. Suppt. 1 (XXIV); **D.**, 60 P.R. 1901 = 167 P.L.R. 1901.]

THIS appeal arose out of an application made by one Mokoond Lal Singh, under s. 9 of the Guardians and Wards Act (VIII of 1890), to be appointed the guardian of the person of his minor son, a boy of 12 or 13 years of age. The applicant, who was originally a Hindu, was converted to Christianity on the 23rd April 1893, when he abandoned his family residence and left his minor son in the custody of his grandfather, a Hindu; and since the latter's death, the boy was living with his maternal uncle. The application was opposed by the maternal uncle of the minor, as also by his paternal uncle. The District Judge of Nuddea, upon the evidence, having found that the welfare of the minor would not be promoted by making him over to the custody of his father, [882] dismissed the application. Against this judgment the applicant appealed to the High Court.

Dr. *Ashutosh Mookerjee*, Babu *Hara Prosad Chatterjee*, and Babu *Gyanendra Nath Bose*, for the appellant.

Babu *Monmotha Nath Mitter*, for the respondent.

Babu *Hara Prosad Chatterjee*, for the appellant, contended that a Hindu father is not deprived of his right to the custody of his children, merely because he has been converted to Christianity. See the cases of *Muchoo* v. *Arzoon Sahoo* (1) and *Skinner* v. *Orde* (2). A Hindu is *prima facie* entitled to the custody of his children as natural guardian in preference to other relations. See Mayne's Treatise on Hindu Law and Usage, 5th Edition, paras. 192 and 193. He also referred to s. 17 of the Guardians and Wards Act, and argued that the words in cl. (2) of the said section to the effect that, in considering what will be the welfare of the minor, the wishes, if any, of the deceased parent should be regarded, clearly show that the parent, if alive, would have a preferential right to the custody of his children.

Babu *Monmotha Nath Mitter*, for the respondent.—Under s. 17 of the Guardians and Wards Act, in appointing a guardian the Court should be guided by what, consistently with the law to which the minor is subject, appears in the circumstances to be for the welfare of the minor. In this case it will not be to the welfare of the minor if he is made over to his Christian father. He referred to the following cases: *In re Newton* (3), *In re McGrath* (4), *The Queen* v. *Gyngall* (5), *In re Joshy Assam* (6), and *In the matter of Saithri* (7); and he also referred to the Treatise on *Minority* by Trevelyan, pp. 78 and 236.

Dr. *Ashutosh Mookerjee* in reply, referred to the following [883] cases: *Kanahi Ram* v. *Biddya Ram* (8), *Queen* v. *Nesbitt* (9), *In re Himnauth Bose* (10), *In re Agar Ellis* v. *Lascelles* (11).

(1) 5 W.R. 235.
(2) 14 M.I.A. 309 = 10 B.L.R. 125.
(3) L.R. (1896) Ch.D. Vol. I. 740
(4) L.R. (1893) Ch. D. Vol. I. 143.
(5) L.R. (1893) Q.B. Vol. II. 232.
(6) 23 C. 290.
(7) 16 B. 307.
(8) 1 A. 549.
(9) (1843) Perry's O.C. 103.
(10) (1863) 1 Hyde, 111.
(11) (1883) L.R. 24 Ch. D. 317 (328).

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The judgment of the High Court (MACLEAN, C.J., and MACPHERSON J.) was as follows :—

JUDGMENT.

MACLEAN, C. J.—This is an application by a father, originally of the Hindu persuasion, but now a Christian, to have himself appointed guardian of his infant son, a boy of about 12 years old. The real object of the application is to obtain the custody of the minor. There is virtually no dispute as to the facts. The father in April 1893 embraced Christianity, and then, if he did not actually abandon, at any rate left his child under the care and custody of his grandfather, who was a Hindu, and after his death he remained, as he still is, in the care of his uncle, who is also a Hindu. The boy, hitherto, has been brought up in the Hindu religion, surrounded by Hindu relations. There is no suggestion, least of all any well-founded suggestion, that the child is not being well cared for, or that he is unhappy. No considerations of that nature arise. The father is about 33 years old : he is not well off, his monthly income being some 15 rupees. He apparently lives at a Christian Mission House at Hooghly, and is paid his salary by the Mission. The mother of the child is dead, and the father has recently married a young Christian girl. A somewhat loose suggestion of immorality is made against the father, but I attach no importance to this. After he left his child, the father contributed nothing to his support, has attempted but once to see him : and, beyond that, has taken no notice of him whatsoever. The present application is dated the 9th July 1896. The circumstances of the boy's Hindu relations appear to be good. The District Judge of Nuddea refused the application : hence the present appeal.

I do not think there is any substantial difference in the law applicable to a case such as this, between the law of England and the law of India, except so far as the Guardians and Wards [884] Act (VIII of 1890) may create any difference. That Act is mainly, if not entirely, based upon the principles of English law. The English authorities establish that, even as against the *prima facie* legal right of the father to the custody and control of the education of his child, the real object to be considered is the welfare of the child, and under s. 17 of the Guardians and Wards Act the Court has to be guided by what, consistently with the law to which the minor is subject, appears under the circumstances to be for his welfare. The boy has been examined, and has expressed a preference to remain with his Hindu uncle, and to continue in the Hindu religion, and not to become a Christian ; and though, having regard to his age, and to the possibility that this expression of his wishes may have been suggested to him by his Hindu relations, too much importance must not be attached to what he says, it is a feature in the case which ought not to be left entirely out of consideration. There is no doubt that under the Hindu law, as under the English, the father is *prima facie* entitled to the custody and control of his infant child, and it is for those who maintain the contrary to show that, under the particular circumstances of the particular case, he ought to be deprived of such initial parental right. That he can and may be so deprived if the circumstances justify it, is well established by many cases in the English Courts, one of the most recent being that of *In re Newton* (1), and also in the Indian Courts [see *In the matter of Saithri* (2), and the recent case in this Court before Mr. Justice Sale of *In re Joshy Assam* (3)]. In the above case in the Bombay

(1) L. R. (1896) Ch. D. Vol. I, 740. (2) 16 B. 307. (3) 23 C. 290.

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High Court, Mr. Justice Bayley very carefully reviewed all the authorities, English and Indian, upon the point.

There are some matters incident to this question,—and one can scarcely avoid, if not concluding, at any rate suspecting, that the real question in this litigation is as to whether this child is to be brought up as a Christian or as a Hindu,—which to my mind are fairly well established. The authorities appear to me to establish that *prima facie* the father is entitled to say in what religion his [885] infant child should be brought up, but, at the same time, that, in a proper case, there is undoubted jurisdiction in the Court to disregard those wishes. But the circumstances must be at least unusual to justify the Court, in so acting.

As was said by Lord Justice Lindley in the case of *In re Newton* (1): "But as a legal proposition, it is clear that the Court has jurisdiction in a proper case to deprive a father of the custody of his children, and it also has jurisdiction to decline to change the religion in which the children have been brought up." Our attention has not been drawn to anything showing, nor has it been argued, that this statement of the law does not apply equally to a Hindu father and child as to an English father and child.

Then we have to consider what is really for the welfare of this minor, using the term 'welfare' in its widest sense, and looking, not only to the question of money and comfort, but to the moral and religious welfare of the child and to the ties of affection. I need scarcely point out, as has been stated by Judges in the Courts of England, that the Court, judicially administering the law, cannot say that one religion is better than another. As I have indicated above, the Guardians and Wards Act says, we must look to the welfare of the child. Those being the principles of law applicable to the present case, and bearing in mind those principles and the initial right of the father to the custody of his infant child and to control its religious education, we must consider whether it is for his welfare that the child should be handed over to the father, and brought up, as the father states is his intention, in the Christian faith. Looking to the fact that when the father embraced Christianity in 1893 he was of, and the child had been brought up in, the Hindu religion, that in 1893 he left the child with his own father who was a Hindu, that on the latter's death he tacitly permitted the child to be taken care of by his maternal uncle, who was also a Hindu, that since April 1893 he has not contributed anything towards his child's maintenance or education, that virtually he has not attempted to recover the custody of his child until he instituted these proceedings, and, practically, has only seen him once, to the fact that (as is sworn to by his brother [886] the witness Nabadwip Chunder Singh) he said "when he was going to become a Christian that he did not want his son, nor his father, nor his brother nor anybody" (a by no means improbable statement in his then mood), to the fact that the child, with the father's assent, has been brought up as a Hindu, that he (the child) respects the Hindu gods and goddesses, and that he has himself, a boy of 12 or 13 years old, expressed a preference not to become a Christian: looking, I say, to all the circumstances, not separately, but collectively, I am of opinion that the District Judge was justified in his conclusion that it was not for the child's welfare that he should be handed over to the custody of his father. In arriving at this conclusion, one must not lose sight of the

(1) L. R. (1896) Ch. D. Vol. I, 740.

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circumstances that if the child become a Christian, he becomes an outcast from his old religion, and if when he attains his majority he desires to return to that religion and method of life, he will only, if at all, be able to do so upon performing strict and possibly costly expiatory ceremonials. For some years this child has been allowed by his father to remain with his Hindu relations, who are willing to educate and take care of him, and who have, in fact, maintained and educated him for some years at their own cost, and has been permitted by his father to be brought up according to the rites of the Hindu religion, the tenets of which, having regard to his age, are not improbably impressed to some extent upon his mind and understanding; and if now he be handed over to his father, such a course must necessarily result in breaking the ties of affection and destroying the associations connected with his life with his Hindu relations. I cannot bring my mind to think that this can really be for the child's welfare. Jealous as the Court is and ought to be in interfering with the legal right of the father as regards the custody and religious training of his child, I consider that, under the circumstances of this case, the father must be regarded as having abdicated his strict legal parental rights, and that it would be (as has been said by a most learned and distinguished Judge) a capricious, if not a cruel, resumption of his paternal authority, if he could now compel his child to be brought up henceforth as a Christian, which admittedly would be the result of handing over the child to the custody of his father. Looking [887] at all the circumstances of the case, I think the Court below was justified in its conclusion, and that this appeal must be dismissed. We, however, give no costs.

MACPHERSON, J.—I am entirely of the same opinion and have nothing to add to the judgment of the learned Chief Justice.

S. C. G. *Appeal dismissed.*

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25 C. 887 = 2 C.W.N. 508.

ORIGINAL CIVIL.

Before Mr. Justice Jenkins.

KHETTER KRISTO MITTER (*Plaintiff*) *v.* KALLY PROSUNNO GHOSE (*Defendant*).* [4th April, 1898.]

Costs—Attorney's lien for costs—General jurisdiction of Court over all suitors—Compromise by parties without knowledge of attorney—Lien, Notice of—Attorney and Client.

The decree obtained by the plaintiff in a suit was satisfied by defendant behind the back of the plaintiff's attorney, although he had notice of the lien for costs of the plaintiff's attorney. The plaintiff's attorney thereupon applied for an order upon the plaintiff and the defendant, or either of them, to pay his costs:

Held, that the High Court has general jurisdiction over its suitors; that although a defendant has the right to compromise with a plaintiff without the knowledge of the plaintiff's attorney, such compromise must be made with the honest intention of ending the litigation, and not with any design to deprive the attorney of his costs, and he cannot make a payment to the plaintiff under that compromise, if he has notice of the lien for the costs of the plaintiff's attorney.

[**Diss.**, 27 C. 269 (271) = 4 C.W.N. 208; **F.**, 30 B. 27 = 6 Bom. L.R. 879; **R.**, 7 Bom. L.R. 547.]

THIS suit was instituted in 1887, the attorneys for the plaintiff at that time being Messrs. Gregory and Jones. Subsequently Babu Mohini

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* Application in Original Civil Suit No. 159 of 1887.

Mohun Chatterji became the attorney, and at the plaintiff's request he paid a sum of Rs. 2,192-7-6 to the former attorneys in satisfaction of their bill of costs. On 9th September 1895 a decree was passed for Rs. 17,000, each party to bear his own costs. The costs up to and including the decree were taxed as between attorney and client, and Rs. 2,017-13-6 were allowed. Subsequent costs to the amount of Rs. 613 were further incurred. From time to time payments on account were made, leaving Rs. 914-4-9 [888] finally due from the plaintiff to Babu Mohini Mohun Chatterji. In execution of the above decree, certain immoveable property was attached and advertised to be sold on 10th March of this year. In the meantime the defendant, without the knowledge of the attorneys on either side, had settled with the plaintiff personally, and an application was made on behalf of the defendant for stay of the sale. That application was granted with the object of keeping matters in *statu quo*.

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The compromise made no provision for payment of Babu Mohini Mohun Chatterji's costs, and the present application was, therefore, now made for an order upon the plaintiff and the defendant, or either of them, to pay to him Rs. 914-4-9, being the balance of his costs, and also his costs subsequent to the decree to be taxed, and in default that he be at liberty to proceed with the sale of the property attached or for such other order as to the Court may seem meet. It was admitted that Babu Mohini Mohun Chatterji had informed the defendant of his lien for costs.

Mr. *Sinha*, for Babu Mohini Mohun Chatterji.—The authorities in England show that, although the parties are entitled to compromise, no payment can be made under it to the prejudice of the attorney's lien after notice of it has been given to the person by whom the payment is made, and the same rule applies here. In this case the defendant was informed of the lien for costs.

Mr. *J. G. Woodroffe*, for the defendant.—This Court has no jurisdiction *brevi manu* to make the order asked for. There is no such practice in these Courts. See *Domun* v. *Emaum Ally* (1) and *Mahomed Zohuruddeen* v. *Mahomed Nooroodeen* (2). The notice of lien also must be of a more definite character than the notice given in this case : *Price* v. *Crouch* (3). Further, inasmuch as part of the aggregate claim consists of costs paid to a prior attorney, no lien to that extent can be claimed: *Christian* v. *Field*(4).

ORDER.

[889] JENKINS, J.—This suit was commenced in 1887, the attorneys for the plaintiff being at that time Messrs. Gregory and Jones. Later on there was a change to Babu Mohini Mohun Chatterji, and on the occasion of that change he paid a sum of Rs. 2,192-7-6 to the former attorneys at the plaintiff's request. On the 9th September 1895 a decree was passed, and by it a sum of Rs. 17,000 became payable from the defendant to the plaintiff. Each party was to bear his own costs of the suit. The costs up to and including the decree have been taxed as between attorney and client, and Rs. 2,017-13-6 have been allowed on that taxation. Subsequent costs to the amount of Rs. 613 have also been incurred. From time to time payments on account have been made, which leave Rs. 914-4-9 still due from the plaintiff to Babu Mohini Mohun Chatterji on account of his costs, besides subsequent costs which are still untaxed.

In execution of the decree in the suit certain immoveable property was attached and advertised to be sold on the 10th March of this year.

(1) 7 C. 401.
(2) 21 C. 85.
(3) (1891) 60 L. J. Q. B. 767.
(4) (1842) 2 Hare 177.

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In the meantime, however, the defendant had settled with the plaintiff personally without the intervention of the attorneys on either side, and an application was made on the 10th March for stay of the sale. That application was granted for the purpose of keeping matters solely in *statu quo*, and not so as to prejudice the rights which otherwise existed.

The compromise to which I have referred made no provision for payment of Babu Mohini Mohun Chatterji's costs, and he has accordingly made this present application that the plaintiff and the defendant or either of them, be ordered to pay to him Rs. 914-4-9, being the balance of his costs, and also his costs subsequent to the decree to be taxed, and in default that he be at liberty to proceed with the sale of the property attached or for such other order as to the Court may seem meet.

This claim on the part of the applicant is based on the right commonly known as an attorney's lien on the fund recovered in suit. Whether that is the most appropriate mode of description it is unnecessary to discuss, for the nature of the right is free from doubt.

[890] It is a claim on the part of the attorney to have secured to him his due reward out of the fruit of his labour, and for that purpose to call in aid the equitable interference of the Court. But while the right is clear, it must be conceded that the litigants themselves are really masters of the suit, and that it is within their power to compromise it without the acquiescence or even the knowledge of their attorneys. The exercise of this right, however, is subject to important qualifications. In the first place the compromise must have been made with the honest intention of ending the litigation, and not with any design to deprive the attorney of his costs; and, secondly, no payment can be made under the compromise to the prejudice of the attorney's claim after notice of it has been given to the person by whom the payment is made.

These principles appear to me to be the clear result of the authorities in England; and founded, as they are, on justice, equity and good conscience, I see no reason why they should not apply in this country. Now the applicant on this occasion claims that both conditions to which I have referred exist, though it is clear it would suffice for his purpose, if he can establish either of them. The facts on which he relies as establishing his position by virtue of notice given are set forth in that part of his affidavit which commences with para. 6. He says: "I personally informed the defendant for whom I acted as attorney in a suit in this Honourable Court, being suit No. 770 of 1894, wherein Gooroo Prosunno Ghose was the plaintiff and the defendant herein was the defendant, of my said lien for costs, and at the time when I informed the defendants as aforesaid, Babu Prosunno Chunder Roy, a vakil of this Honourable Court, who was instructing me on the defendant's behalf in the said suit, No. 770 of 1894, was present."

"That I have personally and repeatedly informed Babu Peari Mohun Chatterji, Dewan or Manager of the defendant's affairs, of my said lien."

The facts set forth in the paragraphs which I have just read are uncontradicted, and it is admitted on the part of the defendant that he had notice of the claim for a lien, so that the case would appear to come within the second of the qualifications I have mentioned.

[891] It has, however, been urged by Mr. Woodroffe, who has argued the case very fully and ably for the defendant, that it is not open to me to make the order asked for, and he has urged several objections. The principal objection is one which goes to the root of the whole matter,

and I will, therefore, deal with it first. He contends that the Court has no jurisdiction *brevi manu* to make such an order as is asked for, and in support of the objection he refers to the absence of any practice justifying such a procedure as is sought to be used on this occasion. In addition he has referred to two cases: one the case of *Domun* v. *Emaum Ally* (1); and the other the case of *Mahommed Zohuruddeen* v. *Mahommed Noorooddeen* (2).

The first of the two cases seems to me to have no application to the matter now under consideration. It simply refers to the question whether, on summary application, an order could be made directing a party to pay his attorney the costs of suit when taxed. It was held that such an order could not be made. That is a wholly different case from the present.

In the same way the case of *Mahommed Zohuruddeen* v. *Mahommed Nooroodden* (2) appears to me to throw no light on the point. The facts are shortly these: An atterney had by way of securing his costs taken a deposit of title deeds, and made a summary application in a suit to which he was no party to have that equitable lien enforced. It was held he should, if he desired to enforce his equitable lien, commence a suit of his own. I fail to see how a decision on those facts can in any way negative the applicant's right to proceed in the manner he has selected.

The present application appears to me to be based on the principle that the Court has general jurisdiction over its suitors, and I see no reason why that jurisdiction should not be as fully vested in a Court here as it is in the English Courts. I therefore think it is open to the Court to deal with this particular question on a summary application framed as the present is.

[892] The other objection raised by Mr. Woodroffe were not of so far-reaching a character. He referred to *Price* v. *Crouch* (3) as authority for the proposition that notice of lien must be of a more definite character than the notice given in this case. I find nothing in the decision given in that case which calls for the conclusion that the notice given by the applicant in the present case was insufficient, for there it was simply held as a matter of fact that the notice was insufficient, because it was not in any sense a notice of lien, but merely of an expectation that provision would be made for costs.

In the present case the attorney has given, in the clearest terms that could have been used, notice that he did claim a lien for his costs of the suit.

Another point urged by Mr. Woodroffe was this: He contended that inasmuch as part of the aggregate claim consists of costs paid to a prior attorney, no lien to that extent can be claimed, and in support of that proposition he referred to the case of *Christian* v. *Field* (2). That case is not an authority for the broad proposition in support of which it was cited.

Be this however as it may, the state of facts on which the argument is based has no existence here, for I do not find that the unpaid balance of costs is in any way made up of the amount paid by Babu Mohini Mohun Chatterji to Messrs. Gregory and Jones. That amount was the earliest item in the account, and if Mr. Woodroffe's argument is correct, it is unsecured, and I certainly should presume that the payments already

(1) 7 C. 401.
(2) 21 C. 85.
(3) (1891) 60 L.J. Q.B. 767.
(4) (1842) 2 Hare, 177.

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received were, under the circumstances, attributed in the first place to the discharge of that amount.

I have now dealt with all the points raised except that as to the proper form of the order. I hold in this case that sufficient notice of lien was given by the attorney, Babu Mohini Mohun Chatterji, to the defendant before payment was made by him under the compromise, and I, therefore, come to the conclusion that Babu Mohini Mohun Chatterji's present application is [893] rightly conceived. I may add, I think, it is very desirable in this country, both in the interests of attorneys and in the interests of litigants themselves that the Court should possess a power to interfere summarily, as has been done in this case.

I direct payment of the amount of costs, which have been taxed, and subsequent costs when they have been taxed, by the plaintiff and the defendant, including the costs of this application.

[Mr. *Sinha* asks that the application be certified for counsel. The Court certifies for counsel.]

Attorney for the plaintiff : Mr. *M. M. Chatterji.*

Attorney for the defendant : Mr. *W. C. Roy.*

C. E. G.

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25 C. 893.

ORIGINAL CIVIL.

Before Sir Francis W. Maclean, K. C. I. E., Chief Justice, Mr. Justice Banerjee and Mr. Justice Jenkins.

CHUNI LAL AND OTHERS (*Defendants*) *v.* ANANTRAM AND OTHERS (*Plaintiffs*).* [14th June, 1898.]

Costs—Application for stay of execution—Practice.

Where the defendants in an original suit applied to the appellate Court for stay of execution of the decree pending the appeal :

Held (BANERJEE, J., dissenting) that the applicant who asked for the indulgence must pay the costs of the application.

[R., 10 C.L.J. 631 = 4 Ind. Cas. 746.]

THIS was an application for stay of execution of the decree passed in this suit by Mr. Justice P. O'Kinealy sitting on the original side of the Court.

Mr. *Allen*, for the appellant.—Applications of this nature can be heard by the Judge sitting on the original side, and the practice of getting an appellate bench appointed for the purpose of hearing such applications is cumbrous and inconvenient. The original side has ample jurisdiction to deal with such applications—ss. 239 and 545 of the Civil Procedure Code. The decisions of NORRIS, J., in *Mahdab Kissen Sett* v. *Protap Chandra Ghose* (1) and of HILL, J., in *Courjon* v. *Leheraux* (2) which have altered the earlier practice of the Court are incorrect. [BANERJEE, J.—Section 545 contemplates that the appellate Court is the proper Court for such application after [894] appeal filed. MACLEAN, C J.—Section 545 does not seem in any way inconsistent with s. 239 of the Civil Procedure Code, but as in my view the appellate Court has jurisdiction and a Bench has

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* Application in Original Suit No. 406 of 1897.

(1) Unrep. Suit No. 98 of 1888 (4th June 1883).

(2) Unrep. Suit No. 267 of 1887 (10th May 1892).

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been specially formed to hear this application the discussion is somewhat academical. Besides it has been the practice of late years to make such applications to the appellate Court.]

Mr. *Chauduri*, for the respondents opposed the application for stay of execution, and submitted that the respondents were entitled to the costs of and incidental to the application—*Simpson* v. *Moore* (1).

Mr. *Allen* in reply.—The defendant is successful in this application inasmuch as he had obtained an order staying execution, and the costs should abide the result.

The following judgments were delivered by the High Court (MACLEAN, C. J., and BANERJEE and JENKINS, JJ.):—

JUDGMENTS.

MACLEAN, C. J.—The applicant must pay the costs of this application. He has come for an indulgence, and as he asks for an indulgence he ought to pay the costs of obtaining it.

That, in my view, is the principle which ought to apply generally to applications of this class, and that view is supported by the practice in the Courts of England. I think that should be the general rule; I do not say it is an inflexible rule. Any way under the circumstances of this case the applicant must pay the costs of the application.

BANERJEE, J.—I agree in the order made as to costs, having regard to the special circumstances of this case, which are that the decree-holder was, in the first instance, unnecessarily made to appear before the Judge on the original side upon this application for stay of execution. That is a point upon which, speaking for myself, I must say that the judgment-debtor has not been able to satisfy me that he was right. But, as a matter of general principle, I am of opinion that the costs of an application like this ought to abide the ultimate result. I do not think that an application like this is an application for an indulgence; when the law allows an appeal, and furthermore when it allows an appellant, upon proper cause being shown, to ask for [895] and obtain an order for stay of execution, it cannot be said that he asks for what is merely an indulgence. And looking at the reason of the thing, it would seem to be something more than an indulgence, being in fact what is necessary to enable the appellant to secure the full benefit of his success in the appeal. For when the law allows an appeal, if the appeal succeeds, and if, in the meantime, the party successful in the Court of first instance is able to enforce the decree of the first Court by the sale of any immoveable property of his judgment-debtor, the success of the appeal may not secure to the appellant all that he would be entitled to, as the reversal of a decree cannot affect the sale of any immoveable property held in execution thereof while it was in force.

That being so, I think that the applicant ought not to be made unconditionally liable for the costs, but that his liability should depend upon the result of the appeal.

There might be circumstances under which the costs of opposing an application like this should be made payable by the applicant independently of the result of the appeal. Thus, where the opposition has reference to the sufficiency of the security offered, and the security is found to be insufficient, so far as the costs may relate to the opposition to that extent, the applicant may justly be deemed liable for those costs independently of the result of the appeal; but he ought not to be made unconditionally liable for costs generally.

(1) 2 C.W.N. ccxxxi.

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JENKINS, J.—I agree as to the incidence of the costs, and I come to that conclusion for the reasons stated by the Chief Justice. Section 220 of the Code of Civil Procedure no doubt says: "If the Court directs that the costs of any application or suit shall not follow the event, the Court shall state its reasons in writing."

Assuming that the application has succeeded, still I think that there is ample reason in this case for requiring the applicant to pay the costs, because he is asking for an indulgence which will have the effect of interfering for the present with the enforcement by the respondent of his decree, and he who seeks such an indulgence should, in the absence of special circumstances, pay for it.

On these grounds I think the order proposed is right.

Attorney for the defendants (applicants): Babu *Ashutosh Dey*.

Attorneys for the plaintiffs: Messrs. *Fox & Mandal*.

C. E. G.

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25 C. 896 (F.B.).

[896] FULL BENCH.

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, Mr. Justice Macpherson, Mr. Justice Trevelyan, Mr. Justice Ghose, and Mr. Justice Rampini.

NABU MONDUL (*Plaintiff*) *v.* CHOLIM MULLIK AND OTHERS, MINORS, BY THEIR CERTIFICATED GUARDIAN SUDAN BIBI AND OTHERS (*Defendants.*)* [3rd February, 1898.]

Full Bench, Reference to—Power of a Single Judge sitting alone, to refer a case in which the value of the subject-matter in dispute does not exceed Rs. 50—*Division Court —Rules of the High Court, ch. V, Rule* 1, *ch. VI, Rules* 1 *and* 6—*Statute* 24 *and* 25 *Vic, cap.* 109, *s. XIII.*

A reference to the Full Bench cannot be made by a Judge of the High Court sitting alone to hear cases in which the value of the subject-matter in dispute does not exceed Rs. 50.

[R., 7 C.L.J. 309 (311); 13 C.L.J. 418=15 C.W.N. 752=10 Ind. Cas. 325; 15 C.L.J. 220=16C.W.N. 567=13 Ind. Cas. 606; D., 12 C.W.N. 987 (939).]

MR. JUSTICE RAMPINI sitting alone referred a second appeal, in which the value of the subject-matter in dispute did not exceed Rs. 50, to a Full Bench for a decision on the point "whether mere long continued possession of a parcel of homestead land, say upward of sixty years, and not *mokurari* or held at a fixed rent or rate of rent is sufficient to justify a Court in presuming that the tenancy of the land is of a permanent and transferable nature, or whether to justify such a presumption something more is required, *viz.*, proof of the land having been originally let out for the erection of *pucka* buildings, or building purposes, or proof of the landlord having stood by and allowed his tenant to erect *pucka* buildings, or expend large sums of money in making improvements of a substantial character."

The judgment of reference was as follows:—

"The plaintiff brings this suit to eject the defendants from a certain parcel of homestead land situated in the Munsifi of Baraset. The defendant No. 1 is a recent purchaser from the defendant No. 2. According

* Reference to the Full Bench in Appeal from Appellate Decree No. 1517 of 1896.

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to the plaintiff, the defendant No. 2 had no permanent or transferable interest in the land, and therefore the defendant No. 1 is in the position of a trespasser. The [897] defendant No. 1, however, pleaded that his vendor's ancestor took the land for dwelling purposes more than 50 years ago, that he and his successors have occupied the land ever since, and planted mango, cocoanut, and jack trees on it, that the interest of the defendant No. 2 was *kaimi*, *maurasi* and *mokurari*, and, therefore, that the defendant No. 2 had a right to transfer the land to him.

"The Munsif found (1) that there was no proof as to the origin of the tenancy. The origin, he said, was lost in obscurity; (2) the defendant No. 2's grandfather took a lease of the land over 60 years ago, and he and his successors have since resided there, having erected dwelling-houses with mud walls and planted mango, cocoanut and jack trees on it; (3) that "there is no evidence creating the tenure to be *maurasi*, *mokurari* or *kaimi*;" (4) that there was no evidence to prove that the tenure is transferable by custom; (5) that it could not be presumed to be *mokurari*; but (6) that it may be presumed that the land was acquired for building or dwelling purposes, and so that the tenancy was *maurasi*, *kaimi* and assignable. He, accordingly, relying on the cases of *Beni Madhab Banerjee* v. *Jai Krishna Mookerjee* (1) and *Gungadhur Shikdar* v. *Ayimuddin Shah Biswas* (2) dismissed the suit.

On appeal the Subordinate Judge said "that the respondents relied upon a *kaimi* right and a right founded on custom and long occupation." He then found that "there was not satisfactory proof of the *kaimi* right and custom, and therefore there are good reasons for making a differentiation between this case and that of *Beni Madhab Banerjee* v. *Jai Krishna Mookerjee* (1). He, however, went on to say "the long occupation of the respondents is not disputed in this Court, and from it the grant presumed by the lower Court was, in my opinion, presumable." He accordingly affirmed the Munsif's decree.

"The plaintiff now appeals, and on his behalf it has been pointed out that all that the Subordinate Judge has found in favour of the respondent is long occupation of the land by the defendant [898] No. 2 and his ancestors, and it is contended that this is not sufficient to justify the presumption of a permanent, and therefore of an assignable or transferable right, which the lower Courts have made in favour of the respondents. The learned pleader for the plaintiff, appellant, has cited the following cases in support of this argument of his (*viz.*), *Prosunno Coomaree Debea v. Rutton Bepary* (3), *Tarukpodo Ghosal* v. *Shyama Churn Napit* (4), *Prosunno Coomar Chatterjee* v. *Jagan Nath Bysack* (5), *Narayanbhat* v. *Davlata* (6) and *Secretary of State for India* v. *Luchmeswar Singh* (7), and he has further called my attention to the case of *Ramgopal* v. *Shamskhaton* (8) as showing that the question is one which raises a point of law upon which a Court would be justified in interfering in second appeal. This last-mentioned case is clear and convincing authority for the learned pleader's second contention, and I therefore propose now to consider the cases above referred to for the purpose of determining whether there is sufficient authority for the proposition laid down by the Subordinate Judge, *viz.*, that from mere long occupation of homestead land, extending over 60 years, a Court is justified in presuming a permanent and assignable grant.

(1) 7 B.L.R. 152. (2) 8 C. 960. (3) 3 C. 696.
(4) 8 C.L.R. 50. (5) 10 C.L.R. 25. (6) 15 B. 647.
(7) 16 C. 223=16 I.A. 6. (8) 20 C. 93=19 I.A. 228.

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"I will begin with the cases relied on by the Munsif, the first of which is that of *Beni Madhab Banerjee* v. *Jai Krishna Mookerjee* (1). In that case it was found that the tenures in question were transferable by the custom of the country. This completely distinguishes that case from the present one, in which both Courts have found that no custom of transferability has been proved in respect of such land as is the subject of dispute in this case. Moreover, in that case *pucka* buildings had been erected on the land. This is not the case in the present suit. There is further in that case an *obiter dictum* of Peacock, C. J., that if a man grants a tenure to another for the purpose of living upon the land [899] that tenure, in the absence of evidence to the contrary, is assignable. But this is a mere *obiter dictum*, and in the present case it has not been found that the lease was granted for the purpose of living upon the land. On the contrary, the origin of the tenancy is said to be unknown and to be lost in obscurity. In any case the land was not leased to the defendant No. 2's grandfather for the purpose of erecting *pucka* buildings on it.

"The next case relied on by the Munsif is that of *Durga Prasad Misser* v. *Brindaban Sookul* (2).

"In this case the lessee had been in possession of the land for 40 years; he had built mud buildings and had planted trees on it. It was accordingly held that he had an assignable interest in the land, but it was not held that he had a permanent interest in it. An interest may be assignable without being permanent; so that this case would seem to be no authority for the view taken by the lower Courts.

"In the next case cited by the Munsif, *viz.*, *Gungadhur Shikdar* v. *Ayimuddin Shah Biswas* (3) there is this difference between it and the present one that the lands in that case were apparently let out for building purposes and the buildings are described as being of a substantial character.

"I now turn to the cases cited by the learned pleader for the appellant. The first of them is *Prosunno Coomaree Debea* v. *Rutton Bepary* (4), in which the land was homestead land. It had been occupied by the defendants, their father and grandfather, for 60 years, a house had been built on the land and fruit trees planted on it and there was no evidence as to the origin of the tenancy. It was held that these circumstances were not sufficient to justify the presumption of a permanent grant, which could only be presumed from long and uninterrupted possession by the original grantee and his descendants, coupled with the fact of the land having been let by the landlord expressly for the purpose of the tenant building *pucka* houses upon it.

[900] "This was followed in the case of *Tarukpodo Ghosal* v. *Shyama Churn Napit* (5), in which it was laid down that there is no law in this country which gives anything in the nature of a protected tenure or holding to a person who has occupied a piece of homestead land, not forming part of an agricultural holding, however long may have been the period of his possession.

"The next case cited for the appellant is the case of *Prosunno Coomar Chatterjee* v. *Jagan Nath Bysack* (6). In that case it has been said: "The Subordinate Judge says that as the defendants and their ancestors have held this land for generations and have made gardens and dug tanks upon it, they cannot be regarded as tenants at will, but that they have a

(1) 7 B.L.R. 152. (2) 7 B.L.R. 159. (3) 8 C. 960.
(4) 3 C. 696. (5) 8 C. L.R. 50. (6) 10 C. L.R. 25.

permanent interest, the nature and extent of which he does not define, and cannot be turned out of their possession so long as they pay rent. This doctrine is directly opposed to several cases in this Court in which it has been held that the mere fact of land having been used for many years for purposes other than agricultural, or even as a homestead, is not enough to confer upon the tenants a permanent tenure [see *Addaito Charan Dey* v. *Peter Das* (1); *Prosunno Coomaree Debea* v. *Rutton Bepary* (2)]. No doubt if land is let for building *pucka* houses upon it, or if the tenant with the knowledge of the landlord does in fact lay out large sums upon it in buildings or other substantial improvements, that fact, coupled with long continued enjoyment of the property by the tenant or his predecessor in title, might justify any Court in presuming a permanent grant, especially if the origin of the tenancy could not be ascertained. But the mere circumstance of a tenant occupying buildings upon property would not justify such presumption, unless it could be shown that they were erected by him or his predecessor, because a landlord might let property of that kind in the same way as agricultural land at will or from year to year."

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"Thus, that case seems to lay down that mere long continued **[901]** enjoyment of property by a tenant or his predecessor in title is not sufficient to justify the presumption of a permanent grant, and that there must be more, *viz.*, either (1) the land must have been expressly let for building *pucka* houses upon it, or (2) the tenant must have, with knowledge of his landlord, laid out sums upon it in building or other substantial improvements.

"The next case cited for the appellant is that of *Secretary of State for India* v. *Luchmeswar Singh* (3) in which it has been decided by their Lordships of the Privy Council that possession at a low and unvaried rent from 1798 to 1873 does not justify the inference of a permanent grant. But that case is distinguishable from the present one, as in it the origin of the tenancy was well known, the land having admittedly been acquired for the purposes of a stud farm.

"Then, in *Narayan Bhat* v. *Davlata* (4) it was said by Sargent, C. J., 'Both Courts have assumed that the tenure in perpetuity as alleged by defendants could be established by merely long possession at an invariable rent. This is opposed to the rulings of this Court, unless it appears that it may be so acquired by local usage—*Babaji* v. *Narayan* (5).'

"The Subordinate Judge has alluded to the case of *Rakhal Das Addy* v. *Dino Moyi Debi* (6), and says it is distinguishable from the present, because the tenant in that case claimed a right of occupancy which was disallowed, as the subject of litigation was homestead land. This is quite true, but I think it supports the argument of the learned pleader for the appellant in this case that something more than mere long possession is required to justify a presumption of a permanent and transferable grant.

"There remains the case of *Dunne* v. *Nobo Krishna Mookerjee* (7). In that case, which was one under the Land Acquisition Act, it was held that, as the defendant had shown his possession of the land for over a hundred years, it was to be presumed that his interest was a permanent and transferable one. There **[902]** was no standing by on the part of the landlords, except that they never attempted to interefere with the possession of the defendants or to vary their rent. That is, therefore, an authority in favour of the view taken by the Subordinate Judge. It is,

(1) 13 B.L.R. 417 note=17 W.R. 383.
(2) 3 C. 696.
(3) 16 C. 223=16 I. A. 6.
(4) 15 B. 647.
(5) 3 B. 340.
(6) 16 C. 652.
(7) 17 C. 144.

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however, to be noticed (1) that the head-note in that case is in one respect incorrect: the defendant's rent receipts did not show possession over a hundred years: they extended over only more than 30 years: the possession of a hundred years was evidenced by oral testimony: (2) the learned Judges who decided that the defendant had a permanent and transferable interest in the land did not apportion the compensation in that case on this principle. They gave the defendant the share in the compensation to which he would have been entitled if the land had been agricultural and he had been an occupancy *raiyat*. On the finding that the defendant's tenancy was a permanent and transferable one, he would seem to have been entitled to the whole of the compensation money after deducting from it the capitalized value of the rent payable to the landlord, and the value of the landlord's right of reversion, if any.

" On a review of the above cited cases it would seem to me that in the case of *Dunne* v. *Nobo Krishna Mookerjee*(1) alone it has been held that mere long possession of homestead land is sufficient to justify the presumption of a permanent grant, but that all the other cases, *viz.*, *Prosunno Coomaree Debea* v. *Rutton Bepary* (2) ; *Tarukpodo Ghosal* v. *Shyama Churn Napit* (3); *Prosunno Coomar Chatterjee* v. *Jagun Nath Bysack* (4) ; and *Narayan Bhat* v. *Davlata* (5), show that this fact alone is not sufficient to justify such a presumption, and that before such an inference can be made there must be something more, *viz.*, either (1) the fact of the land having been let for the erection of *pucka* buildings ; or (2) the fact of the tenant to the knowledge of the landlord and without objection on his part having erected *pucka* buildings or having spent large sums in improvements of a substantial character. **[903]** The cases of *Gungadhur Shikdar* v. *Ayimuddin Shah Biswas* (6) and of *Rakhal Das Addy* v. *Dino Moyi Debi* (7) also support this view.

" In this conflict of rulings and as I disagree with the ruling in the case *Dunne* v. *Nobo Krishna Mookerjee* (1) I think it necessary to refer this case, the decision of which involves the determination of a question of much importance to a Full Bench, and the question I would propound for their decision is whether mere long continued possession of a parcel of homestead land, say for upwards of 60 years and not *mokurari* or held at a fixed rent or rate of rent, is sufficient to justify a Court in presuming that the tenancy of the land is of a permanent and transferable nature, or whether to justify such a presumption something more is required, *viz.*, proof of the land having been originally let out for the erection of *pucka* buildings or for building purposes, or proof of the landlord having stood by and allowed his tenant to erect *pucka* buildings, or expend large sums of money in making improvements of a substantial character.

" I would add that under s. 2, cl. (*c*), Act IV of 1882, the provisions of the Transfer of Property Act do not apply to the lease in this case, as it is admittedly of date anterior to the passing of the Transfer of Property Act [see *Hari Nath Karmoker* v. *Rajendra Karmoker* (8)]. If the case had been of later date, the defendant No. 2's interest would have been transferable [s. 108 (*d*)], but not necessarily of a permanent nature."

Dr. *Ashutosh Mookerjee* and Babu *Janendra Nath Bose*, for the appellant.

Babu *Chunder Kant Sen*, for the respondents.

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(1) 17 C. 144. (2) 3 C. 696. (3) 8 C.L.R.
(4) 10 C.L.R. 50. (5) 15 B. 647. (6) 8 C. 960.
(7) 16 C. 652. (8) 1 C.W.N. 136.

Babu *Chunder Kant Sen*, on behalf of the respondents, when the case came on for hearing before the Full Bench, took a preliminary objection to the hearing of it, on the ground that the reference to the Full Bench was not in accordance with law, inasmuch as a Judge of the High Court sitting alone could not **[904]** make such a reference, in a case in which the value of the subject-matter in dispute did not exceed Rs. 50.

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Dr. *Ashutosh Mukerjee* was heard on behalf of the appellant.

The judgment of the Full Bench (MACLEAN, C.J., and MACPHERSON, TREVELYAN, GHOSE and RAMPINI, JJ., concurring) was as follows :—

JUDGMENT.

MACLEAN, C.J.—A preliminary objection has been taken on behalf of the respondent in this case to the effect that a reference to a Full Bench cannot be made by a Judge of this Court sitting alone to hear cases in which the value of the subject-matter in dispute does not exceed Rs. 50. The point is one of considerable importance. Under Rule 1 of chap. V of the Rules of the High Court, Appellate side, a reference to a Full Bench can only be made when one Division Court differs from another Division Court upon a point of law or usage having the force of law. The question, therefore, to my mind resolves itself into this, whether a Judge sitting alone, as was the case here, is a " Division Court " within the meaning of the rule which I have just read. When we look at the rules carefully it will be found that in them distinctions are drawn between a Division Court and a Judge sitting alone. That is apparent from Rule 6, chap. VI, in which, speaking of appeals under cl. 15 of the Letters Patent, the rule says : "In every appeal under cl. 15 of the Letters Patent against the judgment of a Division Bench or of a Judge sitting singly on the Appellate side of the High Court." That shows the distinction which is drawn between a Judge sitting alone and a Division Court. In referring to that rule I am not unmindful of the argument which was addressed to us to the inference properly deducible from rule 1 of that chapter, which speaks of every appeal to the High Court under cl. 15 of the Letters Patent from a judgment of a Division Court on the Appellate side of the High Court. It was contended that, inasmuch as there was an appeal under that clause from the decision of a Judge sitting alone, and as the rule only refers to a Division Court, the inference was that a Judge sitting alone was to be treated and regarded as a Division Court within the meaning of the rule, and that an indication was **[905]** thus afforded that the distinction which I have suggested between a Division Court and a Judge sitting alone was not well founded. But giving all weight to that contention, and it was upon this rule that Dr. Ashutosh Mukerjee mainly relied, we must necessarily look at all the rules, and I think we obtain a fairly clear indication of what was intended by the term " Division Court " from s. 13 of 24 and 25 Vic., cap. 109, the Act establishing High Courts of Judicature in India. That section shows that a "Division Court" must be constituted of two or more Judges of the High Court, which is incompatible with such a Court being composed of a single Judge sitting alone. It can hardly be supposed that the framers of the rules made under the Act intended to use the term " Division Court " in a sense different from that in which it was used in the Act itself. Moreover the term " Division Court " is scarcely the term one would ordinarily apply to a Judge sitting alone.

The view that one Judge cannot refer a case to a Full Bench is further strengthened by Rule 2 of chap. V, which indicates that at least two Judges must differ from the decision of the former Division

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Court. On these short grounds, I am of opinion that it is not competent for a Judge sitting alone to make a reference to a Full Bench, and consequently that the preliminary objection must prevail. The result, therefore, is that the reference to a Full Bench is irregular, and the case must go back to the learned Judge who made the reference, to be dealt with by him as he thinks right.

Under the circumstances we do not think there ought to be any costs of this hearing.

Case remanded.

After the case was remanded to Mr. Justice Rampini, he, having heard the vakils on both sides, delivered the following judgment :—

JUDGMENT.

This case was heard by me, sitting alone on the 28th May 1897. On that occasion no one appeared for the respondents. I reserved judgment, and on the 7th June 1897 I referred the case to a Full Bench. It has now been held that I had no **[906]** power under the rules of Court to refer the case to a Full Bench and the case has been returned to me for disposal.

The respondents now appear by pleader, who argues that he has a right to be heard on behalf of the respondents as the order of the Full Bench reopens the case. I am of opinion that looking at the provisions of ss. 556 and 571 of the Civil Procedure Code, the pleader for the respondent has no right at this stage of the case to be heard, but I have allowed him to appear as *amicus curiæ* and argue the case for the respondents in that capacity.

His contentions are: (1) That whether the defendant No. 2 has a permanent interest in the homestead land, which is the subject of dispute in this case, or not, he has an assignable interest in it, and, therefore, that the defendant No. 1 is a tenant of the land and cannot be ejected without a notice to quit; (2) that the cases cited by me in my order of reference lay down no hard and fast rule as to when a Court may infer that a tenancy of homestead land is of a permanent character; and (3) that the lower Courts in this case have come to a finding of fact as to the tenancy of defendant No. 1 having been of a permanent nature, and that I cannot interfere with this finding in second appeal.

In support of his first contention the learned pleader for the respondent has cited the Transfer of Property Act, ss. 106, 108 (*j*) and 111 (*h*), and the cases of *Beni Madhab Banerjee* v. *Jai Krishna Mookerjee* (1); *Durga Prasad Misser* v. *Brindaban Sookul* (2); *Doya Chand Shaha* v. *Anund Chunder Sen Mozumdar* (3); *Appa Rau* v. *Subbanna* (4), and *Venkatasamy Naick* v. *Muthuvijia Ragunada* (5).

Regarding the learned pleader's reference to the provisions of the Transfer of Property Act, I would only say that I have already in my judgment of reference expressed my opinion that the provisions of the Transfer of Property Act do not apply to this case as the defendant No. 2's lease is of date anterior to the **[907]** passing of that Act. The case of *Hari Nath Karmoker* v. *Rajendra Karmoker* (6), which I then cited, has now been fully reported in 2 C.W.N., 122. In the judgment in this case, I have referred to the case of *Beni Madhab Banerjee* v. *Jai Krishna Mookerjee* (1), and stated that, in my opinion, it shows that

(1) 7 B.L R. 152. (2) 7 B.L.R. 159. (3) 14 C. 382.
(4) 13 M. 60. (5) 5 M.H.C. 227. (6) 2 C.W.N. 122.

previous to the passing of the Transfer of Property Act non-agricultural holdings might or might not be assignable. In the present case the lower Courts have both held that the land in dispute is not transferable by custom, and I do not see that it was ever contended on behalf of the respondents in the Courts below that it was transferable or assignable on any other ground. From the judgment of the Munsif it no doubt appears that the defendants in their pleadings did plead that the "*jama* was transferable according to law and custom." But the contention raised at the trial was only that it was transferable by custom and this plea was negatived by both Courts. Any how, there was no law before the passing of the Transfer of Property Act which made a lease of homestead land transferable otherwise then by custom.

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FULL BENCH.

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I have nothing further to add to the remarks I have already made in my judgment of reference on this case of *Beni Madhab Banerjee* v. *Jai Krishna Mookerjee* (1). The case of *Durga Prasad Misser* v. *Brindaban Sookul* (2) seems to me to lay down no general rule. On the contrary, Jackson, J., observed that "everything must depend on the circumstances of the case," and in that case the defendant had been allowed to erect buildings on the land, and it was said that his holding was not a temporary one.

Then the case of *Doya Chand Shaha* v. *Anund Chunder Sen Mozumdar* (3) evidently refers to a *raiyati* holding, and not to a plot of homestead land. This is apparent from the terms of the judgment and is demonstrated by the fact that it was referred to and not followed in the case of *Kripamoyi Dabia* v. *Durga Gobind Sirkar* (4), which relates to a *raiyati* holding, and in which the learned Judges, who decided it, said: "It seems to us that unless **[908]** the defendant can prove the tenure set up by him, *viz.*, a permanent and transferable tenure, the plaintiff, the admitted landlord, is entitled to enter into possession, and this view has been uniformly taken by this Court, as would appear from an examination of the case quoted above."

The cases of *Appa Rau* v. *Subbanna* (5) and *Venkatasamy Naick* v. *Muthavijia Ragunada* (6) were also not cases concerning homestead land, and are, therefore, I think irrelevant.

In respect to the learned pleader's contention that there is a conclusive finding of fact by the lower Courts, I would only refer to the Privy Council case of *Ramgopal* v. *Shamskhaton* (7), which in my opinion effectually disposes of it.

The cases I have cited in my judgment of reference may lay down no hard and fast rule on the subject, but the rule which I think should be deduced from them is, as I have already pointed out, that mere long possession of homestead land is not sufficient to justify the presumption of a permanent grant, and that before such a presumption can be made there must be something more, *viz.*, either (1) the land having been let for the erection of *pucka* buildings or (2) a standing by on the part of the landlord, while the tenant without objection erects permanent buildings or effects substantial improvements on the land. In addition to the cases already cited, I would quote one more, *viz.*, *Lalla Gopee Chand* v. *Liakut Hossein* (8), which I consider supports the view I take of this subject.

Taking this view of the matter, I must hold that the Court below were not not justified in presuming that the defendant No. 2 had a

(1) 7 B.L.R. 152. (2) 7 B. L. R. 159. (3) 14 C. 382.
(4) 15 C. 89. (5) 13 M. 60. (6) 5 M. H. C. 227.
(7) 20 C. 93 = 19 I.A. 228. (8) 25 W. R. 211.

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permanent and transferable interest in the land, and therefore that the suit should have been decreed. I accordingly decree this appeal and the suit with all costs in all Courts.

My judgment of reference dated 7th June 1887 should be read along with this judgment, as the first part of it.

S. C. G. *Appeal allowed.*

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25 C. 909.

[909] APPELLATE CIVIL.

Before Mr. Justice Trevelyan and Mr. Justice Banerjee.

LALA HURRO PROSAD AND ANOTHER (*Defendants Nos.* 6 *and* 7) *v.* BASARUTH ALI (*Plaintiff*).* [9th March, 1898.]

Guardian—Power of Guardian to mortgage Minor's property—Act XL of 1858, *s.* 18—*Guardians and Wards Act* (*VIII of* 1890), *s.* 30, *read with s.* 2, *Retrospective effect of—Mortgage without sanction of Court.*

A mortgage of a minor's property, made by his guardian holding a certificate under Act XL of 1858, without obtaining sanction of Court as required by s. 18 of the Act, is absolutely null and void.

Section 2 of the Guardians and Wards Act (VIII of 1890) does not give retrospective effect to s. 30, which, therefore, does not apply to a mortgage executed before the Act came into operation, so as to destroy its void character and render it merely voidable.

[F., 13 C.L.J. 277=9 Ind. Cas. 377 ; R., 17 C.P.L.R. 13 (16) ; 2 O.C. 233 (234).]

THE facts material to the report of this case and the arguments on both sides appear in the judgment of the High Court.

Defendants Nos. 6 and 7, auction-purchasers of the interest of the minors, appealed to the High Court.

Mr. *C. Gregory* and Babu *Satish Chandra Ghose*, for the appellants.

Dr. *Ashutosh Mukerjee* and Moulvie *Syed Mahomed Tahir*, for the respondent.

The judgment of the High Court (TREVELYAN and BANERJEE, JJ.) was as follows :—

JUDGMENT.

In this case a guardian, who had taken out a certificate under Act XL of 1858 on the 27th of May 1884, executed a mortgage, purporting to charge the property of his wards. He did not obtain the sanction of the Civil Court as required by s. 18 of Act XL of 1858. This suit is brought against the wards on the footing of the mortgage. Certain persons, who have purchased [910] the interests of the minors at auction sales, are also parties defendants. Two of the wards have attained majority ; one has died, and is represented in this suit by his widow ; the fourth is still a minor. The learned Munsif, before whom the case first came, dismissed the suit, on the ground that the mortgage, being without sanction, was void. He declined to try any other issue.

On appeal the learned District Judge has held that the mortgage was voidable, but has remanded the case for evidence to be taken as to the *bona fide* nature of the mortgage, and as to its having been executed for legal

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* Appeal from Order No. 314 of 1897, against the Order of G. W. Place, Esq., District Judge of Sarun, dated the 7th of June 1897, reversing the order of Babu Anant Ram Ghose, Subordinate Judge of that District, dated the 30th of August 1895.

necessity. It is admitted before us by the learned vakil for the respondent, and it is abundantly clear, that if the bond were void the suit must fail.

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It is also admitted that the weight of the decisions of this Court treats mortgages made without sanction under s. 18 as absolutely void. He, however, contends that the provisions of Act VIII of 1890 apply to this case, and that having regard to the terms of s. 30 of that Act he is entitled to sue on the mortgage at any time unless it has been avoided by the ward.

In the view which we take of this case it is unnecessary for us to decide what is the effect of s. 30, and how it could be applied to the facts of this case. It is also unnecessary for us to decide whether under any circumstances effect can be given to a voidable contract before the ward has attained majority, and has had an opportunity of finally ratifying or avoiding the contract.

In our opinion Act VIII of 1890 has no application to the present case. The mortgage was executed while the provisions of Act XL of 1858 were in force, and s. 18 of that Act unquestionably applied to it at the time it was made. The question remains whether Act VIII of 1890 operates to destroy the void character of this mortgage, and to render it merely voidable. It would be somewhat extraordinary if the rights of parties to a transfer had been altered by subsequent legislation; s. 30 in terms refers to a disposal of property in contravention of ss. 28 and 29, and to nothing else. Section 28 has nothing to do with the present question. Section 29 only contains a prohibition against the disposal of property by Court appointed guardians without the sanction of the Court. The words are "he *shall* **[911]** not." How this can refer to transactions antecedent to the Act, it is impossible to see. A statutory prohibition could have no reference to transactions which had been completed before the Act came into force. If Act XL of 1858 had contained no prohibition, and certificate holders had power to dispose of property without the sanction of the Court, could it have been argued that ss. 29 and 30 of Act VIII of 1890 rendered voidable acts done before the Acts came into force, and which were valid according to the existing law?

It is contended before us that s. 2 (2) of Act VIII of 1890 has the effect of applying s. 30 to this transaction. We do not see how that section can have such effect.

In our opinion the mortgage being void no other issue arose.

We accordingly set aside the decree of the Subordinate Judge and restore that of the Munsif. The appellant is entitled to his costs in both appellate Courts.

S. C. C. *Appeal allowed.*

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APPELLATE CIVIL.

Before Mr. Justice Ameer Ali and Mr. Justice Pratt.

NIRMAL CHUNDER BANDOPADHYA (*Objector No.* 1) *v.* SARATMONI DEBYA (*Petitioner*).* [27th January, 1898.]

Will—Hindu Wills Act (XXI of 1870)*—Indian Succession Act (X of* 1865), *s.* 50*—Execution of a will, by impression of the* facsimile *of the name, whether valid in law.*

A testator, who, for a number of years, was, as he was unable to write, in the habit of using a name stamp, which used to be attached by a servant to any document or paper he wanted to sign, executed a will, and under his direction a servant affixed the impression of his name stamped on the said document.

Held, that the execution of the will in this case was proper and came strictly within the meaning of the words used in s. 50 of the Indian Succession Act.

THIS appeal arose out of an application by one Saratmoni Debya for the probate of the will of her deceased husband Janaki Nath Mookerjee. The *caveators* opposed the application on the [912] grounds that the alleged will of the deceased was not executed according to law, as only the name stamp of the testator was affixed on the will by his servant; that it was not a genuine document; and that at the time of the alleged execution of the will the testator was not in such a state of mind and health as to enable him to execute the said will, or to understand the purport or effect thereof. The learned District Judge of Hooghly, having held that the affixing of the name stamp by the testator's servant in the testator's presence and by his direction was a signature by another person within the meaning of s. 50 of the Indian Succession Act, and also having held that the testator had the mental capacity when the will was so signed on the occasion of its execution, allowed the application and granted probate of the will. From this decision the objector No. 1 appealed to the High Court.

Mr. *J. G. Woodroffe*, with him Babu *Baicunt Nath Das*, for the appellant.

Babu *Dwarka Nath Chuckerbutty*, with him Babu *Surendra Nath Roy*, for the respondent.

Mr. *Woodroffe*, on behalf of the appellant, contended that the affixing of the name stamp only by a third person was not sufficient, and the execution of the will was not proper within the meaning of s. 50 of the Indian Succession Act, and he referred to the case of *Nitya Gopal Sircar* v. *Nogendra Nath Mitter* (1). Section 50 of the Act contemplates that either the testator shall sign himself or shall affix his mark to the will, or it shall be signed by some other person in his presence and by his direction. In this case, the servant of the testator affixed his name stamp, though under his direction, but that would not be a signature by some other person on behalf of the testator within the meaning of the said section.

Babu *Dwarka Nath Chuckerbutty*, for the respondent.—Affixing a name stamp in the will by a third party is sufficient, and its execution is proper under the law. See the cases of *Jenkins* v. *Gaisford* (2), and *In the goods of Emerson* (3).

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* Appeal from Original Decree No. 151 of 1897, against the decree of J. F. Bradbury, Esq., District Judge of Hooghly, dated the 10th of February 1897.

(1) 11 C. 429. (2) (1863) 11 W.R. (Eng.) 854=3 Sw. & T. 93.
(3) 9 L.R. (Ir.). 443.

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[913] Mr. *Woodroffe* replied.

The judgment of the High Court (AMEER ALI and PRATT, JJ.) was as follows:—

JUDGMENT.

This appeal arises out of an application by a lady named Saratmoni Debya for the probate of a will, dated the 15th November 1895, alleged to have been executed by her husband, Janaki Nath Mookerjee. The will was undoubtedly registered on the 18th of November 1895. Janaki Nath died on the 11th of December 1895, and it was propounded on the 17th January 1896.

Caveats were entered, one by a person named Nirmal Chunder Banerjee on the 24th February 1896, and the other on the 23rd January 1897, on behalf of the minor, Shibdhone Banerjee, by his father and guardian, Mani Lal Banerjee. In the *caveats* the *factum* of the will was impugned. It was stated that the alleged testator was not of a disposing mind ; and it was contended that if the will was executed its execution was not proper under the law.

A considerable body of evidence has been adduced on behalf of the propounder of the will. Nirmal, who was the contesting objector, gave no evidence ; and the learned District Judge, upon the circumstances and facts deposed to by the witnesses for the lady, Saratmoni Debya, held that the will was genuine ; that the testator was of disposing capacity ; and that there was proper execution.

The *caveator* No. 1 has appealed to this Court, and the learned counsel on his behalf has raised the same questions which were raised by the objector in the Court below. We shall deal with the questions relating to the *factum* of the will and the capacity of the testator under one head, leaving the question regarding the proper execution to be dealt with separately, both upon the facts as well as upon the law.

[The learned Judges then considered the evidence relating to the *factum* of the will, and continued.]

We think that all the circumstances point conclusively to the *factum* of the will on that occasion : *factum* in the sense that the testator was perfectly conscious and able to understand [914] what he was doing, and that his name, or the stamp of his name was attached to the will under his direction.

It is unnecessary to dwell further upon these two questions, because we agree with the District Judge in the opinion formed by him that, in spite of the infirmity from which Janaki suffered, and in spite of his paralysis and the difficulty he was under with regard to movement, etc., he was a person fully competent to make a will, and that he understood fully what he was doing at the time.

There remains now the question whether, if the will was executed on the 15th of November 1895, it was *properly* executed. We have already mentioned that it was registered on the 18th of November 1895. The Sub-Registrar, who has now retired from service, has given his evidence, and he has proved that he went to the residence of Janaki, whom he found perfectly conscious, and that he had a talk with him ; that Janaki acknowledged the will ; that at his instance he (Janaki) affixed his thumb-marks to the different pages ; and that thereupon he attached his own signature to the will. Another witness, named Jugabundho Banerjee,

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did the same. The Sub-Registrar states that all this was done in the room where Janaki was lying and "in one and the same assembly;" giving rise to the distinct inference of fact that the witnesses to the impression of the thumb-marks, altogether three persons, including the Sub-Registrar, attached their signatures to the document about the same time in the presence of the testator and in the same assembly. The evidence being to that effect, assuming that the contention to which we shall presently refer was well founded, and assuming even that the will was not properly executed on the 15th November 1895, inasmuch as Janaki himself did not attach his signature or mark to it, the defect would be removed and there would be proper execution before the Sub-Registrar.

But over and beyond this it appears to us that the objection which has been taken by the learned counsel for the caveator regarding the proper execution of the will on the 15th of November is not well founded. His contention is that the stamp of Janaki's name was attached, not by Janaki, but [915] by somebody else; that consequently the act does not come within the meaning of s. 50 of the Indian Succession Act, which was made a part of the Hindu Wills Act; and that, therefore, the execution was not valid under the law. Now s. 50 runs thus: "Every testator, not being a soldier employed in an expedition or engaged in actual warfare, or a mariner at sea, must execute his will according to the following rules:—*First*, the testator shall sign or shall affix his mark to the will, or it shall be signed by some other person in his presence, or by his direction." . . . . It is unnecessary to refer to the 2nd and 3rd clauses. The 1st clause gives sufficient indication of the objection raised. It is contended that the affixing of the stamp, the *facsimile* of Janaki's name, does not amount to proper execution, inasmuch as the only person under the section who is authorised to make a mark is the testator himself, and nobody else; and that if any other person is directed to sign for the testator, he may not affix his name-stamp, as that is equivalent to making a mark.

Now, under the English Wills Act, it has been held that the affixing of the *facsimile* of a name, either by the testator or by somebody else, is sufficient under the law. Section 9 of I Vic., c. 26, provided as follows: "That no will shall be valid unless it shall be in writing and executed in manner hereinafter mentioned (that is to say), it shall be signed at the foot or end thereof by the testator or by some other person in his presence and by his direction." The rest is immaterial. It will be noticed that in the English Act the words relating to the affixing of a mark do not occur; the reason for the introduction of these words in the Indian Act seems to us to be obvious.

In England there are not so many illiterate persons as in this country; and probably the Legislature considered it necessary that, in order to cover the case of the vast majority of people who are not sufficiently literate to sign their names, some provision should be made to enable them to make their wills by marks. In order to understand exactly the difference between signing and affixing the mark, it is necessary to explain what we think is meant by these words. We understand the word "signing" to mean the writing of the name of a person so that [916] it may convey a distinct idea to somebody else that the writing indicates a particular individual whose signature or sign it purports to be. A "mark" is a mere symbol and does not convey any idea to a person who notices it, often even to the person who makes it. The Legislature, therefore, provides

that so far as the testator is concerned, if he is literate, he may either sign his name, which would convey a distinct idea regarding the executant of the document or, if illiterate, may fix his mark as an indication of his act as executant of the will. In the case of somebody else writing for him, it requires that he should write the name or put it in such a manner as would lead anybody else to see at once who the person was who executed the document. If that view be correct, it is evident that the impression of the *facsimile* of the name is not the making of a mark, but really the affixing the name to the document. The use of a pen and ink does not seem to be necessary for the purpose of putting on the signature required. In the case of *Jenkyns* v. *Gaisford* (1) the Judges indicate that the use of pen and ink was not necessary for signing, and that argument may be well applied to this case also. A person may sign or put his name down by means of types, or, if he uses a *facsimile* for signing his name, he may use it for his signature.

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Now let us see what the facts of this case are. It appears that for a number of years Janaki had been in the habit of using a name stamp as he was unable to read or write. That name stamp used to be kept by a servant, and under Janaki's direction used to be attached to any document or papers he wanted to sign. That being so, it appears to us that the learned District Judge was perfectly right in holding that the execution of the will in this case was proper and came strictly within the meaning of the words used in s. 50.

We think, therefore, for all these reasons that the order of the District Judge was right, and that this appeal ought to be dismissed with costs.

S. C. G. *Appeal dismissed.*

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25 C. 917=2 C.W.N. 44.

[917] APPELLATE CIVIL.

Before Mr. Justice Macpherson and Mr. Justice Ameer Ali.

BAIDYA NATH DE SARKAR AND ANOTHER (*Plaintiffs*) v. ILIM AND OTHERS (*Defendants*).* [16th July, 1897.]

Bengal Tenancy Act (VIII of 1885), s. 188—*Right of fractional co-sharer to maintain a suit for enhancement of rent—Agreement with fractional co-sharer to pay rent separately, effect of—Joint landlords.*

A fractional shareholder cannot bring a suit for enhancement of rent. Under the provisions of s. 188 of the Bengal Tenancy Act, where there are several joint-landlords, they must all join in bringing a suit for enhancement of rent; an agreement in a *kabuliyat* by one tenant to pay an enhanced rent to some of the landlords, if, on measurement, the *jama* of his *jote* is increased, does not create a right to maintain such a suit by those landlords. Such a suit cannot be brought otherwise than under the terms of the Bengal Tenancy Act.

An agreement by a tenant with some of several joint-landlords to pay his share of the rent separately does not create a separate tenancy.

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* Appeal from Appellate Decree No. 293 of 1896, against the decree of Babu Baroda Prosunno Shome, Subordinate Judge of Mymensingh, dated the 3rd of December 1895, affirming the decree of Babu Phani Bhushan Mukerjee, Munsif of Iswargunge, dated the 31st of December 1894.

(1) (1863) 11 W. R. (Eng.) 854=3 Sw. & T. 93.

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Gopal Chunder Das v. *Umesh Narain Chowdhry* (1), and *Hari Charan Bose* v. *Runjit Singh* (2), approved of.

[918] *Panchanan Banerji* v. *Raj Kumar Guha* (3) and *Tejendro Narain Singh* v. *Bakai Singh* (4), distinguished.

[F., 20 Ind. Cas. 659=18 C.W.N. 942; Rel., 15 Ind. Cas. 847; 18 C.W.N. 168=20 Ind. Cas. 820; R., 27 C. 417; 40 C. 29=16 C.L.J. 9=16 C.W.N. 877=15 Ind. Cas. 453; 2 C.L.J. 10 (11); 5 Ind. Cas. 397; D., 2 C.L J. 534; 7 C.W.N. 670.]

THE facts of the case appear sufficiently from the judgment.

Babu *Jogesh Chunder Roy*, for the appellants.

Babu *Gobind Chunder Dey Roy*, for the respondents.

The judgment of the High Court (MACPHERSON and AMEER ALI, JJ.) was as follows:—

JUDGMENT.

The plaintiffs are four-anna shareholders of a *taluk*, within which the first three defendants have a *raiyati* holding. They purchased a two-anna share of this *taluk* in 1287 (1880), and the other two-anna share in 1296 (1889). They say that, in 1287, the first [919] defendant executed

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(1) 17 C. 695.

(2) 25 C. 917-N=1 C.W.N. 521.

Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr. Justice Banerjee and Mr. Justice Rampini.

HARI CHARAN BOSE (*Defendant No.* 1) *v.* RUNJIT SINGH (*Plaintiff*).*
[7th September, 1896.]

THE facts of the case are fully set forth in the judgments of the High Court (PETHERAM, C.J., and BANERJEE and RAMPINI, JJ.) which were as follows:—

JUDGMENTS.

BANERJEE, J.—This appeal arises out of a suit brought by the plaintiff-respondent for a declaration of his title to a certain holding, and for an injunction restraining the defendant No. 1 from attaching or proceeding in execution against the same. The main allegations upon which the plaintiff bases his suit are these, namely, that the plaintiff purchased the holding in [918] question in August 1892 at a sale in execution of a decree for rent obtained by a co-sharer in the superior tenure to which the holding is subordinate in respect of his share of the rent; that, previous to his purchase, that is, in March 1892, the defendant No. 1, who owns an eight-anna share in the *darpatni*, and a two-anna share in the *patni*, of Taraf Kabilpore, in which the holding in question is situate, obtained a decree for arrears of rent due in respect of his said two shares; that the defendant No. 1, having sought to sell the eight-annas and the two-annas shares in the holding on the allegation of such shares forming two separate *jotes*, the plaintiff intervened, but his intervention was unsuccessful; and that the said shares of the holding do not constitute separate *jotes*, and the defendant is not entitled to bring them to sale in disregard of the rights acquired by the plaintiff by his purchase.

The defence was that the alleged holding of the plaintiff was not one holding, but consisted of four separate holdings, created by four separate leases granted to the plaintiff's predecessors in title on different dates: two, by the two-annas *patnidar* and the four-annas *patnidar* of Taraf Kabilpore in Aghran 1266, one by the two-anna *patnidar* in Magh 1266, and a fourth by the eight-anna *dar-patnidar* in Bysak 1267, the rights of the last two lessors having now vested in defendant No. 1, and that the defendant No. 1 was, therefore, entitled to proceed against the two tenancies, the one granted by the two-anna *patnidar* and the other by the eight anna *dar-patnidar*, in execution of the rent decree obtained by him, notwithstanding the subsequent purchase by the plaintiff, the said rent being a first charge on the [919] tenancies. It was not disputed in the Courts below that, if the case came under s. 65 of the Bengal Tenancy Act, the defendant No. 1 would be entitled to proceed against the holding. But the main question was whether the case came under that section or not; the plaintiff contending that it did

(3) 19 C. 610. (4) 22 C. 658.

* Appeal from Appellate Decree No. 1695 of 1894, against the decree of F. Taylor, Esq., District Judge of Moorshidabad, dated the 31st of July 1894.

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a *kabuliyat* by which he agreed to pay to the plaintiffs their share of the rent separately, and also to pay an increased rent, if, on measurement an excess area was found. They allege that the area of the holding has been found by measurement to be in excess of the area for which the defendants were paying rent, and they bring this suit for an enhancement of the rent of the holding, including the increased area, and to get their share of the enhanced rent from the defendants.

It appears to be conceded that the different shareholders were collecting their share of the rent separately from the defendants. Both Courts have dismissed the suit on the ground that the plaintiffs, as fractional co-sharers, cannot maintain this suit for enhancement. The only question we have to determine in this appeal is whether the suit is maintainable. Apart from the *kabuliyat*, and in so far as it rests on the agreement of the defendants to pay the plaintiffs their share of the rent separately, we think that this suit is clearly not maintainable as a suit for enhancement, or as a suit for the rent of the area said to be in excess of the area for which the defendant was paying rent. This was held in the case of *Gopal Chunder Das* v. *Umesh Narain Chowdhry* (1). The agreement of the defendant to pay the **[920]** plaintiffs their separate share of the rent did not constitute a separate tenancy under the plaintiffs. Under s. 30 of the Tenancy Act, the landlord of a holding of an occupancy *raiyat* may, subject to the provisions of the Act, institute a suit to enhance the rent on certain grounds, the grounds alleged in this case being that the defendant was holding at a rate which was below the prevailing rate. Now the plaintiffs are not the " landlords " of this holding within the meaning of this section; they are only some of the landlords. The holding is an entire one, and there is no separate holding as regards the share of the plaintiffs. That was held in the case of *Hari Churn Bose* v. *Runjit Singh* (2). The plaintiffs cannot, therefore, enhance the rent of the entire holding, because, under s. 188, all the landlords must join as plaintiffs in a suit for that purpose, and they cannot enhance the rent of their share of the holding as there is no separate holding under them. The case of *Punchanan Banerji* v. *Raj Kumar Guha* (3), which was relied upon

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not, because the leases relied upon by the defendant No. 1 did not create separate and distinct tenancies, whilst the defendant No. 1 contended that it did.

The Court of first instance gave effect to the defendant's contention, and dismissed the suit. On appeal by the plaintiff, the lower appellate Court has accepted the plaintiff's contention as correct, reversed the decision of the first Court, and given the plaintiff a decree as prayed. Against that decree the defendant No. 1 has preferred this second appeal, and the learned Judges, who heard the appeal first, having differed in opinion, the case has been referred to me under s. 575 of the Code of Civil Procedure.

The main contention in the appeal on behalf of the appellant is, that two tenures have been created in respect of a two-anna share, and an eight-**[920]**anna share of certain lands in Taraf Kabilpore, by the two leases granted by the two-annas *patnidar* and the eight-annas *dar-patnidar* in Magh 1266 and in Bysak 1267; while the contention on the other side is that those two *pattas* have not the effect attributed to them, and that, in any view of the case, undivided shares in parcels of land cannot constitute distinct holdings within the meaning of the Bengal Tenancy Act. It was argued for the plaintiff-respondent that the land was originally let out for the purpose of cultivating indigo, that the tenant was, therefore, a "*raiyat*" and not a "tenure-holder" within the meaning of s. 5 of the Bengal Tenancy Act, that the tenancy can only be a "holding" and not a "tenure" within the meaning of that Act, and that the definition of "holding" as given in cl. (9) of s. 3 does not include an undivided share in any parcel or parcels of land such as goes to constitute each of the alleged separate tenancies in this case. I think this argument is sound. It is clear from the findings arrived at by the lower appellate Court, and from the leases relied upon by the appellant,

(1) 17 C. 695. (2) 25 C. 917, 610 Note. (3) 19 C. 160.

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by the appellants, is clearly distinguishable. That case turned entirely upon the particular terms of the *kabuliyat*, and it was, moreover, a suit to enhance the rent on account of the plaintiffs' share of a tenure and had nothing to do with a *raiyati* holding.

[921] Then it is contended that the plaintiffs are entitled, according to the terms of the *kabuliyat*, and apart altogether from the provisions of the Tenancy Act, to enhance the rent of the defendants. The *kabuliyat*, which has not been quite correctly translated in the translation put before us, was for a term of three years, from 1287 to 1289. It deals with the holding as an entire holding, and the first defendant, who alone executed it, [922] agreed to pay the plaintiffs separately their share of the rent. Then, there is another provision upon which the appellants relied, which is to this effect: "If, according to your measurement *jamabandi*, the *jama* of my *jote* is increased, I shall pay rent and give *kabuliyat* without objection according to the increased rate." That, we think, gives the plaintiffs no right to maintain a suit of this description. It merely provides, we

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that the [921] tenancy or tenancies were *raiyati* tenancies and not tenures; and it has never been questioned that the plaintiff would be entitled to a decree if the case does not come under s. 65 of the Bengal Tenancy Act. The whole question, is, whether it comes under that section, or in other words, whether what the defendant No. 1 is seeking to proceed against in execution of his decree for rent, notwithstanding the plaintiff's purchase, is a "tenure" or "holding" within the meaning of that section; and, as already observed, it cannot be a tenure for the simple reason that the tenancy was created for the purpose of cultivation by the tenant presumably through hired labour. The question, therefore, reduces itself to this, namely, whether the leases relied upon by defendant No. 1 have created separate holdings within the meaning of s. 65, or whether there is but one holding under the proprietors of the entire sixteen annas. Now a "holding" is thus defined in s. 3, cl. (9): "'Holding' means a parcel or parcels of land held by a *raiyat* and forming the subject of a separate tenancy." Does this mean an entire parcel or entire parcels, or may it also include an undivided fractional share of a parcel or parcels of land? Evidently the definition applies only to an entire parcel or entire parcels, and is not intended to include an undivided share in a parcel or parcels, and the reason seems to be obvious. A *raiyati* holding, which from the very definition of a "*raiyat*" in s. 5, sub-s. 2, means land occupied by a *raiyat* for the purpose of cultivation, can be ordinarily held only in its entirety, and the cultivation of an undivided fractional share of a parcel of land will be ordinarily meaningless. A "tenure," on the other hand, which is the interest of a tenure-holder, who, as defined in s. 5. sub-s. 1, is a person who has acquired a right to hold land for the purpose of collecting rents or bringing it under cultivation by establishing tenants on it, may relate only to an undivided fractional share in land without leading to any practical difficulty. And it is for this reason that whilst "tenure" is defined as the interest of a tenure-holder, or an under-tenure-holder, "holding" is defined, not as the interest of a *raiyat* but as a parcel or parcels of land held by a *raiyat* and forming the subject of a separate tenancy. I may add that if the definition of a holding were to include an undivided fractional share in a parcel or parcels of land, the definition would be incompatible with the provisions of ss. 121 and 122 of the Bengal Tenancy Act which [922] relate to the distraint of crops or other products of holdings. It was argued for the appellant that, if this view is correct, not only would the separate tenancies created by the several leases in this case, not come under the definition of "holding," but the aggregate of the tenancies created thereby would also be excluded from the definition, for the simple reason, that they do not form the subject of a separate tenancy, as it cannot be said that tenancies created at different times, and differing in some of their incidents, constitute "a separate tenancy" within the meaning of the definition; and if that was so, tenancies of the kind in question in this suit, which are by no means an uncommon class of tenancies, would have to be excluded from the scope of the Bengal Tenancy Act. I do not think that we are driven to such a consequence as that. Though the tenancies created by the several documents are, in one sense, separate tenancies, no doubt, still, having regard to the fact that one important element for consideration, namely, the land in respect of which the tenancy or tenancies are created, remains still one and undivided, we may disregard the diversity in the comparatively immaterial elements, namely, the time of creation of the tenancies, and the mode of payment of the rent that occurs in the several leases,

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think, that if the rent [923] of the entire holding is increased, increased rent shall be paid to the plaintiffs for their share in the holding; but the rent cannot be increased otherwise than under the terms of the Act. There is no agreement to pay any specific amount of rent to the plaintiffs at any further time. So far, therefore, as the terms of the *kabuliyat* are concerned, we think it gives the plaintiffs no [924] right to maintain a suit of this description, either for enhancement of the rent of the holding, or for the rent of the increased area; nor do we think that the

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and treat them all as combining in the constitution of one tenancy, especially when we find that the rents reserved in the several leases are but the aliquot parts of a whole, such parts corresponding to the shares of the grantors of the leases. Great reliance was placed upon the case of *Panchanan Banerji* v. *Raj Kumar Guha*(1), as showing that the leases granted by undivided co-sharers in certain cases go to constitute distinct tenancies. That case, however, is quite distinguishable from the present, as that was a case in which the lease related not to a *raiyati* holding, but to an *ousut taluk* or tenure. Some reliance was also placed on the case of *Jardine Skinner and Co.* v. *Surut Soondari Debi* (2), in which their Lordships of the Privy Council held that a right of occupancy might be acquired in an undivided share in land, and also upon the case of *Gur Buksh Roy* v. *Jeolal Roy* (3), in which a somewhat similar view was taken; but those cases were under the old law, Bengal Act VIII of 1869, [923] which contained no definition of the term "holding" such as we have in the Bengal Tenancy Act. For the foregoing reasons I agree with Mr. Justice Rampini in thinking that the Court of Appeal below was right in its decision; that, what the defendant No. 1 is seeking to proceed against, are not distinct holdings within the meaning of the Bengal Tenancy Act, but are only undivided shares in a holding; and that the defendant No. 1 is only one of a body of joint landlords. That being so, I think this appeal ought to be dismissed with costs.

PETHERAM, C.J.—An area of land, consisting of about 1,160 *bighas*, was owned by four groups of fractional sharers. One group being the owners of eight annas, another of four, and the two others of two annas each. Each of these groups about the year 1859 let its own share to Mr. Laruletta in perpetuity at an agreed rental by a separate lease for cultivation, and under these four leases Mr. Laruletta held and cultivated the whole of the 1,160 *bighas* until his interest in it was purchased by Mr. Howard. Afterwards a decree was obtained by the lessor of one of the leases against Mr. Howard. And after that decree had been passed all Mr. Howard's interest in the land was sold under it and purchased by the plaintiff.

The question for decision in this case is, whether the lessee under each of the four leases is a permanent tenure-holder or a *raiyat* holding at fixed rates, or an occupancy *raiyat* within the meaning of s. 65 of the Tenancy Act, and the rent a first charge on the holding, or whether all the grantors of the four leases are joint landlords within the meaning of s. 188, and the 1,160 *bighas* of land one holding under them all.

The Subordinate Judge took the former view, the District Judge the latter. I think that the view taken by the Subordinate Judge is the correct one.

The grantee under the four leases is certainly the tenant of the land and as certainly a *raiyat* holding at fixed rates, as he acquired the land for the purpose of cultivation; and if he is a tenant of all the land, it must, I think, follow that he is the tenant under each group of the undivided fractional share which the group has let to him and of which it has put him in possession; but all the groups are not joint landlords of the tenant because he has made no contract with them jointly; for this reason s. 188 cannot apply to this case, and the only question is, whether what the tenant holds under [924] each of the four leases is either a "tenure" or a "holding" within the meaning of s. 65.

I have no doubt it is a holding. Section 2, sub-s. 9, defines a "holding" as "a parcel or parcels of land held by a *raiyat* and forming the subject of a separate tenancy," and the argument for the plaintiff is that the use of the words "parcel or parcels of land" excludes the idea that a share though undivided can be a holding, I do not think this is the case. The owner of an undivided fractional share in a parcel of land is the owner of that share in every part of it, and a tenant in possession of such an undivided share is the holder of an undivided share in every part of it, and is, I think, properly described as the holder of the parcel, because he is holder of an undivided share in every part of it.

(1) 19 C. 610. (2) 5 I. A. 164 = 3 C.L.R. 140. (3) 16 C. 127.

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plaintiffs would be in any better position, so far as regards their right to bring a suit of this [925] description, if they limited their claim to recover rent for an excess area in proportion to the two-anna share of the *taluk* in respect of which the *kabuliyat* was given. The case of *Tejendro Narain Singh* v. *Bakai Singh* (1), which the appellants relied upon, is quite distinguishable. There the tenant had given a [926] *kabuliyat*

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I would decree the appeal and restore the judgment of the Subordinate Judge, but as Mr. Justice Rampini is of a different opinion, the case will be laid before a third Judge.

RAMPINI, J.—The plaintiff purchased a certain *jote* or holding in the possession of the defendant No. 2 on the 15th July 1892 in execution of a decree for arrears of rent. The defendant No. 1, who is owner of an eight-annas of a *darpatni* and of a two-annas of a *patni* of this *jote*, obtained a decree for his share of the rent, due from the defendant No. 2, on the 30th March 1892. In execution of this decree he has attached and had proclaimed for sale ten-annas of the holding, alleging that the defendant No. 2 held two separate holdings, consisting of eight annas and two-annas, respectively, of the original *jote*, purchased by the plaintiff in 1892. The plaintiff objected to the proposed sale, on the ground that there were no such separate *jotes* or holdings, and that the entire *jote* had been purchased by him. Failing in his intervention in the course of the proceedings taken in execution of the defendant No. 1's decree, he has instituted this suit to have it declared that they are no separate *jotes* of eight-annas and two-annas each, on which the defendant No. 1, as the holder of a decree for rent, has a first charge under s. 65 of the Tenancy Act, and that the entire *jote* is his by right of purchase ; and that the defendant No. 1 cannot proceed against a ten-annas share of it.

The Subordinate Judge dismissed the suit, holding that the defendant No. 2 did hold two separate holdings of eight-annas and two-annas of the original *jote*. The District Judge, however, reversed the Subordinate Judge's decision, as he was of opinion that the original holding had never been [925] sub-divided, though the rent payable for it to the various *patnidars* and *dar-patnidars* had been distributed, and was payable in separate shares.

The defendant No. 1 now appeals, and on his behalf it has been contended that the learned District Judge has misinterpreted the documents (Exs. H, A and R), which, it is said, show that the holding itself was sub-divided, and not merely that its rent was distributed between the co sharer landlords.

I must premise that as the finding of the District Judge that the defendant No. 2 never held separate holdings, and that the holding purchased by the plaintiff has not been sub divided, is a finding of fact, it cannot be disturbed by this Court in second appeal, unless the learned Judge has clearly misinterpreted the terms of these documents, and I would add that there is unquestionably other evidence on the record besides these exhibits on this point, *viz* , the *dakhilas* for rent granted by the landlords, and application for execution filed by the defendant No. 1 himself, so that the determination of the question as to whether the land held by defendant No. 2 is one holding or several holdings does not rest entirely on the interpretation of these documents.

I, however, see no reason for thinking that the learned District Judge has misinterpreted the terms of Exs. H, A and R.

Exhibit H is a *kabuliyat* executed in 1259 by the predecessor of the defendant No. 2 in favour of one of the eight-annas *patnidars*. It speaks of 1,150 *bighas* of *diara* land, known as " Guru Persad Sirkar, " being held under a *roka* from the *patnidars*. It is said that in 1259 the executants of the *kabuliyat*, *viz*., Messrs. A and J. Laruletta, held " the whole of this land," that the rent of it was Rs. 772, and that they agreed to pay separately Rs. 386 per annum to the eight-annas *patnidars* for his share of the rent. This is certainly strong evidence that the 1, 150 *bighas* form one holding, originally acquired for the purpose of the cultivation of indigo in the name of one Guru Persad Sirkar, and that at the time of execution of this *kabuliyat* the rent only was distributed between the then landlords.

The next document A is a *pottah* granted to Mr. J. Laruletta on the 6th Magh (not Aughran) 1266, by the two-annas *patnidars* of the holding, the total area of the whole land is given, *viz*., 1,160 odd *bighas*. The boundaries [926] of the whole of the land are described. The lessee is enjoined to keep these boundaries intact, and a permanent lease is granted for the lessor's share of the land on payment of a rent of Rs. 117 odd, after deduction from Rs. 942 odd, the total rent of the holding, of Rs. 824 odd, the rent due to the owners of the remaining 14 shares who are specified.

(1) 22 C. 658.

before the Tenancy Act came into force for a term of seven years, which expired after the Tenancy Act came into force, and he agreed to pay rent separately to the plaintiff for that term of seven years, and, after the expiry of that term, to pay a fixed sum in case he failed to execute a fresh *kabuliyat*. The suit **[927]** was brought for that fixed sum upon the express terms of the agreement, and it was held that as the *kabuliyat* was given before the Tenancy Act came into operation, and there was an express agreement to pay a fixed sum on the expiry of the term, the plaintiffs could maintain

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The other document (Ex. R) is another *pottah*, dated 31st Bysack 1267, executed by the owners of the eight-annas *dar-patni* in favour of the same predecessor of the defendant No. 2, *viz.*, Mr. J. Laruletta. It is couched in similar terms to those of Ex. A. It describes the holding as one parcel of land, gives the boundaries of this parcel, grants a permanent lease of the executant's eight-annas share "for the purpose of cultivating indigo and other crops thereon," and stipulates for the payment to the executants of a rent of Rs. 471 odd, being half of the total rent of the holding of Rs. 942 odd.

Both these documents, Exs. A and R, in my opinion, support the view taken by the District Judge that the original holding of 1,160 bighas was never sub-divided, but that only the rent of it was distributed.

There is, however, one provision in the documents A, and R., which it is contended is inconsistent with this view. Both documents contain provisions that the land within the specified boundaries "shall be surveyed at the interval of every five years." But this does not seem to me to point to the conclusion that the holding was sub-divided. Neither document contains any stipulation that the executants themselves are to be at liberty to survey the lands. The land referred to is the land within the boundaries mentioned in the *pottahs*, that is, the whole 1,160 bighas, or, in other words, the whole holding. The measurement of this land would have to be made by all the landlords jointly. There is certainly no provision that the *patnidars* and *dar-patnidars* may each independently measure either all the lands, or the lands appertaining to the share of each, which latter step they could not take, the lands appertaining to the share of each being undivided and undistinguishable from the lands of the others.

I may mention that, according to Ex. C, the rent due to its executant is to be paid quarterly, while according to Ex. R, the rent stipulated for is to be paid monthly. These provisions are, however, mere stipulations for the payment of the rent entered into by the parties for the convenience of the landlords. They in no way affect the question of the division or non-division of the entire holding.

[927] Several cases have been alluded to by the lower Courts in their judgments and have been discussed before us. The first of these is the well-known case of *Guni Mahomed* v. *Moran* (1). That case decides that when a tenant has agreed to pay a co-sharer landlord his share of the rent separately, he can be sued separately for arrears of such rent, but he cannot be sued for a *kabuliyat*, "for the grant and acceptance of a binding lease of the separate share," it is said, "cannot exist contemporaneously with the original lease of the entire *jote*." I do not, however, understand this decision as laying down a general rule to the effect that the granting of a *kabuliyat* of any kind necessarily operates as the creation of a new and separate tenancy. If it does, it is an *obiter dictum*, but no such rule would seem to me to be laid down in this case. Whether a *kabuliyat* creates a new and separate tenancy or not, and effects a sub-division of the holding or not, must, I think, depend on its terms. A *kabuliyat* merely stipulating for the payment of a certain share of the rent by monthly or quarterly instalments, would not seem to me to operate as creating a new tenancy, or as sub-dividing a holding, and this is all, in my opinion, that the *pottahs*, Exs. A and R, provide for.

This principle that the effect to be given to a *kabuliyat* must depend upon its terms is apparently impliedly admitted in the case of *Panchanan Banerji* v. *Raj Kumar Guha* (2), which is the second of the cases referred to by the lower Courts and discussed before us. In this case it was held, upon the terms of the *kabuliyats* executed by the defendant's predecessor, that a separate tenancy had been created. But the terms of that *kabuliyat* were very different from those of Exs. A and R in this case. In the *kabuliyat* in *Panchanan Banerji's case*, the area of the land "which proportionately would belong to the plaintiff," the co-sharer landlord, was set out. It was estimated at 661 *bighas*. The plaintiff, however, on measurement made it 11 *bighas*, and the Court after measurement held it to be 679 *bighas*. Now this is exactly what Exs. A and R in this case do not do.

(1) 4 C. 96. (2) 19 C. 610.

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the suit on the terms of the agreement, apart from the provisions of the Tenancy Act. That is not the case here, as we think that no suit either to enhance the rent, or [928] to recover rent for the alleged excess area, could be brought otherwise than under the terms of the Tenancy Act. The decision appealed from, therefore, appears to us to be right, and we dismiss the appeal with costs.

S. C. B. *Appeal dismissed.*

As already pointed out, they give the boundaries and area of the entire holding, and make no attempt to estimate the proportionate areas of land [928] liable for the shares of the rent payable to the executants of each of them, or to specify their boundaries. Then the *kabuliyat* in *Panchanan Banerji's case* (1) gave the plaintiff a right to measure the land, and for the reasons already given I do not think that Exs. A and R give such a right to the co-sharers landlords who executed them.

The case of *Lalun Monee* v. *Sona Monee Dabee* (2) has also been cited by the District Judge. In that case it has been said: "If the evidence shows that the amounts were paid as aliquot parts of the whole rental, that would go to show that the tenure was one." That is exactly how the rent payable to each co-sharer in this case is treated in Exs. A and R.

For these reasons I agree with the District Judge in concluding that there was no division of holdings in this case, but merely a distribution of the rent, and, that being so, the defendant No. 1 cannot proceed to sell his eight-annas and two-annas shares of the defendant No. 2's holding, which was purchased by the plaintiff in July 1892, as if they were separate and distinct *jotes*. Nor can he sell these shares as a share or shares of the original holding, because the whole *jote* has already been purchased by the plaintiff, and under the Full Bench ruling in *Beni Madub Roy* v. *Jaod Ali Sircar* (3), he, being a "fractional co-sharer 'landlord,' must pursue his remedies to recover his share of the rent under the ordinary law of the country and independently of the Bengal Tenancy Act." But independently of s. 65 of the Bengal Tenancy Act, the defendant No. 1 has no right to proceed against a share of the holding, for it is only under the provisions of s. 65 that he can have a first charge upon a property which is no longer the property of his judgment-debtor but that of a third person.

I, therefore, consider that the plaintiff is entitled to the declaration that he seeks for, and I would accordingly dismiss this appeal with costs.

[**Appr.**, 25 C. 917; **Rel.**, 18 C.W.N. 168=20 Ind. Cas. 820; **R.**, 26 C. 937; 40 C. 29= 16 C.L.J. 9=16 C.W.N. 877=15 Ind. Cas. 453; 2 C.L.J. 10 (11); 7 C.W.N. 670; 15 Ind. Cas. 847; **D.**, 8 C.W.N. 192; 8 C.W.N. 751 (752).]

(1) 19 C. 610. (2) 22 W.R. 334. (3) 17 C. 390.

26 C. 1 (P.C.) = 25 I.A. 241 = 2 C.W.N. 665 = 7 Sar. P.C.J. 394.

1898 JULY 12.

PRIVY COUNCIL.

26 C. 1 (P.C.) = 25 I.A. 241 = 2 C.W.N. 665 = 7 Sar. P.C.J. 394.

PRIVY COUNCIL.

PRESENT:

Lords Watson, Hobhouse and Davey, and Sir R. Couch.

[*On appeal from the Court of the Judicial Commissioner of Lower Burma.*]

KADIR MOIDIN (*Plaintiff*) *v.* NEPEAN AND OTHERS (*Defendants*).
[14th and 16th June, and 12th July, 1898.]

Mortgage—Accounts—Account on redemption of a mortgage—Appropriation of payments—Set-off of rents and profits—Expenditure on improvements—Interest—Transfer of Property Act (*IV of* 1882), s. 76—*Lower Burma Courts Act* (*XI of* 1889), s. 4.

That an account should have been taken between mortgagor and mortgagee in possession consistently with the direction in s. 76 of the Transfer of Property Act, 1882, is in accordance with the " justice, equity and good conscience " required to be administered by s. 4 of the Lower Burma Courts Act, 1889.

It made no difference, in the result of the account, whether the rents and profits received by the mortgagee in each year were set off year by year against the amount expended by the mortgagor in that year for improvement and management, or their total was deducted at the end of possession from the sum expended by him.

The balance of his expenditure had, in fact, exceeded in each year that of his receipts, and carried only simple interest. The mortgage debt decreed bore compound interest. *Held*, that the account need not be taken on the principle that the mortgagee should give credit for his receipts, first, in reduction of that debt which was most burdensome to the debtor. There was no obligation to pay off the compound interest debt before the other.

[2] Whether the improvements and the expenditure were reasonable were questions of fact on which two Courts had concurred; and there was no ground for interference with their finding.

During the life of the mortgagee, his son managed the property, living on it at a distance. The account directed was of sums " laid out in management." Salary to this manager was not paid, and in the account could not be allowed, such allowance not having been decreed. But the cost of this manager's being separately maintained during the father's life could be allowed. For the period after the father's death, as the son became mortgagee himself, such cost of maintenance could not be allowed.

[F., 50 P.R. 1904 = 83 P.L.R. 1904; U.B.R. (1907) 3rd. Qr. Mortgage 1; R., 15 M.L.T. 374 (376) = 22 Ind. Cas. 635; 10 Ind. Cas. 975 (976) = 4 S.L.R. 244 (245). 9 O.C. 18 (23); Expl., 3 N.L.R. 72 (75).]

APPEAL from a decree (14th December 1896) of the Judicial Commissioner, varying a decree (19th July 1895) of the Commissioner of the Tenasserim Division, which varied a decree (13th May and 18th June 1895) of the District Judge of Shwegyn.

The mortgage account, to which this appeal related, was taken under s. 213, Civil Procedure Code, in execution of a decree of the Court of first instance, maintained, with a variation as to interest, by an order of Her Majesty in Council, dated the 27th July 1894, on the appeal of *Kader Moidin* v. *Nepean and others* (1).

(1) 21 C. 882 = 21 I. A. 96.

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In that suit redemption was decreed. The accounts directed by that decree to be taken were arranged under heads which are stated in their Lordships' judgment on this appeal. The land, about 4,524 acres, was originally allotted from the waste, to Kadir Moidin, the appellant, and it was by him transferred to John Nepear, father of the first respondent, on the 3rd June 1871, by entry in the Revenue Register, with possession. This was a usufructuary mortgage, the debt, originally Rs. 10,158, carrying compound interest at 10 per cent. per annum. On the death of John Nepean in 1883, his son C. W. Nepean, who had managed for his father, continued to manage, the mortgagee's rights having devolved on him and the family.

On the 10th September 1894 the respondents filed accounts from 1871. They credited the mortgagor with Rs. 48,706-14 annas as received by the mortgagees for rents and profits from the 3rd June 1871.

On the 14th December 1896, the redemption money was adjudged by the appellate Court below to be Rs. 1,98,785.

[3] The principal questions now raised were: whether it was not requisite, according to the law administered under Act XI of 1889, that the receipts of income by the mortgagee from rents and profits should be set off against, in the first instance, the more onerous debt which carried compound interest; and whether the sums debited to the mortgagor as having been expended on improvements and on management were rightly charged.

Mr. *Haldane*, Q. C., Mr. *J. H. A. Branson*, and Mr. *G. J. Turner*, for the appellant, contended that, in Burma, inasmuch as the local law, Act XI of 1889, the Lower Burma Courts Act, required the Courts, in such a case, "to act according to justice, equity and good conscience," the law applicable to this account seemed to require that the reduction of the more burdensome debt, charged with compound interest, should precede payment of the simple interest debts. By the Roman Civil law, as explained by the Master of the Rolls, Sir William Grant, in *Devaynes* v. *Noble* (1), that was the required course in such an account. The English law, on the other hand, left the mortgagee to take his own course, in the absence of provision in the contract. The Transfer of Property Act, 1882, which guided the Indian Courts on the subject, in s. 76, had not been extended to the interior of British Burma, where the contract was made and had to be carried out, and where the parties resided. The general mode of taking accounts against the mortgagee in possession was clearly stated in the Tagore Law Lectures for 1875-76, by Rash Behari Ghose, in reference to Indian mortgages, where the appropriation of balances was indicated, the account being stated to be closed at the end of each year. This was compared with the explanation given by the Master of the Rolls in *Union Bank of London* v. *Ingram* (2). Also were cited *Cockburn* v. *Edwards* (3), *Jajit Rai* v. *Gobind Tewari* (4), and *Kadir Moidin* v. *Nepean* (5).

[4] In the next place the decree of the Court below should not have allowed to Charles W. Nepean a salary for his management. The item amounted to Rs. 25,200, carrying interest to the extent of Rs. 53,214. He had been the mortgagee managing the land in his own interest. Nor, at all events, could there be interest on the salary. The manager was not entitled to anything.

(1) Mer., 696, cited in Fisher on Mortgages, 4th edition, para. 1242.
(2) (1880) L.R. 16 Ch. D. 53.
(3) (1881) L. R. 18 Ch. D. 449.
(4) 6 A. 303 (310).
(5) 21 C. 882 = 21 I. A. 96.

Other objections, preferred by counsel, are mentioned in their Lordships' judgment. 1898 JULY 12.

Mr. *J. Fox*, for the respondent, contended that the accounts had been rightly taken according to the law and practice in India as stated in the 76th section of the Transfer of Property Act, 1882. This had guided the Judicial Commissioner. On the questions of fact decided below, there was nothing to call for interference with the concurrent findings of the Courts. There had been no case made out of a mortgagor improved out of his estate. The latter had been aware of all that was going on for the improvement of the estate, and had waited for more than twenty years, until by continuous outlay the mortgagee had made the property valuable. The estate had required a resident manager. The house had been built for Charles Nepean, who required it in his capacity of manager. It was a reasonable charge against the mortgagor, as a necessary thing, and also as a permanent improvement of the property. The account as approved by the appellate Court conformed to the Order in Council of the 27th July 1894; and the objections to it were not well founded.

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Mr. *J. H. A. Branson* replied.

JUDGMENT.

Afterwards, on the 12th July, their Lordships' judgment was delivered by

LORD DAVEY.—The action out of which this appeal arises was commenced some years ago by the present appellant for the redemption of a large tract of land situate in the district of Shwegyn in Lower Burma, which was originally waste land, belonging to the Government. The respondents, deriving title from one John Nepean, who died in 1883, denied the mortgage and claimed to hold free from any right of redemption. The [5] appellant's right to redeem was finally established in an appeal to this Board, and by an Order in Council, dated the 27th June 1894, the decree of the District Judge of Shwegyn, which had been reversed by the Judicial Commissioner of Lower Burma, was restored with a slight variation in the form of accounts thereby directed. The accounts as varied were as follows:

(1) An account of what is due to defendants for principal and interest on their mortgage in this case, namely, all debts due to them from plaintiff, and all money expended by them on behalf of plaintiff in paying Government dues on the land together with compound interest at 10 per cent. per annum upon these moneys.

(2) An account of all sums of money laid out by defendants on improvements and management of land comprised in the said mortgage, with simple interest at the rate of 10 per cent. per annum on the amounts expended by the defendants from the respective dates of such expenditure to the date of taking the said accounts.

(3) An account of all rents and profits received since 3rd June 1871 by defendants or any of them or by deceased J. Nepean, whose representatives they are, or by any other persons acting by the order or for the benefit of defendants or deceased J. Nepean.

In compliance with these directions the respondents brought in three accounts, which have been carefully and fully investigated by the District Judge of Shwegyn with the assistance of Mr. Villa, who was named a Commissioner to take the accounts, and there have been appeals to the Commissioner of the Tenasserim Division, and to the Judicial Commissioner

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of Lower Burma. The present appeal is from the decree of the Judicial Commissioner, dated the 14th December 1896.

The difficulty of taking the accounts has been much increased by the fact that John Nepean in his lifetime, and the respondents since his death, either believing themselves to be absolute owners, or thinking that there was not any prospect of the appellant redeeming the lands, kept no proper mortgage accounts, and such accounts as there were are said to have been eaten [6] by white ants. Since the year 1874 the lands have been under the general management of the respondent Charles W. Nepean, who was a son of John Nepean. On his father's death, Charles W. Nepean became entitled to a share of his estate, including this mortgage. Charles W. Nepean resided on the property while his father resided at Shwegyn, where he carried on business as a money lender.

No question in this appeal arises on account No. 1 (the amount due for principal lent and Government dues paid with compound interest) or upon account No. 3, of rents and profits received. But the appellant complains (and this is his first point) of the way in which the amounts found due on account No. 3 have been dealt with on appeal by the Commissioner of the Tenasserim Division, whose judgment in this respect was confirmed by the Judicial Commissioner of Lower Burma. The learned Commissioner has in each year deducted the rents and profits received in that year as shown by account No. 3 from the balance of interest on expenditure then due as shown by account No. 2. It should be observed that the amount of the receipt was in each year less than the balance owing in that year for interest on expenditure.

The Burmese Courts are directed, in the absence of any statutory law applicable to the case, to follow the guidance of justice, equity and good conscience. Mr. Haldane contended that there is no rule of abstract justice in taking the accounts of a mortgagee in possession, and that the Indian rule, which is now embodied in the 76th section of the Transfer of Property Act, 1882, should, though the Act has not been extended to Burma, be followed there in reference to the English practice. The 76th section (*h*) provides that a mortgagee's receipts from the mortgaged property "shall, after deducting the expenses mentioned in cls. (*c*) and (*d*) and interest thereon, be debited against him in reduction of the amount (if any) from time to time due to him on account of interest on the mortgage money, and, so far as such receipts exceed any interest due, in reduction or discharge of the mortgage money." The expenses mentioned in cls. (*c*) and (*d*) are for Government revenue and other charges of a public [7] nature, arrears of rent and repairs. Their Lordships are not prepared to dissent from Mr. Haldane's contention on this point, but it is really unnecessary for them to express any judicial opinion on it in the present case. The Commissioner of the Tenasserim Division intended to follow the Indian rule, as appears from his judgment and from the variation he made in the decree of the District Judge in directing a set off of the receipts in each year against the balance due for interest on expenditure in that year. But, inasmuch as the receipts were in each year less than that balance, and as (account No. 2 bearing only simple interest) the balance of interest did not carry interest, it really makes no difference in the result whether the receipts are set off year by year, or the sum of the receipts at the end of the account is deducted from the sum of the amounts due on account No. 2. Mr. Haldane's real contention was that the receipts ought to have been deducted from the interest due year by year on account No. 1, which bears compound interest, so as

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to stop *pro tanto* the interest running on that interest, or (in other words) that the mortgagee was bound to give credit for his receipts against the debt which was most burdensome to the mortgagor. Their Lordships can find no warrant in principle or in authority for this contention. They agree with the judgment on this point delivered by the Judicial Commissioner, and they do not think that the mode in which the account is stated is inconsistent with the rule laid down in the Indian Transfer of Property Act.

The appellant's next point was on items 12, 13, 14 and 15 of account No. 2. Item 12 is for planting fruit trees, digging well, fencing garden, etc., in connection with the manager's house. Item 13 is for "a large brick house shingle roof at Thayet Kone," and items 14 and 15 for out-houses and fencing compound and making masonry well. Item 12 was objected to as an unreasonable and unnecessary improvement. The house referred to in item 13 was a substantial house, for which Rs. 14,500 is claimed in the mortgagee's account, with Rs. 17,400 for interest. It was built for the use of Charles W. Nepean, when in management of the property, in place of a former house of a less substantial character, for which Rs. 1,500 is claimed in item 11. This latter house had fallen out [8] of repair, and according to the respondent's evidence, it was necessary to replace it by a more substantial erection. The appellant contends that the expenditure was unreasonable and unnecessary, and such as cannot be charged against a mortgagor. The questions whether any improvement made by a mortgagee in possession is reasonable in its character, and whether the expenditure on such improvement is reasonable in amount, are questions of fact. The Commissioner of the Tenasserim Division allowed item 12 at the reduced amount of Rs. 400, instead of Rs. 4,000 as claimed, and with regard to items 13, 14 and 15, he thought that the amount claimed by the respondents was altogether an exorbitant sum to spend on a house for the manager, and that a much less pretentious house would have suited the purposes of the estate, and he allowed Rs. 5,000 for those three items. The Judicial Commissioner confirmed these findings. There is, therefore, a concurrence of opinion on a question of fact between the two learned Commissioners, and their Lordships would not, in accordance with their usual practice, be disposed to disturb their finding, even if they did not altogether concur in it. But in this case they think that the Court below has dealt with the questions on the evidence before them in a manner which is quite satisfactory, and they have no hesitation in agreeing with the result.

The next point is on item 39 for "four elephants employed for eight years (1871 to 1879) on the land for special purpose, clearing jungle and other work at Rs. 100 each month." Rs. 38,400 was claimed by the respondents for this item with Rs. 74,800 for interest. The Commissioner for the Tenasserim Division has allowed Rs. 3,200 with corresponding interest, and this allowance has been confirmed by the Judicial Commissioner. It was not disputed that it was reasonable to employ elephants for the purpose, and there was evidence that four elephants belonging to Mr. Nepean were (at any rate from time to time) employed, but it was contended that the employment was casual and occasional, and that it was charged to and paid for by the cultivators. The evidence, however, on the latter point is vague and inconclusive. In this case again their Lordships are satisfied with the finding of the two Commissioners and will not disturb it.

[9] The only remaining point is on item 54 for "management of land for 23½ years at Rs. 350 per month." The respondents claimed

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Rs. 97,300, and interest Rs. 1,17,570. The Commissioner for the Tenasserim Division allowed a salary to Charles W. Nepean at the rate of Rs. 100 per month, and his decision was confirmed by the Judicial Commissioner. The appellants object, on the ground that the decree allows only "sums laid out" by the defendants in management of the land, and there is no evidence of any salary or allowance being paid to Charles W. Nepean as manager of the property. The evidence shows that Charles W. Nepean received an education in surveying and practical engineering in this country, and on his return to Burma in 1874 took charge from his father of the whole estate in dispute and resided on the land, but he did not actually draw Rs. 350 a month, and he stated that he drew from his father whenever he wanted it. He subsequently states that his father advanced him money to carry on the estate, and at the yearly meetings his father had memoranda of what he gave him, and that his father required from him information as to how the money had been expended. The conclusion their Lordships come to upon the evidence is that during his father's lifetime the respondent Charles W. Nepean was in the position of a son maintained by his father and living at his expense, and at the same time assisting him in the management of his business, but that there was no agreement between him and his father that he should receive any salary or remuneration for such assistance, and that he never in fact received anything in the form of salary. The Courts below thought that an estate of this kind could not be managed without a resident manager, and that if the respondent Charles W. Nepean had not undertaken the management, some other person must have been employed at a salary, and it was, therefore, reasonable that an allowance should be made to the mortgagees for a salary to Charles W. Nepean as well during his father's lifetime as subsequently, though none was, in fact, paid. Their Lordships do not dissent from the view thus expressed as to what might have been reasonable, and if the Court had been asked in framing the decree to insert a special direction that such allowance should be made, it would probably have been [10] acceded to. But in taking an account of "moneys laid out," they think it would not be right to allow to the mortgagee in possession as a disbursement or salary to a manager which was not in full paid either in form or in substance. Their Lordships however think that, although a salary cannot be allowed as such, yet during John Nepean's lifetime the cost of the separate maintenance of Charles W. Nepean, while absent from his father's home and engaged in the management of the property, may be allowed to John Nepean as a disbursement or "moneys laid out in management." And they think that Rs. 100 per month is not an unreasonable or excessive amount to be allowed for that purpose. After the father's death there is more difficulty. Charles W. Nepean was then himself only the mortgagee and was residing on the property and managing it for the benefit of himself and his co-mortgagees, and their Lordships think it would be contrary to principle to allow either a salary or allowance for his maintenance in such circumstances.

Their Lordships will, therefore, humbly advise Her Majesty that the decree of the Judicial Commissioner of Lower Burma, dated the 14th December 1896, be varied by disallowing so much of the sum of Rs. 25,200 for principal and Rs. 55,214 for interest charged against the appellant, being item No. 54 in the account No. 2 of the respondents, as represents the allowance of Rs. 100 per month after the death of John Nepean and interest thereon with consequential variation, and that in other respects the said decree be confirmed.

As the appellant has succeeded, partially only, on one of his points, and has failed on his other points, their Lordships direct that the appellant shall pay to the respondents one-half of their costs of this appeal, and they make no other order as to costs.

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Appeal allowed in part. Decree varied.

Solicitors for the appellant: Messrs. *Withers & Withers.*
Solicitors for the respondents: Messrs. *Carlisle, Unna, Rider & Heaton.*

C. D.

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[11] PRIVY COUNCIL.

PRESENT:

Lords Hobhouse, Morris and Davey and Sir R. Couch.

[*On appeal from the High Court at Fort William in Bengal.*]

NIRMAL CHUNDER BANERJEE (*Plaintiff*) v. MAHOMED SIDDIK (*Defendant*).* [14th and 15th June, 1898.]

Title—Evidence of Title—Ownership, Evidence of—Evidence of titles contested between rival purchasers—Benami transaction—Declaratory decree, Suit for.

Under the Land Registration Act (Bengal Act VII of 1876), registration of ownership was refused on the application of two rival purchasers of the same property, and a reference concerning them was made to the High Court under s. 55. The one purchaser then sued the other, claiming a decree declaratory of his title, under conveyances made to him in 1890 by a Mahomedan widow, since deceased, and by assignees and lessees from her of parts of her interest in the property. He alleged that a *hiba-bil-ewaz*, executed by her in 1858 to her son-in-law for no substantial consideration, was nothing more than a *benami* transfer, after which she had remained the owner with her former title. On that *hiba*, however, the defence was founded, the defendant averring that it was a real conveyance by the widow, and that through the son-in-law, from whose sons the defendant had purchased the property, the latter had obtained a good title. No actual possession was established by either of the parties; the property had been let in parcels to different tenants. Among other things disputed, it was the subject of conflicting evidence whether leases had been made in the past by the then real owner or upon assumption of title by the adverse party. The Courts below differed in their conclusion as to which of the parties was entitled to a decree. The Judicial Committee maintained the decision of the original Court in favour of the plaintiff.

[R., 14 C.W.N. 576 (578) = 5 Ind.Cas. 531 (532).]

APPEAL from a decree (22nd February 1895) of the Appellate High Court, reversing a decree (30th April 1894) of the High Court in its ordinary original jurisdiction.

The appellant, who was plaintiff in this suit (26th January 1893), claimed a declaration of his title as owner, and of his right to registration under the Bengal Land Registration Act, 1876, setting forth a title as purchaser of several parcels of land and houses in Calcutta.

The plaint stated the appellant's title to have been derived under two conveyances executed, on the 11th March, 1890, by Said-un-nissa Bibi, a Mahomedan widow, and under other conveyances executed by the assignees and lessees of portions of her property. An alleged *benami* transaction by her in 1858 was stated, and the plaintiff averred that he was in possession.

[12] The facts appear in their Lordships' judgment.

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An application which the plaintiff had made to the Collector of Calcutta, on the 12th January 1891, for registration as owner, on notice to Mahomed Siddik, now defendant, was met by a claim for the same thing by the latter. A reference had then been made on the 1st March 1892, under s. 55 of Bengal Act VII of 1876 (the Land Registration Act), and, in the result, this suit was brought.

The defence was that Said-un-nissa had no title to convey in 1890, as she had, on the 15th January 1858, made over this and other property, by a deed of *hiba-bil-ewaz* (the transaction referred to in the plaint, but not a *benemi* one), to her son-in-law, Mozuffer Hossein, from whose two sons, Ali Akhtar and Mansur, the defendant had purchased, they having executed to him a conveyance on the 1st August 1887.

The main question between the parties was whether Said-un-nissa had in 1890 a title which she could transfer; and this involved the question whether the *hiba* of 1858 was a substantial gift and conveyance, or was merely a *benami* deed, leaving the widow entitled as before.

Besides the defence that his title was valid on the above ground, the defendant relied on limitation, alleging that the plaintiff, and those through whom he claimed, had not been in possession within twelve years immediately preceding the date of the suit. But this depended on the facts connected with the ownership.

Another objection was taken to the suit with reference to s. 42 of the Specific Relief Act (I of 1877), *viz.*, that the plaintiff, being in fact out of possession, and not asking for it, could not maintain a suit merely for a declaration of his title. The Courts below had not allowed this objection; stating reason that the plaintiff had been as much in possession of the property as the defendant had been; and (as the appellate Court had said) that his suit contemplated, not only relief by declaration of his title, but by his being put into his true position to assert his right to registration under Bengal Act VII of 1876 [13] on production of his title, when declared by the Court, if it should be so, when the suit had been heard.

The High Court in its ordinary original jurisdiction (MACPHERSON, J.), made a decree, declaring the plaintiff to be the owner, and, as such owner, entitled to have his name registered.

The general view taken in the judgment, which went through the facts, appears in the following:—

"In dealing with a case of this description, in which the principal actors are dead, and the evidence is weak and imperfect on both sides, one cannot, in valuing that evidence, overlook the circumstances under which the dispute arose. Woodor was naturally the person who would look after his mother's property and affairs generally. For twenty years after this *hibanama*, there were no disputes of any description about it, but after the death of Woodor, Ali Akhtar proceeds, not to keep the property as his father is said to have kept it, but to dispose of it, and it is not clear that in so doing he was acting with the other members of the family who would be equally interested with him. Asmut-un-nissa had certainly an interest in the property if he had any, but she does not join in the conveyances; and I do not believe in the arrangement by which she is said to have relinquished her interest. This would have been much more formal than it is described to be. If the *hibanama* was a real transaction, and the property had since been in the undisputed possession of Mozuffer Hossein and his sons, it does not seem likely that Said-un-nissa would, on the death of her son, come forward and advance a claim which she had never thought of making while he was alive. On the

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other hand, if the transaction was *benami*, and Woodor had been looking after the property for her, it is by no means so improbable that on his death, the *benami* deed would be put forward; and I do not think Ali Akhtar would be over-scrupulous about this. Said-un-nissa may, of course, have been backed up by others, but it does not seem that in 1879 and 1880 she had even the assistance of Affil-ud-din and Taffil-ud-din.

"The case is by no means free from difficulty; but I believe the plaintiff's case to be the true one, and that Said-un-nissa had a title to this property and was in possession of it in 1880. Bhulu Miah is brought forward to prove that he collected for about a year for Ali Akhtar up to the time of the lease to Sadut; but that I do not believe.

"The plaintiff admits that when he purchased he knew of the sale to the defendant, and that the title was in dispute. The defendant is not so truthful; but it is impossible to suppose that when he purchased in 1887, he did not know the title was disputed. The slightest enquiry on his part would have put this beyond dispute.

[14] "As regards the defendant's objection, that the plaintiff not being in actual possession cannot get a declaratory decree, I would observe that the plaintiff is as much in possession as the defendant; the fact is that neither party is in actual possession and neither is in a position to enforce the tenants to pay rent. If the plaintiff gets his title declared as against the defendant, and gets his name registered, he gets all he wants. There will be a decree declaring the plaintiff's title to this property, with costs on scale 2."

A Division Bench (PETHARAM, C. J., and PRINSEP and PIGOT, JJ.), on the defendant's appeal, reversed the above decree.

The plaintiff having appealed.

Sir *E. Clarke*, Q.C., and Mr. *J. H. A. Branson* were for the appellant.

The respondent did not appear.

JUDGMENT.

Afterwards their Lordships' judgment was delivered on the 8th July by

LORD HOBHOUSE.—This suit was instituted on the 26th January 1893. The plaintiff prays for a declaration of his ownership and of his right to registration. The defendant alleges that he is owner. The property consists of several houses and parcels of land in Calcutta. Each party claims to be in possession. Each party derives his title from a lady, named Said-un-nissa, who, in the year 1858, was the undoubted owner. Neither party is, or has ever been, in actual physical possession of any part of the property, which has been let to tenants. The possession alleged on both sides consists in granting leases, obtaining *kabuliyats*, and recovering rent. From the year 1880 onwards an irregular and indirect legal warfare has been carried on by the rival claimants, each suing a tenant of some portion of the property for rent. This suit is the first attempt to put the whole title directly in issue between the principal claimants. An objection has been taken to its form, but both Courts below have maintained it; and it seems to their Lordships, not only the most convenient, but a strictly regular, way of bringing the dispute to a close. In point of fact the pleadings and evidence and judgments relate, not to liabilities of this or that particular tenant or parcel, but to the validity of the rival claims to ownership as a whole.

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The suit was tried in the High Court of Calcutta on the [15] original side. The original Court decided for the plaintiff. The Court of appeal differed, and dismissed the suit. That decision is challenged in the present appeal. It is unfortunate that the respondent does not appear, for the case is one of much intricacy, and though the appellant's counsel have done their best to present it with fulness and fairness, the want of an opponent is a sensible disadvantage.

In January 1858 Said-un-nissa executed a *hiba* (or deed of gift) by which she transferred her property to her son-in-law Mozuffer, under whom the defendant claims. Between 1880 and 1890, she executed several transfers, by the last of which, in April 1890, the whole of her interest, together with that of her transferees, became vested in the plaintiff. The main question is whether the *hiba* is a substantial or a *benami* transaction. It is not disputed that whatever interest she passed to Mozuffer vested in his heirs, nor that whatever interest she then retained has vested in the plaintiff. There is a subordinate question whether this suit has been brought within due time; but it will be found that the decision on the first point involves findings which will govern the second.

In order to apply the evidence it is necessary to understand the state of Said-un-nissa's family. In 1858 she was a widow, with one son, named Woodor, who was born about 1845, and one daughter, Raj-un-nissa, who was married to Mozuffer, the grantee of the *hiba*, and had issue by him. Mozuffer also had issue by an elder wife, a son called Nabi. By Raj-un-nissa he had four sons and two daughters. The eldest son was named Ali Akhtar, born about 1856; the second, named Mansur, died in 1884, and the third, Mankdur, in 1887, both without issue, at what ages is not stated; the fourth, Masrur, is still living. One of the daughters is dead without issue, the other is living and married. Mozuffer died either in 1876 or 1878, and his wife about two years after him.

The first observation about the *hiba* is that it gave away the whole of Said-un-nissa's property, not only the Calcutta houses but other valuable lands, which it seems she had acquired at various times. It left her without means, and also disinherited her son, as to the amount of whose property we have no evidence, [16] and her daughter too, in favour of her son-in-law, who might alienate the land and whose inheritance would pass to an extent then quite unascertainable to his issue by other marriages or to other wives and their issue. It is impossible to deny the great improbability that such a transfer should be made for Rs. 100 and a copy of the *Koran*, which is the consideration stated in the *hiba*. It is to be observed here that the Court of appeal were under the impression that the gift was made to Raj-un-nissa, which would no doubt be a less improbable action. As the matter stands, the least that can be said of it is this, that it disposes the mind to receive without difficulty evidence showing that the transfer was purely nominal.

So far as direct evidence goes, there is none at all to explain why such a gift should be made. There is some, not in itself very cogent, to show that it was a *benami* transaction. Of the attesting witnesses, two alone survive. Sajat Ali was the *gomashta* of Said-un-nissa's husband and afterwards of herself, and he collected her rents. He says that the *hiba* was executed to baffle claims for dower by the representatives of Woodor's wife, who had recently died. The other witness is Golam Abbas, who was a connection of Said-un-nissa, and held an *ijara* from her, and at the date of the *hiba* was staying in her house. He corrobo-

rates Sajat as to the motive for the *hiba*, and gives an account of the attending circumstances, perhaps too minute to be very trustworthy. Both those witnesses are very old men, and Macpherson, J., who presided at the trial, observes that they speak with some degree of confusion; but he receives their evidence and relies on it, though not strongly. Neither of them has any apparent motive to favour the plaintiff. They leave on their Lordships the impression that they could hardly have invented the idea of a *benami* gift, and that probably there was something said at the time to the effect that they state, though we cannot be sure of the details. So far the evidence runs in accord with the antecedent probability.

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The next question is whether any change was made in the treatment of the property. The only contemporary evidence is that of the two old men. Sajat says that after the *hiba* there was no change in his duties. He continued keeping accounts as [17] he did before. He applied his receipts for the family expenses of Said-un-nissa. "Mozuffer Hossein never asked me to pay the money over to him or to any one else, but asked me to go on in the same way as I did before." Golam says that when staying in Said-un-nissa's house, he saw a tenant, named Dhoni, paying rent to her after the *hiba*, and that he himself paid rent to her under his *ijara*, which endured only for two years but overlapped the date of the *hiba*. Unfortunately, both at this date and at other periods of the history, there are no written accounts. The positive evidence is not strong, but, so far as it goes, it shows that Said-un-nissa's position was not altered by the *hiba* for some little time, it may be two or three years afterwards. This again is in accordance with antecedent probabilities.

During the rest of Mozuffer's life the evidence is almost a blank. It is clear that he and his mother-in-law were on the most friendly terms. He resided in the Burdwan district, and used to visit her at Hosseinabad, where her house was, and in the neighbourhood of which most of her land was situated. Being a Mahomedan lady of a rank which precluded her from appearing to any but relatives and intimates, she necessarily did her business through some other person, and during Mozuffer's life he acted for her to a considerable extent. As regards the Calcutta property, by himself or by an agent named Rahatalla, he collected rent; but there are no accounts or other evidence to show how much he received or how he applied it, nor whether his position and conduct after the *hiba* differed in any way from his prior position and conduct. Said-un-nissa, however, went on living at her home in Hosseinabad, and no evidence is adduced to show that she lived in any more humble or any different way than formerly. Not a suggestion is offered on the part of the defendant to explain what she had to live on if she had parted with all her property. The inference seems almost irresistible that she must have received support out of that property; and if she did, it is difficult to stop short of the conclusion that the whole of the ostensible gift was a sham by the intention of both parties.

When Mozuffer died the property would, supposing the *hiba* [18] to be valid, descend to his widow and children. None of them at that time appear to have made any claim to it, nor indeed has any claim ever been made except by Ali Akhtar and Masrur, who have transferred their interest to the defendant. This circumstance is not explained. Of course the defendant is not bound to explain it, as the plaintiff can only succeed by the strength of his own title. But it is one of the phenomena which

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go to create doubt whether Mozuffer was in his own family considered to be the owner of the property. Ali attempts some explanation by alleging an arrangement by which his surviving sister relinquished her interest to him. But this story of his is very confused and contradictory, and the original Court justly refused to believe it. Even if it were true it would not account for the inaction of Raj-un-nissa, or of her other sons, Nubi who is still alive, Mankdur who lived till 1887, and Mansur who lived till 1884, and who not only did not claim against Said-un-nissa, but on an important occasion took part in an assignment of the property by her. In the face of these facts it is impossible to think that the property contained in the *hiba* was considered by Mozuffer's family as his own.

There is evidence that during the short time for which Woodor survived Mozuffer, he intervened in the management of the property though the extent of this intervention is not made very certain, and again no accounts or writings are produced. Wasek Ali, a witness whose evidence will hereafter come to be carefully considered, says that Woodor employed him in doing some of the business, and a tenant, named Sage, says that he paid rent to Woodor so long as he was alive, and when he died, did not pay. It is at any rate certain that during Woodor's life there was peace as profound as during the life of Mozuffer.

Woodor died in January 1879, and soon afterwards we enter on a period of great confusion. Ali put forward claims to be owner of the property. This was resisted on the part of Said-un-nissa and there ensued the state of contest which has been brought to a head in this suit. There is nothing to explain why Said-un-nissa should have resisted Ali's acts of ownership if she had [19] really made over the property to Mozuffer and he had been in enjoyment of it for twenty years. It is certainly unlikely that this old lady would of herself have disturbed the *status quo* in which she had acquiesced so long, or that anybody should have done it in her name. Whereas it is not difficult to understand that after Mozuffer's death and that of Woodor, Ali coming fresh to the business, finding the *hiba* and the ostensible title given by it, and knowing that his father had collected rents, should have thought that his claim was maintainable in law and have felt little scruple in preferring it.

How Ali dealt with the mofussil property their Lordships cannot ascertain : for his own statements as to his proceedings cannot be looked upon as accurate, and Mr. Justice Macpherson places no reliance on him. That learned Judge deals with the matter in this way. He is speaking of the time after Mozuffer's death :—

"After that, Said-un-nissa and Ali Akhtar appear as rival claimants, and proceed to deal with the property in a way which leads me to regard suspiciously the claim of both. I gather from the evidence that Ali Akhtar first began to sell, for he says that he has sold all the mofussil properties comprised in the *hiba*, that the first sale was in 1286 or 1879, after the death of his father, and the last about ten years ago, and he gives the names of several purchasers. I do not know what the result of all these sales was; but it is clear from the evidence of Bhola Moitro one of the purchasers, that the sale to him was disputed by a purchaser at a sale in execution of a decree against Said-un-nissa, and that he failed to satisfy the Court that he was in possession, although he sticks to the story that he got and still holds possession."

It seems then that in the only mofussil case of which we have anything like clear evidence Ali and his transferee were unsuccessful.

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Ali also alleges that he made sale of a parcel of land for Rs. 66 to Affil, a first-cousin of Said-un-nissa and one of those to whom she conveyed interests in the Calcutta property. This is brought forward to discredit Affil who supports Said-un-nissa's title. Affil says that the sale was provisional and was undone and the money returned. This matter has but little bearing on the main stream of evidence and their Lordships do not pursue it.

On the 31st January 1879, Wasek Ali brought an action in the [20] name and on behalf of Said-un-nissa against one Ostagur for rent of one of the houses and a decree was obtained in April 1879. A like action was brought on the 7th April 1879 against Sage for use and occupation of land of the plaintiff. A decree was obtained and upon non-payment Sage was committed to jail on the 19th August 1880. Two observations are to be made on this case. One is that it is proved by the same deposition of Sage, in which he states that he paid his rent to Woodor as above-mentioned. The other is, that Ali speaks of Ostagur as one of the tenants from whom he collected rent, and says, not only that he collected rent from Sage on several occasions, but that he obtained a decree against him; whereas the only decree forthcoming is that of Said-un-nissa. These observations have an important bearing on the evidence of Wasek Ali, which exhibits in more detail the strange way in which Said-un-nissa and Ali appear as interchangeable characters with respect to the Calcutta property.

All the foregoing events are valuable only as bearing on the true position of Said-un-nissa and Mozuffer's family. As this suit was not instituted till the 26th January 1893, they do not show possession by the plaintiff within twelve years. The next series of transactions has a bearing on both these questions. But it will be observed that at the two most critical points of the history, *viz.*, the execution of the *hiba* and the death of Mozuffer, the result of the evidence is not to show that any change took place in the management of the property, but to make it probable that Said-un-nissa's position was not changed. It is not till after the death of Woodor that conflict begins.

It commences on the 19th July 1880, when Said-un-nissa executed to one Saadut Hossein an *ijara* of all the Calcutta properties for a term of ten years at a rent of Rs. 14 per month. One of the witnesses to this deed is Mansur, Ali's brother, and he wrote Said-un-nissa's name to it. On the 4th August following, Ali executed to Saadut an *ijara* of the same property at the same rent for five years. On the 19th July a *kabuliyat* was prepared as from Saadut to Said-un-nissa. On the 4th or 6th August, this very document, retaining the same date, only with the name of Said-un-nissa struck out and the name of Ali [21] substituted, was executed by Saadut and delivered to Ali. That these curiously mixed and contradictory proceedings should create great confusion of interests is easy to understand, and it is not so easy to explain either their cause or their effect. It is all the more difficult because none of the parties to the dispute has been in physical possession of the property. All has been in the hands of tenants, and possession must be determined by receipt of rent or by the nature of legal proceedings. Another element of complication is that Said-un-nisa was at times residing in Ali's house. She was there when she died. Indeed it is alleged by Affil and Taffil, her cousins, that Ali put her under duress there, and that they called in the police to deliver her from confinement. Nothing turns on this charge, which Ali denies; but it shows a strange mixture of interests. That Saadut was in

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legal possession as lessee for nearly ten years, when he transferred to the plaintiff, is clear, but on the question whose tenant he was the Courts have differed.

His first agreement was with Said-un-nissa. He says that Ali came to him and showed him the *hiba*. He did not previously know Ali. He thought there was a hitch, and so got an *ijara* from Ali and attorned to him by the *kabuliyat*. He remained in possession for nearly ten years, certainly claiming for the last five years under Said-un-nissa's *ijara* ; and towards the end of that time he assigned the remainder of that *ijara* to the plaintiff, together with the rents then in arrear, which were recovered by the plaintiff in a series of law suits.

The view taken by the Original Court is that Saadut, in the first instance, took the lease from Said-un-nissa ; that it is by no means clear that he did not get possession before his arrangement with Ali ; that foreseeing disputes he chose to have two strings to his bow ; and that he cannot be held to have ousted the possession of Said-un-nissa because he chose to attorn to Ali for five years. Their Lordships are disposed to think that this is a just view ; but they add to it that Said-un-nissa is also shown to have had some substantial enjoyment, if not the whole enjoyment, of the property even during the five years covered by Ali's *ijara*.

[22] Saadut himself says in general terms that he paid rent to Said-un-nissa during that time. His agent Wasek Ali enters into details. After showing receipt of rents from tenants during several years, he produces accounts ranging from Srabun 1287 to Choitro 1292 (say 1880 to 1885), when they end abruptly by reference to a document not in the record. These accounts show Saadut's payment of the rent which would fall due under either of the *ijaras*. Wasek describes them thus :—

"A. Yes ; I kept an account of the payments of rent by him as *ijaradar*. Those entries were regularly made by me in the books. I got receipts for the rent paid by Saadut Hossein.

"(Shewn a bundle of documents.)

"These documents came into my possession. When we paid the rent we got these receipts. The money used to be sent through me. Yes : I paid the money, sometimes to the grandson of Said-un-nissa, Ali Akhtar Mea, or Abdul Mansur ; sometimes to a maid servant named Metah ; sometimes to Tassadduck Hossein or to Taffil-ud-din ; sometimes I went to Hosseinabad myself and paid it. These persons whom I have named used to come to our house, I mean No. 40, Mott's Lane, and sometimes I went over to Tassadduck Hossein, and there paid him the rent.

"This continued for three or four years."

The receipts produced in Court are not in the record, and their Lordships are not informed who signed them. Wasek's accounts bear out his general statement. The Court of Appeal treated them as of no value, but the only reason assigned is that the first payment of rent is entered for Srabun 1287, when Saadut could have received no rent and was attorning to Ali. Now Wasek was not asked about this matter, which may perhaps easily be explained. It is anyhow a very slight reason for rejecting accounts ranging over five years, having all the appearance of regularly kept accounts, sworn to as such, and supported by receipts to which their Lordships cannot find that any objection is taken. What is the alternative to saying that the accounts are honest and genuine? They must be forged, and supported by perjury; and to say nothing of the gravity of making such an imputation without evidence, and of the entire absence of apparent motive for Wasek to commit crimes for the sake of the

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plaintiff, it seems to their Lordships that to forge such detailed accounts as these would be a very difficult task to accomplish, and one very easy to [23] expose. Moreover Ali gave his evidence after Wasek's accounts were put in, and he does not address himself to them, nor does he produce any accounts of his own. He merely states in general terms that he collected rents from Saadut.

It is true that the accounts disclose a very abnormal state of things; but on any supposition the state of things was very abnormal. They are stated as between Said-un-nissa creditor and Saadut debtor. The credit side shows the monthly instalments of rent due, and the debit side shows the payments by which the rent was discharged. Among them are a number of payments "to the Bibi herself," some direct, some said to be through Sajad Ali (whether the old *gomashta* or not does not appear), or through her cousins and supporters, Affil, Taffil and Tassadduck; and some through Ali himself and Mansur. It seemed to the Judges below impossible that Ali, making the claims that he did, should in any way have acted as an intermediary between Saadut and Said-un- nissa. But considering all the relations between the parties, the fact that Said-un-nissa must have had something to live on, and that no other source of support is shown, and considering the curious incident that Ali claimed as his own the decree against Sage, which turns out to be Said-un-nissa's decree, the state of things alleged by Saadut and Wasek, though strange, is by no means incredible. It is best to adhere to the positive evidence of Wasek that he made payments to or on account of Said-un-nissa. But if we are to guess, it may have suited Ali's views to tide over the presumably short time of his grandmother's life by letting her receive the rents, while placing himself in a favourable position to claim the property on her death. That is at least more likely than that Wasek should have perpetrated very elaborate forgeries which have escaped detection or even challenge.

Then some letters are produced written by Wasek as Saadut's agent to Ali during the period covered by the accounts. They are said to be absolutely inconsistent with the supposition that Ali received anything on Said-un-nissa's behalf. Their Lordships cannot see that. She had now no single agent as in the time of Mozuffer and of Woodor. Several persons intervened in her affairs. Once accept the idea that Ali was one, and the inconsistency [24] disappears. The letters show that Wasek treated Ali as having a right to intervene and enforce the payment of rent, but by what title he did that and how he applied the payments when got is another question.

Indirectly one of the letters confirms Wasek's position. On the 4th Srabun 1290 he writes: "Ten or twelve days ago Rs. 12 were paid to you." Turning to the account for that year, we find that in the preceding month of Assar, Rs. 12 are entered as paid through Tassadduck. Thus it appears that a payment made to Tassadduck, who acted throughout in Said-un-nissa's interest, is represented to Ali as a payment on account of his own demand, and there is no trace of any objection by Ali. If the money was really paid to Ali, why should it not be so entered in the account? This is a material step towards the position taken by Wasek that the payments made by him were made to various persons on the same account, and that the account of Said-un-nissa.

Their Lordships hold it to be proved that during the year 1891 and afterwards Said-un-nissa received as of right at least a substantial part of the income. That is a legal possession sufficient to relieve the case from

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the bar of time. They turn now to the litigation in the Small Cause Courts.

Their Lordships have carefully examined the records of these suits, upwards of twenty in number, which have been much referred to in the Courts below and at the Bar here. The only cases in which the rival titles were represented by plaintiff and defendant, respectively, are the suits brought by Ali against Saadut. On the 27th March 1885, Ali sued Saadut for arrears of rent under Ali's *ijara*. Saadut pleaded that he had paid no rent to Ali as tenant to him, and that he had executed a lease in favour of Ali under misconception. After many meetings and adjournments the suit was dismissed on 21st April 1887 for want of jurisdiction. On the 15th June 1887, Ali sued again for other instalments of rent. Saadut pleaded "*Res judicata*," and the suit was dismissed. The Court of Appeal cannot understand the ground of these judgments. Neither can their Lordships. But the fact remains that when Ali tried to enforce his claims under his *ijara* he failed, and there is no evidence that he ever recovered any rent after [25] Saadut's first refusal to pay him. On the other hand, it appears by a note in Wasek's accounts that on the 25th November 1887 a decree was made in a suit by Affil and Taffil, then transferees from Said-un-nissa, against Saadut for rent due in Pous 1291 either in 1884 or 1885. Their Lordships do not find the particulars of that suit in the record.

The other suits are against tenants in occupation; five by Ali or his transferee Siddik, and the rest by Saadut or his transferee Nirmal. These litigations have so little influence on the result that they need not be reviewed in detail; but it is a just observation by the original Court that in the suits on Siddik's side no substantial defence appears. In some of those on Nirmal's side the title of Ali was set up as a defence. Let us take as a specimen the suits against Saran Chunder Dey, a tenant, who, by misfortune or misconduct, was more frequently the object of litigation than any one else.

On the 20th August 1885 he was sued by Ali. No defence is stated, and a decree was passed at once *ex parte*.

On the 16th January 1890 he was sued by Siddik, who had then taken his transfer from Ali, on the ground of a lease alleged to have been made by Ali to Dey in 1292 (1885). No defence is stated. There were several adjournments, and on the 22nd March 1899 Siddik put in the *heba* and Ali's conveyance to himself; and he obtained judgment.

On the 29th March 1889, the same tenant was sued by Saadut for use and occupation of the same piece of land. In this suit he defends himself, denying any tenancy from Saadut, and alleging a tenancy under Siddik. There were several meetings and adjournments. On two occasions Siddik appeared and gave evidence. On the 27th November 1889 a decree was given to Saadut.

In December 1889 Dey moved for a new trial on the following grounds:—

"1. That plaintiff's *ijara* of the land in No. 33, Mott's Lane, for ten years from Said-un-nissa Bibi, is not proved.

"2. That the Court should have held that Ali Akhtar had resumed *khas* possession of the land in 1292, and had ultimately sold the same to Mahomed Siddik by a bill of sale, dated the 1st August 1887.

[26] "3. That the Court should have held that Mahomed Siddik was defendant's landlord by virtue of the bill of sale.

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"4. That defendant has discovered the original lease showing the *ijara* given to plaintiff by Ali Akhtar for five years."

On the 5th July 1890 that application was dismissed.

The same result attended two other rent suits instituted by Nirmal in the year 1891, in which Siddik appeared as a witness to support his own title and to defeat that of the plaintiff. These decisions in the Small Cause Courts are not decisive of the present controversy, but they exhibit the struggle that was continually going on for legal possession of the property; and the cause of Ali and his transferee does not gain anything by examination of them.

Many points have been much discussed in the Courts below and here which have been barely or not at all noticed by their Lordships. There is a story of a re-conveyance by Mozuffer to Said-un-nissa; a story of Ali relinquishing his and *ijara kabuliyat*; a story of conversations with him in which he admitted Said-un-nissa's title; and there are disputes about his alleged coercion of his grandmother, his sale to Affil, and his adjustments of property with his sister. These matters are left either wholly unproved, or in obscurity; and they are not of importance enough to justify further investigation. Their Lordships have tried in this very complicated case to follow the most definite outlines they can find, and they will now try briefly to sum up the views they have already expressed more at large.

The alleged gift to Mozuffer is highly improbable, and one for which no explanation whatever is given. There is some little contemporary evidence to show that he was intended to be a *benamidar*. Though he intervened in managing the property and collected rents, there is nothing to show whether or no he had been acting for his mother-in-law previous to that event. There is nothing to show on what Said-un-nissa could have lived unless she lived on her former property. There is evidence to show that at all events for some time after the *hiba* there was no alteration in her mode of living. The perfect peace and friendship which subsisted during the [27] twenty years of Mozuffer's life shows at least that she was satisfied. When Mozuffer died, his family made no claim. None of them, except Ali, and, perhaps, Masrur, has ever made any claim. Mansur assisted when Said-un-nissa executed the *ijara* to Saadut. It is thus shown that Mozuffer's family did not look upon this property as part of his inheritance. Woodor survived Mozuffer for a short time; it may be a year or it may be more. It was he, and not Mozuffer's representatives, who collected rents; and it is certain that during his life no dissension broke out. Soon after his death in January 1879, difficulty arose; first, with Sage and Ostagur. Sage could not or would not pay; he was at once sued, not by Mozuffer's representatives, but by Said-un-nissa; apparently as a matter of course and without any doubt thrown upon her right. And so it was with Ostagur. And yet, the ostensible or paper title was then in Mozuffer.

That brings us to April 1879; and passing there, and supposing that the question had then arisen whether the property belonged to Said-un-nissa or to Mozuffer, and that the evidence given was such as is found in this record, their Lordships think it would warrant a confident conclusion that Mozuffer took only as *benamidar*. Some of the streams of evidence are slight, but they all flow in the same direction. Is there anything in the later time when Ali appears upon the scene to reverse that conclusion?

So far as Said-un-nissa's dealings go the conclusion is strengthened; for she now enters on a course of dealing with the property which is not justifiable except on the supposition that she believed herself to be

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its true owner. She is the only person who, after Mozuffer's death, could know at first hand the exact truth of the case. She is dead and cannot now be cross-examined on the evidence afforded by her conduct. But is it conceivable that she should have given away her property, have gone on for more than twenty years treating it as belonging to somebody else, and then suddenly have treated it as her own without any apparent alteration of circumstances moving her to do so? Though she was old and a *purda* lady, nobody suggests [28] that her acts were not spontaneous or that she did not understand her own business. It is shown by the evidence of Saadut and Wasek that she did take part in business; and indeed Ali himself says that he took her to task about the *ijara*, and that she was ashamed of herself, not that she pleaded weakness or ignorance, or disclaimed responsibility. On this record no explanation of her conduct can be found except that she really believed herself to be the true owner.

It must be admitted that the story of the rival *ijaras* presents some obscure problems. Ali had some success with Saadut. The relation between him and Said-un-nissa, and the various relatives who acted with or for her, are very puzzling. But these things do not touch the essence of the case. It does not appear that Ali attempted to eject Saadut after the termination of his five years' *ijara*, though, according to his contention, he was owner of the reversion. For some reason or other he failed to make good his claims against Saadut even under the *ijara* and for aught that appears he abandoned them. And neither he nor his transferee has succeeded in recovering rents from tenants either under the *ijara* or by his reversionary title in any case in which the two rival titles have been brought by evidence into opposition with one another.

Those are the main reasons which induce their Lordships to hold that the view taken by the original Court was the correct view. They think that the decree appealed from should be discharged with costs to be paid by the defendant, and that the decree of Mr. Justice Macpherson should be restored. They will humbly advise Her Majesty to this effect. The respondent must pay the costs of this appeal.

Appeal allowed.

Solicitor for the appellant: Mr. *J. F. Watkins.*

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[29] PRIVY COUNCIL.

PRESENT:

Lords Watson, Hobhouse, and Davey, and Sir R. Couch.

[*On appeal from the High Court at Fort William in Bengal.*]

RAMCHURN SINGH (*Plaintiff*) *v.* RANIGANJ COAL ASSOCIATION, LIMITED (*Defendant*). [16th and 17th June and 8th July, 1898.]

Lease—Construction of Lease—Construction of a contract in a potta *allowing relinquishment of the land leased, in whole or in part.*

A *potta* granted a permanent *mokarari* lease for mining purposes and gave to the tenant the privilege of surrendering either the whole or part of the land included in the lease, with a deduction to be made in the rent for the extent of the land that might be found on measurement to have been surrendered.

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Held, that this privilege could only be exercised by the tenant upon a strict observance of the conditions expressly declared, or plainly implied, in the lease itself.

The lease was of 1,974 *bighas*. The tenant executed a deed of relinquishment of 1,409 *bighas*, 8 *cottahs*, 8 *gundas*, whereof possession was surrendered with the exception of two plots, one of 24, and the other of 9 *bighas*.

Held, that according to the true construction of the contract there was error in the judgment of the High Court which decided that the retention of the plots did not altogether deprive the relinquishment of its effect. This retention did more than lessen the area actually surrendered. It was a mistake to suppose that an increased rent to be paid by the relinquishing tenant in proportion to the areas retained and surrendered, respectively, would adjust the point disputed as a matter of law.

The contract was that in case the tenant surrendered a part the future rent was to be ascertained by the measurement of the area relinquished.

To have made a new surrender would have been within the competency of the tenant. But for the tenant to continue to hold possession of part of the area which he had purported to relinquish was not open to him, or consistent with the validity of the surrender, the contract not admitting of approximate equivalents in regard to the possession of the total area professed to be surrendered but not surrendered.

Therefore the surrender upon which rested the defence to a suit by the lessor for the full rent was invalid in law.

APPEAL from a decree (24th July 1894) of the High Court, reversing a decree (11th November 1893) of the Subordinate Judge of Deoghur.

This was a claim for the rent of land leased to the defendant [30] Company for working their colliery in Madan Kula, a *mauza* in a *ghatwali mehal* in Deoghur, zilla Donka, Santhal Pergunnahs.

The plaint filed on the 12th December 1892 stated that the plaintiff's father had granted to the defendant Company a *potta* dated the 15th Falgun 1292, B. S., or the 26th February 1886, which was a permanent *mokarari* lease, with full rights for mining purposes, of 1,974 *bighas* 8 *cottahs* at an annual rent of Rs. 6 a *bigha*; in all Rs. 11,846-8, payable in four annual *kists* in Srabun, Kartick, Magh, and Cheit. The *potta* allowed surrender of the whole or any portion of the land by *istafa*, or resignation, with a corresponding reduction of rent at the same rate. The defendant Company had alleged a relinquishment of 1,409 *bighas* 8 *cottahs* 8 *gundas* at the end of the Bengali year 1298, the 15th April 1892; but that relinquishment had not been validly made. The rent tendered, *viz*., Rs. 847-8, on account of the *kists* due for Srabun and Kartick 1298.B. S., was less by Rs. 6,000 than the rent for the whole area which was then due. This amount with Rs. 150 for interest was now claimed.

The defence was that the Company had duly relinquished and surrendered possession of the area above mentioned, and that no rent in respect thereof was due for Srabun and Kartick (or after the end of Cheit 1298, B. S.).

The rent after the end of the Bengali year which terminated on the 15th April 1892 was annual rent of Rs. 3,390, instead of the previous annual rent of Rs. 11,846. The rent at the altered rate was covered by the Rs. 847-8 tendered.

The terms of the *potta* are stated in their Lordships' judgment.

Both the Courts below agreed in their view of the evidence that surrender of the two plots above mentioned had not been made, forming together 35 *bighas*, part of the alleged 1,409.

The question now was as to the effect of the retention on the part of the Company of the possession of these, and whether (as the Subordinate Judge had held) this retention deprived the alleged relinquishment of validity as a basis for the reduction of the rent, in accordance with the

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contract in the *potta*, or (as the High Court had held) this failure to re-deliver possession of 35 [31] *bighas* had no effect to prevent the contract from operating a reduction of the rent proportioned to the measurement of the area effectively made over to the plaintiff such as it had been.

The dates were these: On the 4th April 1892, the Company notified to the lessor that from the Bengali year 1299, which began in Cheit, corresponding to the 15th April 1892, they would cease to hold an area of 1,409 bighas, and would retain only 565 bighas. On the 8th April the lessor acknowledging the notice protested against the relinquishment, alleging, amongst other things, the absence of any comparison of maps showing the areas respectively retained and surrendered.

On the 13th July 1892, the Company deposited and tendered Rs. 847, as being the rent payable on account of the *kist* due.

On the 30th July 1892 (6th Srabun 1299) the lessor replied by a statement which repeated his objections to the relinquishment.

The issues were in effect: Was the relinquishment valid and in accordance with the terms of the lease? Did the defendants actually relinquish, or did they hold possession of the land, or of any portion thereof, after the alleged relinquishment? Was the tender and deposit of rent by the defendants sufficient?

The Subordinate Judge decreed the plaintiff's claim.

This decree was reversed by the High Court. The Judges were of opinion that the relinquishment must have effect except as to the 35 *bighas* of which surrender was not made. They concluded thus:—

The result then is, that the decree of the Court below will be set aside, and in lieu thereof a decree made, declaring the defendants liable to pay to the plaintiff annually rent for the 565 *bighas* admittedly retained by them, and for the 35 *bighas* which are also in their possession, that is, for 600 *bighas* in all, at the rate of Rs. 6 a *bigha*, as provided by the lease of the 16th Falgun 1292, amounting to a sum of Rs. 3,600, and further ordering that the defendants do pay to the plaintiff, as rent for the Srabun and Kartic instalments of 1299 a sum that bears the same proportion to the original amount of those instalments as given in the said lease, that the reduced annual rent of Rs. 3,600 bears to the original annual rent of Rs. 11,846-8 annas 6 *gundas* 1 *cowri* 3 *biswas*, with interest as provided in the lease.

[32] On this appeal,—

Mr. *J. D. Mayne*, for the appellant.—The alleged relinquishment having been ineffective in part, *viz.*, as to the 35 *bighas*, and having been a surrender of 1,374 *bighas* instead of 1,409 stated in the *istafa*, or deed of relinquishment, was altogether inoperative. The surrender not being effective as to the total, the Court could not adjust a rent to a different surrender, not the one on which the defendants relied, or the one which they professed to make. The condition in the contract was that measurement should determine the reduction as to the amount payable.

Mr. *M. Crackanthorpe*, Q. C., and Mr. *A. Phillips*, argued that the judgment of the High Court ought to be affirmed. In regard to the continued payment of rents for the use of the 24 *bighas* occupied by cultivating *mostajirs*, or occupiers with no permanent term of holding, it appeared that the latter had been on the ground from a date long anterior to that of the *potta*. The receipt of small payments from them by the Company should not be regarded as withholding a right from the plaintiff that had, to the knowledge of the defendants, been within those conferred by the *potta*. It probably was the result of oversight, or inadvertence.

The size of the area so occupied would show that the retaining possession by the Company was not likely to have been with the object of obtaining even a minimum of substantial advantage. So also as regarded the *bighas* occupied by the coolies for their huts—an area of 8 *bighas* 8 *cottahs*. It was doubtful, moreover, whether the defendants could be said to have had any possession of this plot.

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Mr. *J. D. Mayne* replied.

JUDGMENT.

Their Lordships' judgment on a subsequent day, 8th July, was delivered by

LORD WATSON.—By a *mokarari potta*, dated the 26th February 1886, Bar Kumar Bhaia Gopal Lal Singh, the father and immediate predecessor of the appellant, let to the respondents, the Raniganj Coal Association, Limited, an area of 1,974 *bighas* 8 *cottahs* and 8 *gundas* of land, situated in the Sonthal [33] Pergunnahs, sub-division Deoghur, as delineated upon a relative plan, with all underground and surface rights pertaining thereto, at a yearly *jumma* of Rs. 6 per *bigha*, amounting in all to Rs. 11,846-8-6-13. It was declared that coal, limestone, and iron were to be included in the subjects let, but that the tenants were to have "no title to work gold or silver, or copper or lead, or any other precious metals which may be found out." Power was given to the tenants to set up collieries, make coal pits, erect houses and bungalows for dwelling purposes, establish bazaars, make gardens, and excavate tanks; and also full power to alienate their interest in the whole or any portion of the lands, or to make *dur-mokarari* settlement, or to under-let.

The following provision, out of which the present action arose, was made in favour of the tenants: "Further, it will be always open to you, whenever you may like, to tender *istafa* (resignation) of the whole or any portion of the lands settled under this *potta*. If such *istafa* be made in respect of the whole or any portion of the land, then you shall get a deduction in the rents at the rate of Rs. 6 per *bigha* for the extent of land that may be found on measurement to have been so relinquished, and, with the exception of the deduction in the total amount of rents to that extent, all the other terms and conditions of this deed shall remain in force and operative." The option thus given was qualified by the provision that the tenants should not have the right to relinquish by selection pieces of land from which the coal may have been to the very last worked out, or pieces of land from which all the trees may have been destroyed to their very roots owing to any act on their part; and also that they should pay the full amount of rent for the whole of the Bengali year, in which the *istafa* might be made by them.

On the 4th April 1892, an *istafa* or deed of relinquishment was executed on behalf of the respondent Company by their manager, Mr Whiffen, and was on the same day presented to the Magistrate for transmission to the appellant. On the 8th April 1892, the appellant granted an acknowledgment that he had received notice of the deed, and protested against the validity of the relinquishment, upon the ground that the jungle of the lands [34] had been destroyed by the respondents, contrary to the terms of the *mokarari potta*, and that the plan which accompanied the deed which professed to be a copy of the plan incorporated with the original *potta* of 1886, with the lands to be relinquished delineated upon it, had not been compared or verified in his presence.

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The deed in question contained an intimation to the effect that, from the year 1893, the respondent Company would only remain in possession of the 565 bighas of land marked on the plan, and would not, from that date, hold possession of the remaining lands "measuring an area of 1,409 *bighas*, 8 *cottahs*, and 8 *gundas*, according to the standard measurement, and representing a *jumma* of Rs. 8,456-8-6-1-3, at the rate Rs. 6 per *bigha*. The second party *ghatwal* is at liberty either to settle the said lands and *jumma* with others, or to retain their *khas* possession. The first party Company have no claim or objection thereto."

The plaint in this action was filed in the Court of the Subordinate Judge of Deoghur on the 12th December 1892. The appellant having previously declined to accept payment of a quarter's rent for the 565 *bighas* which were not sought to be surrendered, the amount had been paid by the respondent Company into the Court of the Subordinate Judge. In his plaint, the appellant claimed a decree for the full amount of rent stipulated in the *mokarari potta* of 1886, on the ground that the renunciation tendered was invalid. The respondents lodged a written statement, in which they controverted all the material averments made by the appellant.

Issues were adjusted, and the case went to proof before the Subordinate Judge. The third of these issues, the only one which for the purposes of this appeal, their Lordships think it necessary to notice, was in these terms: "Did the defendant Association actually relinquish the land or hold possession thereof, or of any portion of it, after the alleged relinquishment, under the lease dated the 15th Falgun 1292, or under any other right?" Upon that issue, the Subordinate Judge held that the respondents did not actually relinquish the whole of the area which they professed to give up. He found that, "In the first place they have allowed cooly huts to remain on the area they profess to have relinquished, these huts being occupied by coolies who are working their mines; [35] and, in the second place, they have collected rents from cultivators who hold land there." A decree was given to the appellant for the full rent claimed by him; but it is right to explain that, in arriving at that result, the learned Judge relied, not only upon the failure of the respondent Company to quit possession of the whole lands which they professed to relinquish, which he describes as "a fatal mistake," but also upon the fact which he found, in the absence of evidence to the contrary, that Mr. Whiffen, their manager, had not authority to execute the deed of relinquishment on behalf of the Company.

On appeal to the High Court at Calcutta, Mr. Justice Norris and Mr. Justice Banerjee reversed the decision of the Subordinate Judge. By their decree, these learned Judges, in lieu of the judgment which they set aside, declared that out of the 1,974 *bighas* 8 *cottahs* 8 *gundas* of land originally leased to them, the respondents had, from and after the date at which they had made a relinquishment, been in possession of not only the 565 *bighas* which they professed to retain, but of 600 *bighas*, and they gave a decree against the respondents for the rent of these 600 *bighas* at the rate of Rs. 6 per *bigha*, with interest at the rate stipulated in the *mokarari potta*, upon each instalment of rent from the date at which it became due and payable.

Their Lordships entertain no doubt that, although the Courts below differed as to the extent of the respondent's liability for rent which resulted from that conclusion, they were agreed in finding that, in point of fact, the respondents had not surrendered possession to the appellant

of the whole area of land which they professed to relinquish. And, having regard to the evidence which was before them, and to the reasons which were assigned by the Subordinate Judge, and by the learned Judges of the High Court, their Lordships have had no difficulty in coming to the conclusion that both Courts were agreed as to the particular portions of the total area described as relinquished, of which the respondents had failed to surrender possession. The Judges of the High Court indicated, in terms which are entirely consistent with the findings of the Subordinate Judge, that the respondents, notwithstanding their professed relinquishment, had retained possession of 9 *bighas*, which were occupied by coolies **[36]** employed in working their coal mines, and of 26 *bighas* for which they had drawn rents from the cultivators. It was strenuously, and with some plausibility, argued by the respondents' counsel, that the views expressed by the learned Judges of the High court, taken *per se*, did not amount to actual findings; but that contention became hopeless, when it appeared that their views were made the basis of the decree pronounced by the Court of appeal, which finds the respondents liable in rent for these 35 *bighas*, in addition to the rent of the 565 *gbihas* of which alone they professed to retain possession. No adequate cause has been shown for disturbing these concurrent findings of fact, which are the basis of conflicting judgments in the Courts below; and their Lordships therefore accept them as conclusive in disposing of this appeal.

The Subordinate Judge held that the surrender made by the respondents was ineffectual to qualify their *mokarari* lease, or to relieve them of their obligation to pay rent for the whole 1,974 *bighas* 8 *cottahs* and 8 *gundas*, because they had retained possession of 35 *bighas* out of the 1,409 *bighas*, 8 *cottahs* 8 *gundas*, which they had professed to surrender. On the other hand, the learned Judges of the High Court held, that the respondents had effectually surrendered 1,374 *bighas* 8 *cottahs* 8 *gundas*, being 35 *bighas* less than the area described in their *istafa* of the 4th April 1892. The learned Judges arrived at that result upon the principle that the 35 *bighas* retained were so small an area in proportion to the 1,409 *bighas* 8 *cottahs* 8 *gundas* sought to be relinquished, that the surrender must be regarded as substantial and sufficient. The *ratio* of their decision is thus explained in the judgment of the High Court: "But here the relinquishment is regulated by the contract entered into between the parties; and that contract expressly allows the tenant at any time to relinquish the whole or any portion of land let out The mere fact of the tenant remaining in possession of the land he professes to have relinquished will not, therefore, necessarily vitiate the relinquishment altogether. The proper question for consideration in this case, therefore, is not whether the possession by the lessees of a part of the land **[37]** professed to be relinquished makes the relinquishment invalid as a matter of law, but whether such possession renders the professed relinquishment unreal in point of fact; or, in other words, whether such possession from its nature or extent indicates that the lessees have, notwithstanding their relinquishment, been enjoying a substantial portion of the benefits resulting from their occupation of the land relinquished, and that the relinquishment is made only with a view to avoid the burden of paying rent."

Their Lordships do not find it necessary to discuss the question, whether, if the terms of the *mokarari potta* had admitted of approximate equivalents for the total area professed to be relinquished, the decision of

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the learned Judges would have been correct. In their opinion no such equivalents are admissible. The right of relinquishment is a privilege given to the tenants, by means of which they may restrict the lease, and establish their tenure upon a new basis, or may extinguish the lease altogether; and the tenants cannot avail themselves of that privilege to any extent, unless they strictly observe the conditions which are either expressed or are plainly implied in the lease itself. In so far as it concerns the power of relinquishment the scheme of the contract embodied in the lease is exceedingly simple. The *istafa*, or in other words the resignation made by the tenants, which, by the plainest implication, must contain a precise statement of the area to be relinquished, is to form the basis of future relations between the contracting parties; and, in order to fix, for the future, the rent which the tenants are liable to pay, and the lessor is bound to accept, the lease contemplates that no step shall be necessary, beyond measurement of the area surrendered, and deduction of an amount calculated at the rate of Rs. 6 per *bigha* for such area, from the original rent. Their Lordships may observe that, in their *istafa*, or deed of surrender, the respondents complied with the requirements of the lease, and distinctly intimated that, as soon as the surrender took effect, the appellant would be in a position either to let the relinquished area to tenants, or to assume *khas* possession of it. To adopt the construction put upon the lease by the High Court would, in their Lordships' opinion, defeat the plain intention of the contracting parties. It is equivalent to [38] holding that the *istafa* tendered may be qualified or restricted, not by the tenants making a new surrender, which would be within their competency, but by their simply continuing to hold possession of part of the area which they had surrendered. In that case, the future rent could not possibly be ascertained by measurement of the area described in the deed of relinquishment. Its ascertainment would, in that case, involve an investigation, and probably a litigation also, as to the precise extent of the land of which the tenant had retained possession, an enquiry which is not contemplated by the lease, before the amount of future rent could be settled.

Their Lordships think it right to notice that the respondents endeavoured to justify their retaining possession, not of the 9 *bighas* occupied by mining coolies, but of the 26 *bighas* which they let and drew rents for, upon the ground that they held these 26 *bighas*, not as tenants under the original *potta* of February 1896, but in virtue of their right as *mostajirs*, holding of the appellant by a separate title. The *potta*, which expressly lets to the respondents all "underground and surface rights" in the 1,974 *bighas* 8 *cottahs* and 8 *gundas* demised, makes mention of these *mostajiri* rights as having previously existed, and describes them as having been made over to the appellant's predecessor in title. There are deeds in process which prove that the transfers were made to him by the *mostajirs*; but there is not a tittle of evidence to show that the rights exercised by the *mostajirs* ever became vested in the respondents, or that the respondents had any title to possess these *bighas* which they claim the right to retain, other than that which they derived from the *mokarari potta*.

Being of opinion that the *istafa*, or surrender, upon which the respondents' defence to this action rests, was invalid in law, their Lordships will humbly advise Her Majesty to reverse the judgment of the High Court, to restore the decree of the Subordinate Judge, and to order that the respondents shall pay to the appellant the costs incurred by him before

the High Court. The respondents must pay to the appellant his costs of this appeal. 1898 JULY 8.

C. B. *Appeal allowed.* PRIVY COUNCIL.

Solicitors for the appellant: Messrs. *T. L. Wilson & Co.*
Solicitors for the respondents: Messrs. *Lattey & Hart.* 26 C. 29 (P.C.) = 25 I.A. 210 = 2 C.W.N. 697 = 7 Sar. P.C.J. 399.

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[39] PRIVY COUNCIL.

PRESENT:

Lords Watson, Hobhouse and Davey, and Sir R. Couch.

[*On appeal from the High Court at Fort William in Bengal.*]

RAMESWAR KOER AND ANOTHER (*Defendants*) *v.* MAHOMED MEHDI HOSSEIN KHAN AND OTHERS (*Plaintiffs*).
[22nd and 23rd June, and 8th July, 1898.]

Contract Act (IX of 1872) *s.* 60—*Creditor's appropriation of payments to one or other of debts—Transfer of Property Act (IV of* 1882), *ss.* 86, 88—*Enforcement of mortgage —Rate of interest from date of suit to date fixed for realization.*

One of two mortgages bore interest at 12 per cent. on the mortgage debt payable with rests; and the other carried simple interest. Payments made by the debtor had been appropriated by the creditor to payment of the interest on the bond bearing simple interest, while the compound interest had, on the other hand, been left to accumulate. In a suit, brought against the representative of the debtor after his decease, to enforce the mortgage bearing compound interest, the objection was taken to the appropriation by the creditor.

Held, that the rule in s. 60 of the Indian Contract Act, 1872, follows the ordinary law in prescribing a rule as to the case in which the creditor may, at his discretion, apply, to one or other of the debts due to him, payments made by the debtor. A reluctance shown by the debtor to agree to pay compound interest. before he executed the mortgage bond at such interest, was not an indication, within that section, that he intended that application of his payments should be made first to that bond.

The Transfer of Property Act, 1882, was in force when this suit was instituted, but not when the relation of debtor and creditor between the parties commenced. Assuming that a discretionary power to a Court remained under s. 209, Civil Procedure Code, to decree interest to run, at less than the contract rate, in a suit commenced before Act IV of 1882 became law, still the best guide to discretion, in this case, was to be found in s. 86 of that Act, which required the Courts to decree mortgage debts with interest at the rate provided by the mortgage (if to that rate no valid legal objection could be taken), down to the date fixed for realization.

[**F.**, 21 A. 361 (**F.B.**); 30 C. 953 (960); 31 C. 138 (140); 5 C.W.N. 653 (654); 33 P.L. R. 1903; 5 N.L.R. 37 = 2 Ind. Cas 27) 15 M.C.C.R. 227; **Appr.**, 23 A. 181 (**P.C.**) = 28 I.A. 35 = 3 Bom.L.R 51 = 5 C.W.N. 137 = 7 Sar. P.C.J. 792; **R.**, 27 A. 322 (323) = 4 A L.J. 219 = A.W N. (1907) 60; 29 C. 43 (52); 29 M. 170 = 16 M.L.J. 133; 6 C.W.N. 769; 1 N.L.R. 43 (45); 2 N.L.R. 162 (168) (**P.C**); 3 O.C. 129 (154); 5 N.L.R. 136; **Expl.**, 23 M. 637; 17 C.P.L.R. 164 (168); 3 N.L R. 72 (75); **D.**, 34 C. 150 (**P.C.**) = 4 A L.J. 109 = 9 Bom. L.R. 304 = 5 C.L J. 106 = 11 C.W.N. 249 = 34 I.A. 9 = 17 M.L.J. 43.]

APPEAL from a decree (24th April 1894) of the High Court, varying decrees (15th September 1892) of the Subordinate Judge of Patna.

The plaintiffs, now respondents, were the representatives of the late Nawab Latif Ali Khan, C. I. E., of Patna, who died on the 26th April 1890. The original defendant was Raj Kumari Ratan Koer, the grand daughter of the late Run Bahadur Singh, Raja of [40] Tekari, who died in the same year, and his representative. She died after having obtained

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leave, on the 25th March 1895, to file this appeal, and by her will she had appointed the appellants to represent her. This suit was brought upon a registered mortgage, executed in favour of the late Nawab, on the 9th August 1880, corresponding to the 19th Sawan 1287, Fasli, by the late Raja, to secure repayment of Rs. 1,00,000 in five years, with interest payable at periods of four months, and at the rate of one per cent. a month, the unpaid interest in each month to be added to the principal.

The plaint, filed on the 7th August 1891, claimed the principal, with Rs. 49,500 for interest and Rs. 10, 278 on account of compound interest, with future interest from the date of the suit, at the rate of 12 per cent. per annum, till payment.

Among other grounds of defence, Raj Kumari, in her written statement, alleged that the late Nawab and the plaintiffs had credited to the interest due in another account money remitted to him by the late Raja for payment of the interest on the mortgage bond in suit; that this had been done in regard to a bond executed by the Raja at Gaya on the 26th March 1881, payable six months later, for Rs. 38,550 in favour of the late Nawab which bond bore simple interest only; that sums, amounting to Rs. 9,100, after the 26th September 1881, had been credited to the interest account of that bond, without any right on the part of the creditor to apply them in that manner; and that such sums ought to have been credited to the account of the mortgage bond of the 9th August 1880.

The issues raised these questions. The Subordinate Judge, in deciding in favour of the plaintiff on the facts, was of opinion that the law in s. 92 of the Evidence Act would have precluded variation of the mortgage bond by oral evidence of what had been said at the time. He decided the question of appropriation by the creditor according to s. 60 of the Contract Act, IX of 1872, there being no intimation by the debtor to which debt the payments were to be applied, and "no other circumstances" indicating to which debt the payment was to be applied. His decree was for payment at the mortgage rate of **[41]** interest down to the date of the institution of the suit, and he decreed interest at 4 per cent. per annum from that date until realization, fixing the latter date at six months from the date of his decree.

Both parties appealed to the High Court; the defendant, on the ground, amongst others, that s. 60 of the Contract Act, 1872, had been wrongly applied; the plaintiff, cross-appealing, that the right direction in the decree would have allowed interest at 12 per cent. until the date of payment.

The High Court (BEVERLEY and AMEER ALI, JJ.) affirmed the findings below, but altered the rate of interest at 4 per cent. to 12 per cent. from the date of the institution of the suit until realization. Referring to *Surya Narain Singh* v. *Jogendra Narain Roy Chowdhri*(1), they made the decree "that interest run, on the amount due on the mortgage with interest, at 12 per cent. from the 7th August 1891 to the 15th March 1893, the date fixed by the lower Court for the repayment of principal and interest."

On this appeal,—

Mr. *C. W. Arathoon*, for the appellants.—On the finding of the Subordinate Judge, and on the construction of the two bonds, an implied intimation should have been attributed to the Raja to the effect that he intended that payments made by him should be applied in payment of

(1) 20 C. 360.

that bond which carried compound interest. He could not have intended that the period during which such interest should accumulate should be unnecessarily prolonged. The facts, showing that the Raja would have first paid off the debt bearing compound interest should have been considered to be an indication by him of that bond to which he intended that his payments should be applied. This should have been held to have rendered s. 60 of the Contract Act, 1872, inapplicable in this case.

Regarding the interest at 12 per cent. allowed by the High Court, it was clear that the plaintiffs' claim related to a transaction [42] which preceded the date of the coming into operation of the Transfer of Property Act, 1882. Section 86 of that Act was inapplicable to the decree in question. The first Court, not being bound by it, rightly decreed interest from the date of the institution of the suit at the Court's discretion, under s. 209, Civil Procedure Code, which was applicable to the decree in question.

Sir *W. Rattigan*, Q. C., and Mr. A. *Phillips*, for the respondents, in regard to the appropriation of payments, were called upon only as to one item of Rs. 1,734, which purported to have been credited to the Gaya bond on a date before any money on it was due. As to this, it was argued that, if opportunity had been afforded by the point having been mentioned at the hearing, it might have been explained. Several explanations were conceivable. The defendant might have shown a mistake in the date, or that the date of the receipt of the money, and not the date of its appropriation to the bond, was represented by the entry. At this stage the account should not be re-opened. As to the interest to be paid the decree of the High Court was right. Section 86 of the Transfer of Property Act applied to the remedy of creditors claiming enforcement of mortgage securities, and the fact of the indebtedness having arisen, and of the mortgage having been executed before the Act came into operation, did not prevent ss. 86, 88 from being applied to this decree. The remedy was governed by the Law of Procedure in force at the time of the suit. No right or liability, which had arisen under a different law, in force before the passing of the Act IV of 1882, was affected by the application of s. 86 to the decree in the suit commenced before the passing of the Act.

But even if it were assumed that the provisions of the Act were inapplicable to this decree, the result would be the same. If it were to be taken that the Court at the date of this decree could in the matter of a mortgage award interest at its discretion, without adhering to the stipulated rate, from the date of the institution of the suit, acting under s. 209 of the Civil Procedure Code, still, in the exercise of that discretion, the rate prescribed in the Act of 1882 was shown thereby to be a suitable rate. There could be [43] no better exercise of the Court's discretion, and on this ground the decree of the High Court should be affirmed should the other ground fail.

In regard to the rate of 12 per cent., the reasons for that, the contract rate, being given down to the date of the decree, appeared in the judgment of this Committee in *Orde* v. *Skinner* (1).

Mr. *C. W. Arathoon* replied.

JUDGMENT.

Afterwards, on the 8th July, their Lordships' judgment was given by

LORD HOBHOUSE.—The suit in which this appeal is presented is one for the enforcement of a simple mortgage. The Subordinate Judge passed

(1) 3 A. 91 (107) = 7 I. A. 196 (211).

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a decree in favour of plaintiffs for the sum of Rs. 1,24,239-8 and interest at 4 per cent. per annum from the date of the suit to date of realization; with directions for sale in case of non-payment in six months. Both parties appealed to the High Court on several grounds; when the High Court varied the decree by ordering 12 per cent. interest instead of 4, and with that exception affirmed it. The defendant appeals from the High Court decree on grounds of which only two need be considered.

The mortgage bond in question is dated the 9th August 1880. The principal money secured is a lakh of rupees to be paid in five years. Interest is to be paid at the rate of rupee 1 per cent. per mensem, by three equal instalments in the year, each for four months' interest. In default of those payments of interest, the bond provides that the unpaid interest shall be added to capital and bear interest in its turn.

By their plaint the mortgagees claimed Rs. 49,500 interest and Rs. 10,728 compound interest. The sum allowed by the Subordinate Judge is considerably less; but the defendant contends that it ought to be less still; because the mortgagees have appropriated to another bond called the Gaya bond which carries simple interest, divers payments which they should have appropriated to the bond now in suit which carries interest on interest.

[44] The Gaya bond is dated 26th March 1881 and is made payable six months later. The Indian Contract Act, 1872, follows the ordinary rules of law in providing that when the debtor has omitted to intimate, and when there are no circumstances indicating, to which of several debts a payment is to be applied, the creditor may apply it at his discretion to any debt actually due and payable to him from the debtor. In this case the mortgagor did omit to intimate any intention on the point. Mr. Arathoon contends that there are circumstances indicating that his payments should be applied to the bond in suit. But the only circumstance he can point to is the original reluctance of the mortgagor to pay any compound interest at all. That reluctance was overcome, and it has nothing whatever to do with the appropriation of payments. It is clear that the mortgagees had a right, in the silence of the debtor, to apply to the Gaya bond payments made after 26th September 1881 when that bond had fallen due.

One sum, however, Rs. 1,734-12 in amount, is endorsed on the Gaya bond as having been paid on a day before the bond fell due. It is a very small matter, because it is only the interest on that sum which is in question. As regards the principal it cannot signify to the mortgagors whether it went in payment of one bond or the other. Still, if there were clearly an error it might now be rectified. But it is certain that the specific point was never raised in the Courts below. In her written statement the defendant, who represents the original mortgagor, complains that the mortgagees have wrongly made credits to the interest due on other bonds, not that anything had been credited to interest not due. Both in that statement and in her grounds of appeal to the High Court the ground taken by her is that every one of the payments made should have been credited to the bond in suit, not that the earliest payment was distinguishable from the others. The case has been argued in both Courts on grounds applying equally to all the payments, and the defendant's arguments have been rightly rejected. If the point now made had been made in the Courts below, some answer or explanation might have been forthcoming. Their Lordships are not in a position to deal with it now.

[45] The second ground taken for the appeal is that the High Court have altered the rate of interest after the date of suit from 4 to 12 per cent.

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The Subordinate Judge evidently considered that the case fell within s. 209 of the Civil Procedure Code, which gives a discretion to the Court in such matters. The High Court founded their order on ss. 86 and 88 of the Transfer of Property Act, which indicate clearly enough that the ordinary decree in a suit of this kind should direct accounts allowing the rate of interest provided by the mortgage up to the date of realization. It is pointed out by Mr. Arathoon that, though the suit was instituted after the passing of the Transfer of Property Act, the legal relations of debtor and creditor had arisen before it. Whether that would prevent the application of the Act is disputed, but assuming in the defendant's favour that it would, the same result must ensue in this case. The discretion given by the Code is a judicial discretion to be exercised on proper judicial grounds. The Legislature has stated what should be the rule in suits of this kind, and the Courts cannot have a better guide to their discretion. No peculiarity has been shown to exist in this case for cutting down the mortgage rate of interest. If the High Court has allowed something less, the mortgagee makes no complaint. The mortgagor cannot complain if he is made to pay no more than he contracted to pay.

The appeal, therefore, fails on both the assigned grounds. Their Lordships will humbly advise Her Majesty to dismiss it, and the appellants must pay the costs.

Appeal dismissed.

Solicitors for the appellants : Messrs. *Dallimore & Son.*
Solicitors for the respondents : Messrs. *T. L. Wilson & Co.*

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26 C. 46.

[46] APPELLATE CIVIL.

Before Mr. Justice Banerjee and Justice Stevens.

SRIKANT MONDUL AND OTHERS, MINORS, BY THEIR MOTHER AND GUARDIAN SATYAMONI DASI (*Plaintiffs*) v. SARODA KANT MONDUL AND OTHERS (*Defendants*).* [13th July, 1898.]

Bengal Tenancy Act (VIII of 1885), s. 85—Sub-lease of a raiyati holding, by a registered instrument for a period of more than nine years, whether valid.

A sub-lease of a holding, by a *raiyat* without the consent of the landlord though created by a registered instrument, is altogether void, under s. 85 of the Bengal Tenancy Act.

[Diss., 2 C.L.J. 540 (542) ; 13 C. L J. 649 (651) = 10 Ind. Cas. 469; Appr., 6 C. W. N. 916 ; R., 8 C.W.N. 136 (137) ; 36 C. 256 = 1 Ind. Cas 942 = 13 C.W.N. 183 ; 8 Ind. Cas. 65.]

THE facts of this case are as follows : The plaintiffs brought a suit against the defendants for recovery of possession of a hut, as well as for the declaration of their *jamai* right to certain land, on the allegation that the plaintiffs obtained a permanent lease of the land from the defendant No. 7, and that the remaining defendants, who were the superior landlords and persons claiming under them, resisted the plaintiffs from obtaining

* Appeal from Appellate Decree No. 119 of 1897, against the decree of F. F. Handley, Esq. District Judge of 24 Pergunnahs, dated the 9th of December 1896, reversing the decree of Babu Dwarka Nath Ghose, Munsif of Basirhat, dated the 30th of November 1895.

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possession of the same. The defence of the landlord defendants, *inter alia*, was that defendant No. 7, who was only a *raiyat*, had no right to grant a sub-lease of the *raiyati* holding without their consent, and as such the sub-lease was invalid. The sub-lease was for a period of more than nine years, and was created by a registered instrument. The Court of first instance decreed the plaintiff's suit. On appeal to the District Judge he reversed the decision of the first Court, holding that inasmuch as defendant No. 7, the grantor of the sub-lease, was a *raiyat*, he had no right to create a sub-lease in favour of the plaintiffs, without the consent of the landlords, under s. 85 of the Bengal Tenancy Act. Against this decision the plaintiffs appealed to the High Court, mainly on the ground that the sub-lease was valid at least for nine years.

[47] Dr. *Ashutosh Mookerjee*, for the appellants.

Babu *Grish Chunder Chowdhary*, for the respondents.

The judgment of the High Court (BANERJEE and STEVENS, JJ.) was as follows :—

JUDGMENT.

BANERJEE, J.—This appeal arises out of a suit brought by the plaintiffs, appellants, for declaration of their *jamai* right to certain lands and their purchased right to a hut standing on the land, and for possession of the same, on the allegation that the plaintiffs have obtained a permanent lease of the land from the defendant No. 7, who is a *gantidar*, and that the remaining defendants, who are the superior landlords, and persons claiming under them, have resisted the plaintiffs in obtaining possession of the same.

The defence of the defendants Nos. 1 and 2, who are the superior landlords, was to the effect that the defendant No. 7, under whom the plaintiffs claim to hold as sub-lessees, never had any permanent right in the land, that he was only a *raiyat* in respect of the same, and that the plaintiffs therefore have acquired no right to the property in dispute.

The first Court found for the plaintiffs and gave them a decree. On appeal by the defendants, Nos. 1 and 2, the lower appellate Court has reversed that decree, holding that the plaintiffs have acquired no right to the land in dispute by their sub-lease, it being invalid under s. 85 of the Bengal Tenancy Act.

In second appeal it is contended for the plaintiffs, appellants, that the decision of the lower appellate Court, dismissing the whole suit, is wrong in law, first, because the suit, so far as it relates to the hut in question, ought not to have been dismissed, when the first Court found that the plaintiffs had proved that they had purchased the hut and that finding had not been displaced; and, secondly, because the finding of the lower appellate Court, that the sub-lease is altogether void, is incorrect, and the lower appellate Court ought to have held that the sub-lease was valid, at least for nine years.

The first contention is substantially correct, and the case must go back to the lower appellate Court in order that it may dispose of the appeal with reference to the hut.

[48] As regards the second point, s. 85 of the Bengal Tenancy Act provides in sub s. 1, that if a *raiyat* sub-lets otherwise than by a registered instrument, the sub-lease shall not be valid against his landlord unless made with the landlord's consent; the second sub-section provides that a sub-lease by a *raiyat* shall not be admitted to registration if it purports to create a term exceeding nine years; and the third sub-section

provides that where a *raiyat* has, without the consent of his landlord, granted a sub-lease by an instrument registered before the commencement of the Act, the sub-lease shall not be valid for more than nine years from the commencement of the Act.

The only case, then, in which, according to this section, a sub-lease created by a registered instrument without the consent of the landlord, though purporting to be for a longer period than nine years, is to be upheld for the period of nine years, reckoned from the commencement of the Bengal Tenancy Act, is where the document was registered before the commencement of the Act. In any other case, the validity of a sub-lease will have to be tested by the conditions imposed by s. 85; and there is nothing in the section authorising the Court to split the contract of sub-letting into two parts, a valid portion extending to a period of nine years, and an invalid portion for the remainder of the term.

It was argued that the sub-lease in this case was registered, and as there was nothing on the face of that document to disentitle it to be registered, the grantor purporting to be, not a *raiyat*, but a tenure-holder, the condition required by the first sub-section was satisfied, and the sub-lease was one by a registered instrument, and was therefore valid.

We are of opinion that this argument is wholly unsound; for if it were otherwise, it would always be in the power of any *raiyat* to render the section altogether nugatory by pretending to be a tenure-holder and granting a sub-lease in perpetuity, or for any long term, and thus inducing the registering officer to register it. The effect, such as s. 85 attaches to a registered sub-lease, attaches to such a document when the registration has taken place, not merely as a matter of fact, but also in accordance with the conditions of sub-s. 2; and in the present case, it having **[49]** been found that the grantor of the sub-lease was a *raiyat* we must take it that the sub-lease ought not to have been admitted to registration if it had been executed without a misrepresentation of fact as it has been.

That being so, we think that the lower appellate Court was quite right in holding that the sub-lease in this case was altogether void, having regard to the provisions of s. 85 of the Bengal Tenancy Act. As the appeal fails upon the main contention raised in it, we think that, notwithstanding that the case has to be remanded to the lower appellate Court, in regard to the claim for the hut, the respondents are entitled to the costs of this appeal.

S. C. G. *Appeal allowed. Case remanded.*

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26 C. 49.

APPELLATE CRIMINAL.

Before Mr. Justice O'Kinealy and Mr. Justice Henderson.

BASANTA KUMAR GHATTAK (*Appellant*) v. QUEEN-EMPRESS (*Respondent*).* [7th July, 1898.]

Evidence—Evidence in criminal case—Criminal Procedure Code (Act X of 1882), *s.* 342 *—Statement of accused under that section—Misdirection.*

A gap in the evidence for the prosecution cannot be filled up by any statement made by the accused in his examination under s. 342 of the Criminal Procedure

* Criminal Appeal No. 399 of 1898, against the order passed by L. Palit, E., Officiating Sessions Judge of Jessore, dated the 16th of May 1898.

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Code. It is a misdirection to ask the jury to consider a document, purporting to be proved by such a statement, as evidence against the accused.

[F., 27 M. 238=2 Weir. 408; R., 5 C.W.N. 670 (672); 36 M. 457=22 M.L.J. 73=10 M.L.T. 506=(1911) 2 M.W.N. 576=12 Ind. Cas. 961=12 Cr.L.J. 585; 4 N.L.R. 163=8 Cr. L.J. 56; D., 3 L.B.R. 208 (209); (1900) P.L.R. 63 (66).]

THE appellant had filed a petition of complaint against one Nibarun Chunder Biswas, who was committed for trial to the Sessions Court at Jessore under s. 477 of the Penal Code. At the trial the appellant was examined as a witness, and ordered by the Sessions Court to be committed for trial under s. 193 of the Penal Code for having made false statements. The evidence adduced at the trial of the appellant consisted of his petition of complaint, his statement on oath and deposition before the committing [50] Magistrate, and also his deposition before the Sessions Court. There was no evidence to prove the petition of complaint, but the order on the back of it in the handwriting of the Deputy Magistrate, and the statement of the accused taken under s. 342 of the Criminal Procedure Code, were considered as sufficient to prove it. The Sessions Judge agreeing with the jury convicted the appellant. In appeal before the High Court it was argued that the petition of complaint was wrongly admitted as evidence in the case, and that the Sessions Judge had misdirected the jury by telling them that the filing of that petition was one of the circumstances from which they were to find that the charge had been proved.

Mr. *K. N. Chaudhuri* and Babu *Dwarka Nath Mitter*, for the appellant.

The Deputy Legal Remembrancer (Mr. *Gordon Leith*), for the Crown,

The judgment of the High Court (O'KINEALY and HENDERSON, JJ.) was as follows:—

JUDGMENT.

This is an appeal from a decision of the Sessions Judge of Jessore, who tried the case with the aid of a jury.

It has been argued before us that there have been several misdirections in the charge. The only misdirection, however, that we can find in it is in regard to a petition of complaint, and an order on the back of it, which was put in evidence and is called Ex. III. It was a complaint made in another proceeding altogether, and all the evidence given in regard to it is that the order on the back of it is in the handwriting of a certain Deputy Magistrate. There is no evidence to show that this complaint was ever put in by the present appellant, and that being so, we think that the evidence that the handwriting on the back of it is the handwriting of a Deputy Magistrate, is not sufficient. The Sessions Judge in charging the jury pointed out this as one of the material circumstances from which the intention of the appellant would be apparent, and the document itself was read out. We think under these circumstances there has been a misdirection.

[51] It has also been pointed out by counsel on behalf of the appellant that the statement of the appellant was taken under s. 342, and, so far as we can see, he has properly objected to the reception of that evidence. The object of that section is not to fill up a gap in the evidence for the prosecution, but to enable the prisoner to explain any circumstances appearing in the evidence against him. At that time this statement was

not properly in evidence against him, and we think the Judge was wrong in asking the accused about it.

The result is that the conviction and sentence are set aside, and the case remanded to the Sessions Judge for a retrial.

S. C. B.

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26 C. 51=3 C.W.N. 313.

APPELLATE CIVIL.

Before Mr. Justice O'Kinealy and Mr. Justice Gupta.

CHHATO RAM, MINOR, BY HIS MOTHER AND GUARDIAN AKHAJ SAHUN (*Defendant*) v. BILTO ALI (*Plaintiff*).* [9th May, 1898.]

Limitation Act (*XV of* 1877), *s.* 19—*Acknowledgment by guardian of minor—Guardians and Wards Act* (*VIII of* 1890), *ss.* 27 *and* 29—*Act XL of* 1858—*Guardian, Powers of,*

An acknowledgment of a debt by the guardian of a minor appointed under the Guardian and Wards Act does not bind the minor and is not such an acknowledgment under s. 19 of the Limitation Act as would give a new period of limitation against the minor.

[**R.**, 43 P.L.R. 1907 (**F.B.**)=23 P.W.R. 1907 ; **D.**, 26 B. 221 (229)=3 Bom. L.R. 817 (**F.B.**) ; 29 C. 647=6 C.W.N. 729.]

THE suit out of which this appeal arose was instituted on the 2nd of April 1895 for the recovery of Rs. 500 with interest, alleged to have been lent to the minor defendant's father on the 18th of March 1891. The plaintiff stated that the certificated guardian of the minor defendant executed a deed on the 14th of March 1894, in which the guardian made an acknowledgment of the loan. The original Court dismissed the suit, holding that the guardian had no power to acknowledge a debt so as to bind the **[52]** minor under s. 19 of the Limitation Act. The Subordinate Judge held that the suit was not barred, and gave a decree for the amount claimed. The defendant then preferred this second appeal.

Babu *Jogesh Chunder De*, for the appellant.

Babu *Jogendra Chunder Ghose*, for the respondent.

The judgment of the High Court (O'KINEALY and GUPTA, JJ.) was as follows:—

JUDGMENT.

This is an appeal from a decision of the Subordinate Judge of Ranchi, dated the 9th February 1897.

The defendant's father had given a bond for money to the plaintiff, and after he died one Akhaj Sahun was appointed guardian, under Act XL of 1858, of the minor and obtained a certificate. That certificate gives him all the powers he can exercise under the late Guardians and Wards Act. Under s. 27 of the present Act large powers are given to the guardian in relation to the property of the ward, but these powers are somewhat limited by s. 29. Before the passing of the latter Act, two kinds of guardians were acknowledged in our Courts, namely, a natural guardian and a certificated guardian, and the powers of a guardian who had obtained a certificate were more limited than

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* Appeal from Appellate Decree No. 473 of 1897, against the decree of Babu Atal Behari Ghose, Subordinate Judge of Lohardagga, dated the 9th of February 1897, reversing the decree of Babu Bhabun Mohan Ganguli, Munsif of Ranchi, dated the 9th of December 1895.

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those of the natural guardian. The present Act has somewhat enlarged the powers given under Act XL of 1858, but they are certainly not greater than those given to a natural guardian. The debt fell due and was acknowledged by the guardian Akbaj Sahun within the period of limitation, and the question we have now to decide is whether a guardian, under the Guardians and Wards Act, has the power under s. 19 of the Limitation Act to give a new period of limitation by a proper acknowledgment. A guardian is not ordinarily an agent. He has certain statutory powers in regard to the property under his management and no more. In some three decisions of this Court (1) it has been decided that a natural guardian has not the power to acknowledge a debt so as to bind the minor under s. 19 of the Limitation Act. [53] We can see no difference in regard to that section between a guardian who has obtained a certificate and one who has not.

We, therefore, decree the appeal and dismiss the suit with costs in all the Courts.

S. C. B.

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26 C. 53=2 C.W.N. 649.

APPELLATE CIVIL.

Before Mr. Justice Banerjee, Mr. Justice Rampini and Mr. Justice Henderson.

KAMESHWAR PERSHAD AND ANOTHER (*Plaintiffs*) *v.* AMANUTULLA, *alias* MANICK BABU AND ANOTHER (*Defendants*).*
[11th August, 1898.]

Second appeal—Grounds of Second appeal—Civil Procedure Code (Act XIV of 1882) ss. 584, 585—Professional communication—Evidence Act (I of 1872), ss. 65, 66, 127—Secondary evidence.

The grounds upon which a second appeal lies to the High Court are those set out in s. 584 of the Civil Procedure Code, and s. 585 enacts that no second appeal shall lie except on the grounds mentioned in s. 584. The provisions of those sections should be strictly adhered to. *Anangamanjari Chowdhrani* v. *Tripura Sundari Chowdhrani* (2); *Pertap Chunder Ghose* v. *Mohendra Nath Purkait* (3); *Durga Chowdhrani* v. *Jewahir Singh Chowdhri* (4); and *Ram Ratan Sukal* v. *Nandu* (5), referred to.

(*Per* BANERJEE, J.)—Section 127 of the Evidence Act (I of 1872) extends to to a communication made to the pleader's clerk the same confidential character that attaches to a communication to the pleader direct, under s. 126.

(*Per* BANERJEE and RAMPINI, JJ.)—Where oral evidence was given to prove the contents of a letter, which was neither produced nor called for, but no objection was raised to the giving of the evidence, *held* that this was secondary evidence of the contents of a document, and could not be given without satisfying the conditions of s. 65 of the Evidence Act. Section 66 rendered it legally inadmissible, although no objection was raised to the giving of it.

[Diss., 31 C. 155 (158).]

[54] THE facts of this case, so far as they are material to this report, appear from the judgments. The appeal originally came on for hearing

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* Appeal from Appellate Decree No. 2091 of 1896, against the decree of H. Holmwood, Esq., District Judge of Gaya, dated the 17th of August 1896, reversing the decree of Babu Suresh Chunder Banerjee, Munsif of Aurangabad, dated the 28th of February 1894.

(1) See 13 C.L.R. 112, and 13 C. 292. (2) 14 C. 740=14 I. A. 101.
(3) 17 C. 291=16 I. A. 233. (4) 18 C. 23=17 I. A. 122.
(5) 19 C. 249=19 I. A. 1.

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before Mr. Justice RAMPINI and Mr. Justice HENDERSON, who differed in opinion, and the case was referred, under s. 575 of the Civil Procedure Code, to Mr. Justice BANERJEE who agreed with Mr. Justice RAMPINI.

The plaintiffs appealed to the High Court.

Mr. *C. P. Hill*, Moulvie *Mahomed Yusuf*, and Babu *Uma Kali Mukerjee*, for the appellants.

Moulvie *Serajul Islam*, Moulvie *Syed Shumsul Huda*, and Moulvie *Mahomed Mustafa Khan*, for the respondents.

The judgments of the High Court were as follows :—

JUDGMENTS.

RAMPINI, J.—This is a suit to recover possession of an eight annas share of *mouzah* Ledha, which the plaintiff purchased at a sale in execution of a decree obtained against the defendant No. 2. The defendant No. 1 resists the plaintiff's suit on the ground that he is in possession of the property by virtue of a *mokurari* lease executed in his favour by the defendant No. 2. The plaintiff seeks to have this *mokurari* lease set aside on the ground that it is a fictitious and collusive lease, and that the defendant No. 1 is but a *benamidar* for defendant No. 2, who is still the owner, and who is really in possession of the mouzah.

The Munsif decreed the suit, but on appeal his decree was reversed by the District Judge, who, on the 30th July 1894, dismissed the suit, holding that the plaintiff had failed to prove that the *mokurari* lease was a fictitious transaction. A second appeal was then preferred to this Court, and on the 13th May 1896 the judgment of the lower appellate Court was set aside by a Division Bench of this Court, and the appeal was remanded to the Judge with certain instructions. The ground of the remand by this Court was that the judgment of the lower appellate Court was erroneous in law. The defects in the District Judge's judgment pointed out by this Court were: (1) That the Judge was wrong in supposing that the Munsif had shifted the onus of proof from the plaintiff to the defendants merely because of the relationship between the latter; (2) that the Judge was wrong in supposing that the transaction took place [55] long before the plaintiff attempted to sell the property; and (3) that the Judge had omitted to remark upon the absence of the defendant No. 1 and upon his omission to prove that he actually paid consideration for the deed.

The case accordingly went back to the Judge "for a fresh decision on the point, as to whether the plaintiff had made out a *prima facie* case, such as he might reasonably be expected to prove, and, if so, whether the defendant had succeeded in rebutting it."

The appeal was retried by the District Judge on the 17th August 1896, and he has now found: (1) that the plaintiff has entirely failed to make out any *prima facie* case whatever against the defendant No. 1 whose *bona fides* was alone in issue; and (2) that the only point on which the plaintiff had offered evidence had been fully rebutted by the defence witnesses. He accordingly again decreed the appeal.

The plaintiff again appeals to this Court, and again it is argued that the Judge's decision is erroneous in law, and it has been contended that there are errors and defects in the Judge's judgment, which have affected the merits of his decision, and we are again asked to remand the case to the Judge with fresh instructions for a fresh decision.

I am unable to see that there are any such errors or defects in the Judge's decision as would justify us in taking this course. The Judge appears to me to have fully carried out the instructions given him by this

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Court, when remanding the case. He has rightly placed the onus of proof in the first instance, on the plaintiff, and has considered the evidence on both sides and has come to the conclusion that the plaintiff has not succeeded in establishing his case that the *mokurari* is a fictitious and fraudulent transaction. He has further held that the defendants have rebutted the evidence adduced by the plaintiff in support of his case. He has fully considered the evidence of the passing of the consideration and holds that it did not pass. He has considered the non-appearance of the defendant No. 1 in the Munsif's Court, and his failure to give evidence as to the [56] passing of the consideration. He has further discussed the evidence of possession on both sides, and after fully complying with this Court's instructions has come to a fresh decision in the case.

I can see no defect in his judgment such as would justify us in again remanding the case.

There appears to me to be only one error in his judgment on a point of law, *viz.*, that he has excluded the evidence of two pleaders on the ground that it was inadmissible under s. 126 of the Evidence Act. But he points out that the Bench of this Court, who remanded the case, did not in any way animadvert on the exclusion by him of the evidence of these two witnesses at the first hearing of the appeal, and he argues that this shows either that the exclusion of the evidence of these two pleaders was not objected to before this Court, or else that this Court considered that their evidence had been rightly excluded from consideration.

However this may be, I consider that the evidence of these two pleaders is inadmissible, and has been rightly excluded, though not for the reason assigned by the District Judge. Their evidence has been read to us. They were called on to give evidence as to the contents of a letter received by a pleader's *mohurir* from the defendant No. 1. Now this letter was not called for, and was not produced at the Court. Therefore no secondary evidence of its contents was admissible, and the evidence of the pleaders is, therefore, inadmissible under s. 66 of the Evidence Act. The learned counsel for the appellant urges that no objection appears to have been raised to the giving of this evidence, and hence he contends that their evidence is admissible. But there is no law in this country that the absence of objection to evidence, which is legally inadmissible, makes it admissible. I therefore consider that the evidence of the pleaders has been rightly excluded from consideration, In any case, their evidence, which has been referred to before us by both sides, is not material. The Munsif points out that their evidence at the best can only give rise to a suspicion with regard to the claim of defendant No. 1.

[57] I am further of opinion that we cannot interfere with the judgment of the Judge of the lower appellate Court as his finding on the only issue that arises in the case is a finding of fact, which cannot be set aside by us in second appeal. There are numerous rulings of the Privy Council to this effect: see *Anangamanjari Chowdhrani* v. *Tripura Sundari Chowdhrani* (1); *Pertap Chunder Ghose* v. *Mohendra Nath Purkait* (2); *Durga Chowdrani* v. *Jewahir Singh Chowdhri* (3); *Ram Ratan Sukal* v. *Nandu* (4); *Ram Gopal* v. *Shamskhaton* (5); and *Lukhi Narain Jaga Deb* v. *Jodu Nath Deo* (6). I am, therefore, of opinion that this appeal should be dismissed with costs, but as my learned brother does not agree with

(1) 14 C. 740 = 14 I.A. 101.
(2) 17 C. 291 = 16 I.A. 233.
(3) 18 C. 23 = 17 I.A. 122.
(4) 19 C. 249 = 19 I.A. 1.
(5) 20 C. 93 = 19 I.A. 228.
(6) 21 C. 504 = 21 I.A. 39.

me on this point, the appeal must be laid before the learned Chief Justice for reference to a third Judge. 1898 AUG. 11.

HENDERSON, J.—This was a suit by the plaintiffs, who are respectively the auction-purchasers of an eight-anna share in a certain *mouzah* named Ledha, and his *ticcadar*, to obtain direct possession of that share by setting aside a *mokurari*, which had been set up by the defendants, on the ground that the *mokurari* was fraudulent and executed without consideration. It was alleged in the plaint that the plaintiffs had been in possession of the *mouzah*, but had been dispossessed, and an issue was framed upon this allegation. The Munsif was of opinion that the issue as to the possession and dispossession of the plaintiff was not very material, and he found upon the evidence that the plaintiff had never been in possession, although the plaintiff No. 2 had made an attempt to take possession, but without success. APPELLATE CIVIL. 26 C. 53 = 2 C.W.N. 649.

The real issue in the case was, whether the *mokurari* executed by the defendant No. 2 in favour of the defendant No. 1 was collusive and fraudulent. As to this issue the Munsif held, and rightly held, that under the circumstances it was for the plaintiffs to make out a *prima facie* case. He found that a few years [58] before the execution of the *mokurari*, the plaintiff No. 1 had obtained a decree against the defendant No. 2; that the defendant No. 1 was a relative of defendant No. 2; and that notwithstanding the execution of the *mokurari* the defendant No. 2 had continued to remain in possession of the *mouzah*. Under these circumstances he held that the plaintiffs had made out a *prima facie* case, and proceeded to deal with the evidence adduced by the defendant to meet that case. Upon that evidence he found that the consideration for the *mokurari* had not been satisfactorily proved, and that there had been no change in the possession; and he laid considerable stress on the fact that the defendant No. 1 had not himself given evidence to prove payment of consideration and change of possession. Upon these findings he came to the conclusion that the *mokurari* was fictitious and gave the plaintiffs a decree. On appeal the District Judge held that the plaintiffs entirely failed to prove their case, and that the defendants were not called upon to produce even as much evidence as they did, and he allowed the appeal. On second appeal, the High Court, after commenting at some length upon various passages in the judgment of the District Judge, and pointing out that he had not sufficiently considered the evidence of the plaintiffs' witnesses, that the defendant No. 2 had after the execution of *mokurari* continued in possession, and that he had altogether omitted to remark upon the evidence of the defendant No. 1, and upon his omission to prove that he actually paid consideration for the deed, made an order remanding the case in the following terms :—"Under these circumstances, we think that the District Judge has not properly applied his mind to the evidence in the case, and that the case ought to be sent back to him for a fresh decision on the point whether the plaintiffs have made out a *prima facie* case, such as he might reasonably be expected to prove, and if so whether the defendant has succeeded in rebutting it. The case will go back accordingly." The District Judge has now reconsidered his former decision, and has held that the plaintiffs have entirely failed to prove their case.

With regard to the question whether the defendant No. 2 ever relinquished possession, he says: "But admitting their existence (the relationships between the defendants), what the [59] plaintiffs really undertake to prove, and that under the circumstances is about the only relevent fact they are in a position to prove, is that defendant No. 2 has

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relinquished possession. If he establishes a *prima facie* case on this point the onus certainly shifts very heavily to the defendants." He then deals with the evidence adduced by the plaintiffs to show that they had had possession, but had been dispossessed by the defendant No. 2. This evidence he rejects as the Munsif had done. He goes on to say:

"It is argued by respondents that, although he disbelieves the possession of Ajudhia Singh (plaintiff No. 2), and his dispossession by Shamsher Bahadur (defendant No. 2), the Munsif is at liberty to take the plaintiffs' evidence, as a whole, as sufficient to prove that Shamsher Bahadur never relinquished possession to his alleged vendors (*mokuraridars*).

"The next argument is that the consideration of Rs. 1,000 is inadequate and defendant No. 2's evidence shows that it was probably never paid. The third argument is that the defendant No. 2 produces no witnesses as to the passing of the consideration. The fourth, that defendant No. 1, though given every opportunity, does not appear. Finally, it is said that no *challans* for Government revenue are produced.

"As regards the first point I find it is impossible to separate the false story of dispossession by Shamsher Bahadur from the general allegation that Shamsher Bahadur was in possession. The whole evidence is directed to one point, and the possession of Shamsher Bahadur is merely incidental to his conduct in dispossessing Ajudhia Singh, an event which never happened. The case on plaintiffs' evidence is simply this: *A* dispossessed *B*. Therefore *A* must have held possession. When it is shown that the first member of this proposition is absolutely untrue, it seems impossible to me to assume the second."

I shall first deal with the finding that it is impossible to separate the false story of dispossession by Shamsher Bahadur, the defendant No. 2, from the general allegation that Shamsher Bahadur was in possession, that is, did not relinquish possession. To my mind there is no connection between the two points. They are quite distinct. It may be that the plaintiffs' [60] story that they were dispossessed is entirely false, or false so far that they merely attempted unsuccessfully, as the Munsif held, to take possession. But in either view it does not follow that the evidence adduced by the plaintiffs to show that the defendant No. 2 never relinquished possession after the execution of *mokurari* is false. The non-relinquishment of possession depends upon evidence which is entirely independent of the evidence as to the alleged dispossession, and that evidence is corroborated by other circumstances, which are admitted. This appears from the original judgment of the District Judge. The weight to be given to that evidence, and to the corroborating circumstances, was no doubt a question for the Judge. In his original judgment the District Judge makes the following remark: "The only point that plaintiff does offer any evidence on is the point of defendant No. 2's possession. All his witnesses say that defendant No. 2 continued in possession, and defendant No. 1 never had possession. This, it is contended, is supported by the defendant's evidence, that the village *amlas* were never changed. I do not think this contention can prevail, the parties are admittedly relatives. The *patwari* is a permanent official, and the *barahil* is the *chowkidar* of the village, and has always been *barahil* of the sixteen annas. The plaintiff's witnesses are *ryots* of a neighbouring village, and there is not a particle of evidence to show where the collections really went. It is only shown that the same servants continued to collect them." In his judgment on remand the District Judge has repeated his observations with regard to the fact that the *patwari*, *barahil* and *chowkidar* had not been changed, but he appears

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to have withdrawn from his consideration the evidence as to the non-relinquishment, apparently because he has been unable to separate what he calls the false story of dispossession by the defendant No. 2 from the alleged non-relinquishment of possession by defendant No. 2. In this, I think, he has erred. In the passage I have quoted from his former judgment he had stated that all the plaintiff's witnesses say that defendant No. 2 continued in possession and that defendant No. 1 never was in possession. In his present judgment he appears also to be wrong in saying that the whole evidence is directed to one point, and that the [61] possession of Shamsher Bahadur is merely incidental to his conduct in dispossessing Ajudhya Singh (plaintiff No. 2). The case on the plaintiffs' evidence is not simply the *A* and *B* proposition stated in the passage I have quoted. It is not quite clear whether the District Judge means to hold, but I think he does mean to hold, that the Munsif was not at liberty to take the plaintiffs' evidence, as a whole, to prove that Shamsher Bahadur, defendant No. 2, never relinquished possession to his alleged vendor (*mokuraridar*) ; but, if he does mean so to hold, I think he is again wrong.

The District Judge does not appear to have properly applied his mind to the point whether possession changed on the execution of the *mokurari*.

It has been contended that the District Judge has wrongly excluded from consideration the evidence of two pleaders who were called by the plaintiffs. It may be, and I express no opinion as to it, that this evidence is of little weight, but it was clearly relevant on the question whether the defendant No. 2 did in fact relinquish possession to the defendant No. 1. With regard to this evidence the Munsif makes the following remarks: "The plaintiffs examined two pleaders of this Court, one Babu Thakur Prasad, and another Babu Sashi Bhusan Mukerjee, pleaders for defendant No. 1. It appears from their evidence that in the latter part of the year 1892, the defendant No. 1 wrote a letter to the address of one Abdul Thakur *mohurir* of pleader Babu Shashi Bhusan Mukerjee; that in that letter reference was made to the successful result of the criminal case in favour of defendant No. 1; and that the defendant No. 1 in that letter stated that the *enam* or reward for the criminal case will be sent by the defendant No. 2. The letter is not forthcoming. It is said to be with Abdul Thakur, and it was not called for. The letter was being opened by Babu Sashi Bhusan on a particular day in this Court-room, when Babu Thakur Pershad, pleader, without any authority and against the protest of Sashi Babu, read a portion of it to the hearing of Munshi Ibrahim Hossein, plaintiff's pleader, who immediately said to the other two pleaders that they would have to give evidence on this point, and that they should remember the content [62] (*sic*) thereof. This fact throws a good deal of suspicion on the claim of defendant No. 1 to this property as his own."

In his original judgment the District Judge, with regard to this evidence, made the following remarks: "The communications were privileged and I must expunge all reference to this evidence from the judgment and the record." In his judgment now under appeal he says: "The evidence of the plaintiff's witnesses Nos. 7 and 8 I excluded as inadmissible, and their Lordships have not overruled my finding on this point. I need not, therefore, re-admit their evidence, but would merely draw attention to the Munsif's remarks on it at pages 8 and 9 of the paper book, as showing that it was on their evidence alone, coupled with the fact of relationship, that the Munsif held the document fictitious and threw the

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onus on the defendants. If their evidence disappears there is not one particle of the plaintiff's case left."

I may mention here that it was pointed out to us that it was in evidence that Sashi Bhusan Mukerjee on being pressed stated that the costs in the criminal case, which arose out of the attempt by the plaintiffs to get possession, would be paid by defendant No. 2. There can be no question that the evidence of the pleaders (witnesses Nos. 7 and 8) was admissible, and that the District Judge had, therefore, improperly withdrawn it from consideration. The fact that this Court, in remanding the case, did not refer to the opinion expressed by the District Judge, as to the admissibility of the evidence, does not, it seems to me, preclude us now from dealing with it. The remark of the District Judge, that it was on their evidence alone coupled with the fact of relationship that the Munsif held the *mokurari* fictitious and threw the onus on the defendants, is not correct. It is merely a repetition of what he had said in his previous judgment, and upon this point this Court in remanding the case pointed out the incorrectness of the statement, and drew his attention to the fact that the Munsif had relied upon other circumstances, and amongst them to the continuance in possession by the defendant No. 2. What the Munsif said on p. 8 was: "He adduced evidence to show that he obtained the decree against defendant No. 1 in the year 1888, that the defendant No. 1 is maternal [63] uncle of one Ekbul Hossein, who is defendant No. 2's sister's husband, and that the defendant No. 2 is in actual possession of the property. The relationship as between defendant No. 2 and defendant No. 1 has been admitted. The plaintiff No. 1 has, therefore, shown that the particular transaction is suspicious; and the onus, therefore, shifts on the defendant No. 1 to show that the consideration was actually paid, and that he is actually in possession for himself.

As to the consideration for the *mokurari* the High Court on remanding the case said: "On the question of consideration the Judge merely says this: 'The defendant meets the mere statement of plaintiff that no consideration passed by his own statement on oath that he got the money.' That remark applies to defendant No. 2, who was the party alleged to be interested in effecting this fictitious transfer in order to save the property from his creditor. The Judge omits altogether to remark upon the absence of the defendant No. 1, and upon his omission to prove that he actually paid consideration for the deed." The District Judge now makes the following remark: "I do not think any witnesses as to the passing of the consideration were necessary, unless plaintiff had made out some *prima facie* case to prove that no consideration did pass. It is absurd to say that defendant must prove affirmatively every point which plaintiff has entirely neglected to give any evidence upon. Defendant No. 1 had no obligation beyond putting forward defendant No. 2 to admit the receipt and to prove the *potta*, which is itself a perfectly valid legal receipt." The passage which I have first quoted shows a want of appreciation of the position. The determination of the question, whether the consideration was paid or not, could only become necessary, if the plaintiffs made out a *prima facie* case that the *mokurari* was not genuine, and then it was for the defendants, who alone had any knowledge on the subject, and not for the plaintiffs, to prove consideration. It was not enough to say that the defendant No. 1 had no obligation beyond putting forward defendant No. 2 to admit the receipt and prove the *potta*, which is itself a perfectly valid receipt. The recital as to payment in the *potta* is no evidence of payment as between the plaintiffs and the

defendants. The [64] District Judge appears to have paid very little attention, if any, to the direction in this connection given to him in the judgment remanding the case as to the absence of the defendant No. 1, and his omission to prove that he actually paid consideration for the *mokurari*. Moreover, in dealing with the discrepancies between the evidence of defendant No. 2 and the recitals in the *mokurari* as to the payment of consideration, the Judge relies upon a supposed usage, as to which there is absolutely no evidence.

With regard to the fact that the defendant No. 1 did not give evidence the District Judge finds that his non-appearance was due to a misapprehension of the proper procedure on the part of the Munsif, and he has quoted a passage from the Munsif's judgment, but I am unable to see that there was any misapprehension on the part of the Munsif as to the proper procedure. It appears that while the plaintiffs were anxious to have the defendant No. 1 examined in Court, they did not wish to examine him as their witness on commission. It was no part of the duty of the plaintiffs to call the defendant No. 1 as their witness. If it became material to prove that the consideration actually passed it was for the defendant No. 1 to prove that fact. He had ample opportunity, the Munsif has stated, to give his evidence, the case being adjourned on many occasions for his appearance. It was not until after the conclusion of the evidence on both sides that any application was made by his pleader that he might be examined on commission. No medical certificate as to his health appears to have been furnished on his behalf, for the Judge remarks that if the Munsif doubted that the man was really ill he should have ordered a medical certificate to be produced. The District Judge has held that the defendant No. 1 was perfectly ready and also within time with his evidence, and had no opportunity given him to give it. This may possibly amount, though I am not prepared to say it does, to a finding of fact with which this Court ordinarily cannot interfere, but it seems to me that it also involves a finding that the Munsif was wrong in refusing, as he did, under the circumstances stated by him, to issue a commission at the last moment—a finding with which I cannot agree.

[65] With rgard to the non-production of the *challans* for Government revenue, the District Judge remarks that "their non-production by any one shows that the defendant No. 1 must have been the person who paid." This certainly was not the proper inference to draw. If the plaintiffs had made out a sufficient case to make it necessary to prove who paid the Government revenue, it was for the defendant No. 1 to prove that he, if it was the fact, paid it. Again, the District Judge states that the defendant No. 1 was precluded from producing the *challans*, as he was given no opportunity to give his evidence, but surely these *challans* might have been proved, without the defendant No. 1 going into the witness box himself.

In my opinion, if the Judge really considered that the defendant No. 1 had been improperly precluded from giving evidence, which under the circumstances was necessary for his case, his proper course would have been to remand the case in order that his evidence might be taken.

Finally, the District Judge finds that "the plaintiff has entirely failed to prove his case, *i.e.*, to make out any *prima faice* case whatever against defendant No. 1 whose *bona fides* alone is in issue, and that the only point the plaintiff offered evidence upon has been fully rebutted by the defence witnesses," and he allowed the appeal and dismissed the plaintiff's suit.

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Even in the statement of his final conclusion the District Judge repeats the mistake in saying that there was only one point on which the plaintiffs had given evidence, the one point being apparently the alleged dispossession of the plaintiffs by the defendant No. 2, and not the non-relinquishment of possession by the defendant No. 2 on the execution of the *mokurari*. See paper book, p. 9.

It has been urged before us by the respondent's pleader that the finding on the whole case is a finding of fact with which this Court cannot interfere on second appeal, and we have been referred to a number of decisions of the Privy Council. On the other hand, counsel for the appellants has contended that the District Judge has not complied with the directions given to him by this Court in its judgment remanding the case, and that by [66] reason of the defects in his judgment, which I have pointed out, there has been an entire mistrial of the case.

The question, whether a second appeal will lie, having regard to the decisions of the Privy Council in *Durga Chowdhrani* v. *Jewahir Singh Chowdhri* (1) and *Ram Gopal* v. *Shamskhaton* (2), is one which is not free from difficulty. I may mention, however, that the judgment of the learned Judges of this Court, who made the order of remand in this case, is really an authority, if the point were taken, that a second appeal does lie. The finding of the District Judge, with which this Court had then to deal, is the same finding as that now before us. But, be that as it may, the judgment of the District Judge is extremely unsatisfactory, and I consider there is great force in the contention that there has really been a mistrial of the case.

In the first place, the District Judge has improperly excluded from consideration the fact, which he himself admits, that all the witnesses for the plaintiffs say that the defendant No. 2 continued in possession, and that the defendant No. 1 never was in possession after the execution of the *mokurari*. He has done so not so far as one can gather from his judgment because he has disbelieved their evidence, but because he considered it was impossible to separate the story of the alleged dispossession of the plaintiffs from the story of the defendant No. 2 having continued in possession—two matters between which, as I have said before, there was no apparent connection. This error is one of law rather than of fact. Had he considered that evidence it is possible he would have taken a very different view as to the necessity for the defendants to have proved affirmatively that the consideration actually passed. He might also have taken a different view of the fact that after the execution of the *mokurari* the same servant continued to collect the rents.

In the next place he was wrong in treating the evidence as to the possession of the defendant No. 2 as being merely incidental [67] to his conduct in connection with the alleged dispossession of the plaintiffs. This also is not a mere error in finding of facts.

Again he erred in holding that the Munsif and therefore he himself also were not at liberty to take the plaintiffs' evidence as a whole to prove that the defendant No. 2 never relinquished possession, and also in excluding altogether from consideration the evidence of the pleaders. These I take it are errors in law.

In stating that, apart from the relationship and the evidence of the pleaders, there was not a particle of the plaintiffs' case left, he appears merely to be repeating the view already referred to that the evidence as

(1) 18 C. 23=17 I.A. 122. (2) 20 C. 93=19 I.A. 228.

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to non-relinquishment could not in the face of the story as to the alleged dispossession be considered.

The District Judge has also erred in law in treating the recitals in the *mokurari* as to the payment of consideration as any evidence as between the plaintiffs and the defendants, and also in relying upon a supposed usage in respect to such recitals as to which there was no evidence whatever. With regard to the passing of the consideration, if, by reason of the case made by the plaintiffs as to the relationship of the defendants and the non-relinquishment of possession by the defendant No. 2, it became necessary to decide the question at all, it was for the defendant to show that the consideration actually passed.

The finding that the fact that the defendant No. 1 did not give his evidence was due to a misapprehension on the part of the Munsif as to the proper procedure, and that the defendant No. 1 had no opportunity given to him to give his evidence, in my opinion precluded the District Judge from drawing—as he was entitled though not bound to draw—an inference against the defendant.

The errors to which I have drawn attention are not merely errors in findings as to matters of fact. They are no doubt involved in such findings, and if they are not strictly errors in law they are errors in law and fact. To use a phrase more often applied to a charge to a Jury, the District Judge has misdirected himself as to various matters of law and fact, and, moreover, while he has omitted to take into consideration all [68] evidence in the case, he has relied on matters which were not in evidence at all.

For the reasons stated above, I am of opinion that it is impossible to say that there has been a proper trial of the case by the District Judge. His final conclusion that the plaintiffs have entirely failed to make out a case against defendant No. 1 is one based upon, amongst other considerations, the various erroneous findings to which I have alluded. It is not correct, therefore, in my opinion to say that his final conclusion is merely an erroneous finding of fact, with which this Court cannot, regard being had to the decisions of the Privy Council to which I have referred, interfere on second appeal. I would therefore send the case back to the District Judge in order that he may reconsider his decision in the light of the observations which I have made.

BANERJEE, J.—The suit out of which this appeal arises was brought to recover possession of certain immoveable property upon obtaining a declaration that the *mokurari* lease, dated the 5th December 1891, executed by the defendant No. 2 in favour of the defendant No. 1, was a fabricated, collusive and fraudulent document, and that the defendant No. 1 had acquired no title under it.

The allegations of fact upon which the plaintiffs brought this suit were, that the plaintiff No. 1 had purchased an eight annas share of *mousah* Ledha at a sale in execution of a decree against defendant No. 2; that the defendant No. 1 in collusion with the defendant No. 2 dispossessed the plaintiff No. 2, who was a *ticcadar* under the plaintiff No. 1, and set up a false and fraudulent *mokurari* lease; and that the plaintiffs were, therefore, obliged to bring this suit.

The defence of the defendant No. 1, who alone contested the suit, was to the effect that the mokurari lease impugned by the plaintiffs was a real *bona fide* and valid lease, and that the defendant No. 1 was entitled to retain possession of the property in dispute as *mokuraridar*.

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The first Court found for the plaintiffs and gave them a decree. [69] On appeal by the defendant No. 1, the learned District Judge reversed the Munsif's decree and dismissed the suit. There was a second appeal against the District Judge's judgment; upon which that judgment was set aside, and the case remanded to the District Judge for a fresh decision upon the point as to whether the plaintiffs had made out a *prima facie* case, such as they might reasonably be expected to prove, and, if so, whether the defendant had succeeded in rebutting it. Upon this remand, the learned District Judge, after a consideration of the evidence, has come to the conclusion that the plaintiffs have failed to make out a *prima facie* case, and he has accordingly again dismissed the plaintiff's suit. The plaintiffs have now preferred this second appeal, and as the learned Judges, Mr. Justice Rampini and Mr. Justice Henderson, before whom the appeal came on for hearing, have differed in opinion, the former being of opinion that the appeal ought to be dismissed, and the latter that the decree of the lower appellate Court ought to be reversed, and the case remanded, the case has been referred to me under s. 575 of the Code of Civil Procedure, read with s. 587.

The grounds upon which the learned vakil for the appellant contends that the judgment of the lower appellate Court ought to be reversed are, *first*, that the learned Judge below is in error in holding that it is impossible to separate the false story of dispossession by Shamsher Bahadur from the general allegation that Shamsher Bahadur was in possession, when he ought to have held that the two points were fairly separable from one another; *second*, that the learned Judge below was in error in excluding from consideration the evidence of the two pleaders as inadmissible; *third*, that the learned Judge below is wrong in holding that no witnesses, as to the passing of consideration, were necessary; *fourth*, that the learned Judge in the Court below is also wrong in his remarks about the non-examination of the defendant No. 1; *fifth*, that the learned Judge below is further wrong in his remarks on the non-production of the Government *challan*; and, *sixth*, that the learned Judge below is wrong in observing that the evidence as to the payment of consideration a few days after registration, was exactly in conformity with usage, in the absence of evidence [70] to prove such usage. And these, I may add, are also the main grounds upon which Mr. Justice Henderson in his judgment says that the decision of the lower appellate Court ought to be set aside.

Before considering these points in detail, I may observe that the grounds upon which a second appeal lies, and it is open to this Court to interfere with the judgment of the lower appellate Court, are those set out in s. 584 of the Code of Civil Procedure; and s. 585 expressly enacts that no second appeal shall lie except on the grounds mentioned in s. 584. And their Lordships of the Privy Council have, in more than one case, pointed out the necessity of adhering strictly to the provisions of these sections, I need only refer to the cases of *Anangamanjari Chowdhrani* v. *Tripura Sundari Chowdhrani* (1); *Pertap Chunder Ghose* v. *Mohendra Nath Purkait* (2); *Durga Chowdhrani* v. *Jewahir Singh Chowdhri* (3) and *Ramratan Sukal* v. *Nandu* (4).

Now, the grounds mentioned above, upon which I am asked to interfere with the judgment of the lower appellate Court can come only under the heads (*a*) and (*c*) of s. 584, if indeed they can come under the section at all.

(1) 14 C. 740 = 14 I.A. 101.
(2) 17 C. 291 = 16 I.A. 233.
(3) 18 C. 23 = 17 I.A. 122.
(4) 19 C. 249 = 19 I.A. 1.

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Let us then see how far the grounds urged before me by the learned vakil for the appellant really come under either of those two heads. The first ground is, that the learned Judge below is in error in saying that it is impossible to separate the false story of dispossession by Shamsher Bahadur from the general allegation that Shamsher Bahadur was in possession, when really there is no logical impossibility in separating the one from the other. Can this come under either cl. (*a*) or cl. (*c*) of that section, 584 ? That is, is it contrary to any law or does it involve any error of procedure, for a Court that has to deal with the facts of a case, to say, that it cannot believe one part of the story told by certain witnesses when another part of the story told by the same witnesses is manifestly false ?

[71] The answer to this question must, in my opinion, be in the negative. It is true that the lower appellate Court has expressed itself a little too strongly when it says that it is impossible to separate the one story from the other ; but we must take language in its ordinary sense, and I do not think that the learned Judge below meant, in the passage of the judgment to which reference is made, that it was logically impossible to separate one part of the story from the other. All that he means to say, as is evident from the context and especially from an earlier part of the judgment, in which he has criticised the evidence of the witnesses in detail, is, that taking the evidence as a whole, he finds it practically impossible to accept as true that part of their statements wherein they allege that the defendant No. 2, Shamsher Bahadur, was all along in possession, when he must disbelieve their evidence so far as it goes to show that the plaintiff, Ajudhya Singh, had obtained possession, and had been subsequently dispossessed by Shamsher Bahadur.

Upon the second point, the learned Judge below is of opinion that the evidence of the two pleaders, who depose to defendant No. 1 having written to the *mohurir* of one of them, who was his own pleader, that the pleader's reward in a certain criminal case was to be paid by the defendant No. 2 was inadmissible, because it involved the disclosure of a privileged communication. That view Mr. Justice Rampini considers incorrect, though he is of opinion that the evidence has been rightly excluded. I am of opinion that so far as the evidence of the pleader Shashi Bhusan Mukerjee is concerned, the ground upon which the learned Judge below has excluded it, is correct, because Sashi Bhusan Mukerjee was the pleader of defendant No. 1, who wrote the letter, and though the communication contained in the letter was not addressed to the pleader direct but was addressed to the pleader's clerk, s. 127 of the Evidence Act extends to such a communication the same confidential character that attaches to a communication to a pleader direct under s. 126.

As regards the evidence of the other pleader, Thakur Pershad, I concur with Mr. Justice Rampini in thinking that the learned Judge was wrong in excluding it on the ground of its involving **[72]** a disclosure of a privileged communication ; and I also agree with him in thinking that, though the evidence of this second pleader was not inadmissible upon the ground upon which the learned District Judge excluded it, it is really inadmissible on the ground that it involves the giving of secondary evidence of the contents of a document without satisfying the conditions required to be fulfilled by s. 65 of the Evidence Act.

As to the third point, no doubt the learned Judge below is wrong in law when he says, "I do not think any witnesses as to the passing of the consideration were necessary ;" but that part of his judgment is wholly

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matter of surplusage, he having in an earlier part of his judgment found that there was evidence to prove payment of consideration, that evidence consisting of the receipt for the consideration and the deposition on oath of the defendant No. 2 in which the receipt of consideration is admitted.

On the fourth point I think it enough to say that the learned Judge below has found—I am quoting his words—"that the defendant No. 1 was perfectly ready and also within time with his evidence and had no opportunity given him to give it;" and I think that this finding is sufficient to dispose of the objection that the learned Judge below was wrong in not attaching due weight to the non-examination of defendant No. 1; and this remark is sufficient also to meet the fifth point raised.

As to the 6th point, it is true that the learned Judge below does make use of the word "usage" when he says that "it is the invariable practice to acknowledge full consideration of the purchase-money in these deeds, and the deposit of 25 per cent. or so, followed by the payment in full four or five days after registration, *i.e.*, when '*takàza badlani*' or exchange of the registration receipt for the money takes place, is so exactly in conformity with usage that it corroborates defendant No. 2's statement." But what he really means to say is this, that the account given by the defendant No. 2, as to the manner in which consideration was paid, is one that accords best with the way in which such transactions usually take place; and I do not think that this involves any error of law. If any fact had been found without any evidence to support it then no doubt the finding would have been open to interference in second [73] appeal as has been held by the Privy Council in the case of *Hemanta Kumari Debi* v. *Brojendro Kishore Roy Chowdhry* (1). But that is not the case here. I should add that not only has the lower appellate Court found in this case that the plaintiffs' evidence is insufficient to make out a *prima facie* case but it has also found that the evidence adduced by the defendant has sufficiently met the only case put forward by the plaintiff in his evidence. The learned Judge observes: "As regards the actual evidence to rebut plaintiff's case on the record it fully and categorically meets the only case put forward by plaintiff in his evidence. That case is, as I have said, that defendant No. 1 never had possession. Three *raiyats* of Ladha, of whom one is *chowkidar* and one is *barahil*, distinctly swear that he was." And, then, after giving his reasons for dissenting from the Munsif's view, that these witnesses were not reliable, he concludes in these words: "I have thus given the evidence for both sides my most mature and detailed consideration, and I can only repeat my previous finding that the plaintiff has entirely failed to prove his case, *i.e.*, to make out any *prima facie* case whatever against defendant No. 1, whose *bona fides* alone is in issue, and that the only point the plaintiff offered evidence upon has been fully rebutted by the defence witnesses."

I am, therefore, of opinion that no ground has been made out for the interference of this Court with the judgment of the lower appellate Court in second appeal, and I agree with Mr. Justice Rampini in dismissing this appeal with costs. The respondent is entitled to the costs of the two hearings in this Court.

S. C. C. *Appeal dismissed.*

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(1) 17 C. 875=17 I.A. 65.

26 C. 74=3 C.W.N. 70.

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APPELLATE CIVIL.

26 C. 74= 3 C.W.N. 70.

[74] APPELLATE CIVIL.

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, and Mr. Justice Banerjee.

CORPORATION OF CALCUTTA (*Petitioners*) v. BHUPATI ROY CHOWDHRY (*Opposite Party*).* [22nd August, 1898.]

Calcutta Municipal Consolidation Act (Bengal Act II of 1888), ss. 125, 132 *and* 135—"*Valuation,*" *meaning of—Re-valuation made by the Municipality within six years from the date of the valuation made after hearing objection, Legality of—Provincial Small Cause Courts (Act IX of* 1887), *s.* 25—*Code of Civil Procedure (Act XIV of* 1882), *s.* 622—*Statute* 24 *and* 25 *Vic.*, *c.* 104, *s.* 15—*Superintendence of HighCourt.*

The word "valuation" in s. 135 of the Calcutta Municipal Consolidation Act (Bengal Act II of 1888) means, not "the amount of the valuation" only, but also the process or act of valuation.

A valuation was made by the Calcutta Municipality of a holding; the rate-payer objected to the amount, and the Vice-Chairman of the Municipality, on hearing the objection, fixed the valuation at a certain amount. Within six years from this valuation fixed after objection, a re-valuation was made by the Municipality, and the rate-payer objected to the legality of such valuation on the ground that the Municipality had no power to make a re-valuation within six years from the date of the last valuation. The Vice-Chairman overruled the objection, and the rate-payer appealed under s. 157 of the Act to the Judge of the Court of Small Causes at Sealdah, who allowed the appeal.

Held, that inasmuch as the objection raised by the rate-payer was an objection to the valuation within the meaning of s. 135 of the Act the Judge of the Small Cause Court had jurisdiction, to deal with it. That being so, it was not open to the High Court to interfere, either under s. 25 of the Provincial Small Cause Courts Act, or under s. 622 of the Code of Civil Procedure, or under s. 15 of 24 and 25 Vic., c. 104.

[F., 33 C. 396=3 C L.J. 169=10 C.W.N. 289; 36 C. 994=11 C. L.J. 50 (51)=13 C. W.N. 1221=3 Ind. Cas. 861=10 Cr. L.J. 385; 6 C.W.N. 480; **Rel.**, 15 Ind. Cas. 452 (453)=15 C.L.J. 500.]

THE facts of this case, so far as they are necessary for the purposes of this report, appear sufficiently from the judgment of the High Court.

Mr. *C. P. Hill* and Mr. *W K. Eddis*, for the petitioner.

Dr. *Ashutosh Mookerjee*, Babu *Ganendro Nath Bose*, and Babu *Nanda Lal Sircar*, for the opposite party.

[75] The judgment of the High Court (MACLEAN, C.J., and BANERJEE, J.) was as follows :—

JUDGMENT.

MACLEAN, C.J. (BANERJEE, J., concurring).—The facts necessary to be stated for the decision of this rule are shortly as follows: In a valuation made by the Corporation of Calcutta to take effect from the 1st April 1891, the annual value of certain premises belonging to the opposite party was fixed by the Commissioners at 651 rupees. On the 2nd April 1891, the opposite party objected to that valuation, but, owing, as it is said, to the great number of objections taken by other rate-payers, the objection was not determined until the 28th January 1895, when the Vice-Chairman reduced the annual value to 487 rupees. Under the "Calcutta Municipal Consolidation Act, 1888" (Bengal Act II of 1888) fresh valuations are to be made every six years, and, in 1897, the Commissioners made a fresh valuation to take effect from the 1st April 1897 and the annual value of the above property was fixed at 566 rupees. On the 10th July 1897 the

* Civil Rule No. 1617 of 1898.

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opposite party, under s. 135 of the Act, gave notice of his objections to the last valuation. These objections were heard by the Vice-Chairman on the 10th December 1897, and the valuation was reduced to 540 rupees. The opposite party appealed under s. 157 to the Court of Small Causes at Sealdah, and the Judge of that Court, on the 23rd May 1898, allowed the appeal, and determined that the said valuation was illegal, inasmuch as a period of six years had not expired from the date of the last preceding valuation, and set aside the last valuation. Under these circumstances we are invited by the present rule to interfere under s. 25 of the Small Cause Court Act (IX of 1887).

To this rule two objections are raised :—

First.—That, unless the Judge of the Small Cause Court had no jurisdiction to determine the matter, this Court cannot interfere, either under s. 25 of the Small Cause Court Act, or under s. 622 of the Code of Civil Procedure, or under s. 15 of 24 and 25 Vic., c. 104.

Secondly.—That, if the above point be decided adversely to the opposite party, the Judge was right on the merits.

It has not been disputed by Mr. Hill, nor could it well be disputed [76] on the authorities, as they stand, that if the Judge of the Small Cause Court had jurisdiction to determine the matter, this Court will not interfere under s. 15 of Statute 24 and 25 Vic., c. 104 (see the cases collected in the case of *Tejram* v. *Harsukh* (1). Save in cases cognizable by the Small Cause Court, we could not interfere under s. 25 of the Small Cause Court Act by reason of sub-section (*e*) of s. 3 of that Act. As regards s. 622, although this Court may interfere in regard to certain errors other than those of jurisdiction, no such errors have been suggested in the present case. But the Corporation contend that the Judge of the Small Cause Court had no jurisdiction to determine the question of the legality of the valuation in the sense of whether or not the Corporation could make the valuation at the time they did, and it becomes necessary to decide this question at the outset, for if it be decided against the contention of the Corporation, the second question, as to the merits, will not arise.

The contention of the opposite party is, that, upon the true construction of the Act, I have referred to (Bengal Act II of 1888), the Corporation were premature in re-valuing his house, as six years had not elapsed from the date of the last "valuation," *viz.*, the 28th January 1895. The question of jurisdiction appears to me to hinge upon what is meant by the term "valuation" in s. 135 of the Act, for the person dissatisfied with that "valuation" may object if he comply with the provisions of the section. The Corporation contend that the term "valuation" means "the amount of the valuation" or the amount at which any particular property is valued, and that it is only to the amount of the valuation that the rate-payer can object ; and it is only such an objection with which the Small Cause Court has jurisdiction to deal. The point is, perhaps, not free from doubt, but the first criticism on this contention is that the Act speaks of "valuation" not "amount of the valuation," and it would be rather incongruous if the dissatisfied person, *i.e.*, the rate-payer, can object to the payment of part of the valuation, but cannot challenge the valuation [77] in its entirety. The opposite party here, *i.e.*, the rate-payer, says that he objects, not to a part of the valuation, but to the valuation in its entirety, and that he objects to that valuation, because

(1) 1 A. 101.

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it is premature, *i.e.*, made before the Corporation were entitled to make it, and consequently that it imposes upon him a liability to pay the new assessment from a date from which he is not bound to pay it. He argues that this goes to the very root of the matter, and consequently that he objects to the entire valuation. It is a little difficult to see why this is not an objection to the valuation. What does the term "valuation" mean? Is it confined merely to the amount at which the property is valued, or does it cover the process or act of valuation? Section 125 speaks of a valuation being cancelled on the ground of irregularity, which points to something beyond the mere question of amount. If a valuation were made before the proper time it would be irregular. Again s. 132, which speaks of the valuation of districts, imports that the term "valuation" cannot be construed in the restricted sense for which the Corporation contend, for the valuation of a district cannot mean the mere amount of the valuation, but must include the process or act of valuation itself. A "valuation" is the act of valuing, and the opposite party may under s. 135 object to that act of valuing, and here he objects to the whole act of valuing on the ground that it is unauthorised and premature.

I think then the contention of the opposite party is well founded, and that we should be placing a narrow construction on the section if we were to adopt the argument of the Corporation. In my opinion, then, the objection raised by the rate-payer was an objection to the valuation within the meaning of s. 135, and that being so, the Judge of Small Cause Court had jurisdiction to deal with it, and it is not open to us to interfere.

I do not propose to enter into the merits, *i.e.*, as to whether or not the Judge of the Small Cause Court has placed a right construction on the Act, but I cannot refrain from saying that the language of the Act is very far from clear upon the point, and that the view taken by the Judge of the Small Cause Court is open to the criticism, on the score of confusion and **[78]** inconvenience in the working of the assessment of the Corporation, to which Mr. Hill has subjected it. However, we have nothing to do with that; if the Act does not meet, in this respect, the reasonable requirements of the Corporation, it may be advisable to amend it. That, again, is a matter for the consideration of the Corporation.

For these reasons the rule must be discharged with costs.

S. C. G. *Rule discharged.*

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APPELLATE CIVIL.

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, and Mr. Justice Banerjee.

TOFALUDDI PEADA AND OTHERS (*Defendants*) *v.* MAHAR ALI SHAHA (*Plaintiff*).* [27th July, 1898.]

Mortgage—Transfer of Property Act (IV of 1882), s. 59—Mortgage deed signed by the mortgagor, attested by one witness, and containing an acknowledgment by the Sub-Registrar, whether valid—Indian Succession Act (X of 1865), s. 50—Mortgage being invalid whether a money decree can be made upon the covenant in the bond.

The requirements of s. 59 of the Transfer of Property Act are not satisfied when a mortgage bond is signed by the mortgagor, attested by one witness, and contains the Sub-Registrar's signature to the endorsement, recording the admission of the execution by the executant; therefore such a mortgage is not valid in law.

When a suit is brought upon a mortgage bond, although the mortgage is held to be invalid on the ground that the requirements of s. 59 of the Transfer of Property Act were not satisfied, the plaintiff is entitled to recover, upon the covenant, money which the defendant covenanted to pay.

[F., 26 C. 246 (249); 33 C. 985 = 4 C.L.J. 219; 9 C.W.N. 1001 (1002); 14 C.P.L.R. 42 (45); **Appr.**, 32 C. 729 (732) = 9 C.W.N 697; 30 M. 284 (288) = 17 M.L.J. 167 = 1 M.L.T. 416; **R.**, 32 M. 410 (F.B.) = 1 Ind. Cas. 1 = 19 M.L.J. 584 (589); 8 A.L.J. 786 (790) = 10 Ind. Cas. 558 (559); 16 C.W.N. 1075 = 15 Ind. Cas. 666 (668); **Cons.**, 24 M. 397 (399); **Disappr.**, 17 M.L.J. 39.]

THIS appeal arose out of an action brought by the plaintiff to enforce a mortgage bond. The bond was alleged to have been executed by three persons: *M.*, *T.* and *G.* *M* signed his name himself, but *T's* and *G's* names were signed by the pen of one Mangal Kazi, who also signed his name as the writer of the names of the executants. He did not sign separately as a witness, but the scribe signed his own name as such. Below the word witness **[79]** in the bond appeared the signatures of the scribe as well as of Mangal Kazi; the latter, however, as the person by whose pen two of the executants signed. *M* signed in the presence of Mangal Kazi: Before the Sub-Registrar, *M* signed himself, and *T's* name was written by the pen of the said Mangal Kazi. *G* was then in jail, and his admission was recorded by the Officer in charge of the jail, who put his signature below the statement made by *G*. The bond also contained the Sub-Registrar's signature to the endorsement, recording the admission of the executants.

The defence, *inter alia*, was that no decree could be passed upon the bond, as it was an invalid one, the requirements of s. 59 of the Transfer of Property Act not having been satisfied. The Munsif dismissed the suit of the plaintiff, holding that the requirements of s. 59 of the Act were not satisfied, and the bond was invalid under the law. On appeal to the Subordinate Judge he reversed the decision of the first Court. Against this decision the defendants appealed to the High Court.

Dr. *Ashutosh Mookerjee*, for the appellants.

Babu *Chunder Kant Sen*, for Babu *Dwarka Nath Chuckerbutty*, for the respondent.

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* Appeal from Appellate Decree No. 827 of 1897, against the decree of Babu Gris Chundra Chatterjee, Subordinate Judge of Khulna, dated the 17th of February 1897, reversing the decree of Babu Bhupal Chandra Ganguli, Munsif of that district, dated the 18th of November 1898.

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The High Court (MACLEAN, C. J. and BANERJEE, J.) delivered the following

JUDGMENTS.

MACLEAN, C.J.—Upon the question whether this is or is not a valid mortgage, having regard to the provisions of s. 59 of the Transfer of Property Act, I think it is not. That section says that a mortgage can only be effected by a registered instrument, signed by the mortgagor and attested by at least two witnesses. The question of attestation is a question of fact, and this mortgage was not attested by two witnesses; for I am unable to accept the argument for the plaintiff that the acknowledgment by the Sub-Registrar is equivalent to the attestation of an attesting witness. But although as a mortgage the deed may not stand, I think the plaintiff is entitled to recover, upon the covenants in the bond, the principal money which the defendants covenanted to pay. There is no question of this money demand **[80]** being barred by limitation, and he is entitled to a money decree on that covenant.

Then, as regards the interest, which is at a high rate, the question of liability must depend upon the question whether the plaintiff did or did not obtain possession of the land covered by the mortgage. Upon that question, as no evidence was gone into on the point in either of the lower Courts, I think there must be a remand to the lower appellate Court, in order that it may ascertain whether the plaintiff did or did not get possession. We think that, under the circumstances, there should be no order as to the costs of this appeal.

BANERJEE, J.—I am of the same opinion. The suit out of which this appeal arises is brought to enforce a mortgage bond. The mortgage bond is attested by only one witness; and the question is whether it can be valid, having regard to the provisions of s. 59 of the Transfer of Property Act. The Court of Appeal below has, in effect, held that the requirements of s. 59 have been satisfied by the Registrar's signature to the endorsement recording the admission of execution by the executant; and, in support of this view, the lower appellate Court refers to certain cases, of which I may mention *Horendra Narain Acharji Chowdhry* v. *Chandra Kanta Lahiri* (1), which are cases under s. 50 of the Indian Succession Act.

I am of opinion that this view is unsound. It is quite true that the signature of the Registrar at the foot of the registration endorsement embodying the admission of the executant has been held to be sufficient attestation within the meaning of s. 50 of the Indian Succession Act; but that is no reason for holding that the signature of the Registrar would be sufficient attestation within the meaning of s. 59 of the Transfer of Property Act. For s. 50 of the Indian Succession Act, cl. 3, says that a will "shall be attested by two or more witnesses, each of whom must have seen the testator sign or affix his mark to the will or have seen some other person sign the will in the presence or by the direction of the testator, or have received from the testator a personal acknowledgment of his signature or mark or the **[81]** signature of some other person," and the Registrar's signature would come under the last description of attestation referred to in the third clause of s. 50 of the Indian Succession Act. But s. 59 of the Transfer of Property Act does not show that the attestation therein contemplated is anything other than the attestation of the act of signing by the executant; and it cannot, in the absence of any express provision

(1) 16 C, 19.

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to that effect, be taken to include the attestation of the executant's admission of having signed the document.

It was then contended that though this mortgage may be invalid under s. 59 of the Transfer of Property Act, still the plaintiff would be entitled to have a declaration that the property in suit is charged with liability to satisfy the debt under s. 100 of the Transfer of Property Act. I am of opinion that s. 100 is not intended to cover a case like this. It contemplates a case in which the transaction does not amount to a mortgage, although certain property is made security for the payment of money, and not a case where property is intended to be mortgaged, but the mortgage has become invalid by reason of the mortgage deed not fulfilling the requirements of the law.

Upon the question of interest and the question of the plaintiff's right to obtain a money decree, I agree entirely in the view taken by the learned Chief Justice.

S. C. G. *Appeal allowed. Case remanded.*

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26 C. 81 (P.C.) = 25 I.A. 161 = 2 C.W.N. 737 = 7 Sar. P.C.J. 432.

PRIVY COUNCIL.

PRESENT :

Lords Watson, Hobhouse, and Davey.

[*On appeal from the Court of the Judicial Commissioner of Oudh.*]

MUHAMMAD IMAM ALI KHAN (*Defendant*) *v.* HUSAIN KHAN (*Plaintiff*). [1st, 5th and 26th July, 1898.]

Oudh Estates' Act (I of 1869)—Estate of a sanad-holding talukhdar—*Lineal primogeniture by custom—Award of a body of* talukhdars *within s. 33 of Oudh Estates' Act—Withdrawal of a voluntary admission.*

The title to a *talukdhari* estate devolving upon a single heir by a custom of lineal primogeniture was contested. The plaintiff claimed to succeed his [82] deceased brother as *talukhdar*. The defendant, who was his paternal uncle, was in possession. Before the annexation of the province the *kabuliyat* had been taken in the name of the plaintiff's brother as *talukhdar*, who afterwards had been settled with at both the summary settlements. By primogeniture, whether lineal or by proximity of degree (of which latter kind there was no evidence as to its being the customary one) he was the heir. To him a *sanad* had been granted, and the *talukhdari* had been entered in list II under the Act of 1869. On the other hand, it was urged that the above was consistent with the existence of a trust for the benefit of the titular *tatukhdar's* uncles, of whom the defendant was the survivor, they having assented to the recognition of a nominal title in their nephew.

Held, that, in intention as well as in form, the grant of the *talukhdari* had been made absolutely to the *sanad*-holding *talukhdar*.

In regard to the state of things before annexation, it might have been questioned whether or not the property was being held *benami* at that time. But after the Oudh Estates' Act, 1869, had become law, the title shown by the plaintiff must prevail, and he must recover the estate, unless a trust for the defendant should have been established. There had been no consideration given, and there was nothing to create a trust. There had been no transfer, no estoppel, and no bar by time.

In 1868 an award had been made by a body of *talukhdars* as arbitrators within s. 33 of the Act, between members of the family other than the present disputants. This as well as a *wajib-ul-arz* of one of the villages of the *talukh* was admissible as evidence of what was the custom in regard to its devolution,

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In 1879 the plaintiff had, on his brother's death, while admitting "the custom prevailing in my family of *gaddinashini*," joined in a petition that the defendant's name should be entered *dakhil kharij* in the revenue records.

Held, that there might be a withdrawal of any gratuitous admission, unless there should be some obligation not to withdraw it; that there was no such obligation here; and that there had been no proof of any title upon which the admission could rest.

[F., 78 P.R. 1904; 25 Ind. Cas. 286; Appl., 2 A.L J. 225 (233); R., 31 A. 457 =6 A.L.J. 767=11 Bom.L.R. 890=10 C.L.J. 216=13 C.W.N. 1073= 4 Ind. Cas. 25=19 M.L J. 605 (614)=12 O.C. 304; 32 A. 363 (373)=7 A.L J. 764=12 Bom.L.R. 504=12 C.L J. 36=14 C.W.N. 770=6 Ind. Cas. 787=20 M. L J. 604=8 M.L.T. 79=13 O.C. 163; 29 B. 133 (144); 26 M. 662 (670); 8 A.L. J. 632=10 Ind. Cas. 448; 8 A.L.J. 786=10 Ind. Cas. 558 (559); 4 Bom.L.R. 857 (868); 4 C.L.J. 323 (330); 9 Ind. Cas. 83 (89); 11 Ind. Cas. 316 (317); 12 Ind. Cas. 339 (342); 13 Ind. Cas. 436 (438); 11 O.C. 301 (305); 44 P.R. 1907= 82 P.L.R. 1908=111 P.W.R. 1907; 23 Ind. Cas. 965; D., 20 Ind. Cas. 429.]

APPEAL from a decree (26th July 1894) of the Court above mentioned, reversing a decree (7th July 1891) of the District Judge of Lucknow.

This suit was brought by the present respondent against Kazim Husain Khan, now deceased, and represented by his son the present appellant, to obtain possession of the *talukhdari* estates of Bhatwamau in the Bara Banki District and of Katori Khund in that of Sitapur, with other property; the plaintiff [83] making title through his brother Badshah Husain, deceased in November 1878.

The ancestor, who was *talukhdar*, was Imam Ali Khan, who was succeeded by his son Ali Baksh Khan, who died about the year 1839 leaving four sons. The eldest of these, Nabi Baksh, who was killed in 1857, left two sons, one the said Badshah, and the other Sardar Husain, the plaintiff-respondent.

The relationship of the parties and all the material facts of the case appear in their Lordships' judgment.

In the time of the last Nawab of Oudh the *kabuliyat* of the above two estates was taken in the name of Badshah, who was then a minor. After the annexation in 1856, at the first summary settlement, the settlement of the *talukh* was made in his name. At the restoration of the *talukh*, in the second summary settlement following upon the events of 1857-58, the *talukh* was again settled in his name as *talukhdar*. On the 11th October 1860 *a sanad* was granted in his name. Afterwards when the lists were prepared under the Oudh Estates Act, 1869, he was entered as *talukhdar* in list II.

The principal question raised on this appeal was whether Badshah was the absolute owner, or was merely the nominal *talukhdar* holding in trust for two brothers of his father, that is, for the elder Tajammal till his decease, and afterwards for Kazim, the surviving brother. Also it was questioned whether there had or had not been acts that amounted to a transfer of the proprietary right by the plaintiff to the defendant.

The plaint (March 1889) alleged the succession of the plaintiff as *talukdhar*, under cl. 6 of s. 22 of the Act I of 1869, on the death of Badshah, and that Tajammal at one time, and on his death Kazim, had managed the estate under a written authority from Badshah. It was added that Kazim had obtained a *dakhil kharij* in 1879 with the plaintiff's assent, but this assent had been given under undue influence exercised over him. Possession of the *talukdhari* estates, and of the whole of the property left by Badshah, and mesne profits, with interest, were claimed.

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The defendant Kazim answered that he and his deceased [84] brother Tajammal, by whose exertions the estates, at one time lost to the family, had been recovered, were entitled; and that the defendant was now the real proprietor. If the plaintiff had ever been entitled to the succession as *talukdhar*,—though this was denied,—yet, by his own acts in 1879, the plaintiff had made it over to Kazim.

The questions, which the above indicated, were stated in the issues framed between the parties.

The District Judge found that until 1856 the custom of the family was for one member to hold the estate, and that under the Nawab of Oudh the estate at one time had been lost to the family, but was recovered by the exertions of Tajammal Husain with the aid of the defendant; and that these two had the beneficial ownership of the estate, and caused the summary settlement of 1856 to be made with Badshah, as a nominal owner or trustee for them. He was of opinion that what took place afterwards, the issue of the *sanad*, and the registration under the Oudh Estates' Act, 1869, gave no better title to him, and that consequently the respondent had failed in establishing his right to the possession of the estate. He dismissed the suit for the *talukdhari* estate.

An issue, whether the defendant had acquired any of the property in his hands with his own funds was found against him.

Both parties appealed.

The appellate Court was constituted under Act XIV of 1891, of both the Judicial, and the Additional Judicial, Commissioner.

Their judgment was that the decree of the first Court should be reversed, upon the view which they took of the evidence. They attributed weight to the fact that Badshah's name was entered in the *kabuliat* prior to the annexation, and that no satisfactory explanation as to this, adversely to the title of Badshah, had come from the defendant. They considered the facts as to the conduct of Tajammal, and of the defendant, in connection with the settling of the estates in the name of Badshah, and the entry in list II, without finding any evidence of a trust.

The judgment concluded by summing up to the following [85] effect the main conclusions at which the Court arrived: The plaintiff was, in their opinion, the heir of Badshah, the last legal owner; and the plaintiff had established that he had not acted with a free will and intention when he petitioned for the defendant's name to be inscribed in the *malguzari* register. The defendant, on the other hand, had not established that the plaintiff had transferred the *talukhdari* rights to him, or shown that the suit was barred.

The decree was made for possession and mesne profits.

Mr. *Lawson Walton*, Q.C., and Mr. *G. E. A. Ross*, for the appellant, contended that the evidence had shown that Badshah had nominally held the estate, and was, in fact, constituted a trustee for the defendant. The original putting forward of Badshah had taken place in consequence of the state of things in Oudh before annexation having rendered it expedient. He had continued to be the ostensible owner, but had not interfered in the management of the *talukh*. This had been left to Tajammal, and after his death to the defendant Kazim Husain. Badshah had never taken any active part, or exercised proprietary rights over the estate. The mutation of names in the settlement records had, on the death of Badshah, been made in favour of the uncles, with the consent

of the plaintiff—a fact which could have hardly taken place had not the position of the plaintiff been that of a person only nominally entitled. All the circumstances connected with the restitution of the *talukh*, after the confiscation of 1858, and the settlement in Badshah's name, at the second summary settlement, were reviewed. The good opinion entertained of Tajammal by the authorities was referred to; and it was contended that the issue of the *sanad* in Badshah's name was not inconsistent with the real proprietorship having belonged to that elder member of the family, who managed the property, but had concurred in allowing the nominal position of *talukhdar* to remain as it had previouly been registered. The distinct admission by Badshah that all the authority which he had was to be exercised by Tajammal could be accounted for by there having been the understanding that the actual proprietorship should not be interfered with; nor was there any interference [86] by Badshah, who lived a retired life on the maintenance supplied by his uncle. Reliance was placed on the admission by the plaintiff that Kazim was entitled to the proprietary possession as shown by his signing the petition of the 25th November 1878, for the latter to be entered in the collectorate register, and by his statement made shortly afterwards. Reference was made to *Ramanand Kuar* v. *Raghu Nath Kuar* (1); *Thukrain Sookraj Koowar* v. *The Government* (2); *Hardeo* v. *Jewahir Singh* (3); and *Shere Bahadur Singh* v. *Dariao Kuar* (4), on the subject of *talukhdari* estates held in trust, and the constitution of the trusts in such cases. Reference was also made to the Indian Contract Act, IX of 1872, s. 16.

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432.

Mr. *A. Cohen*, Q.C., and Mr. *C. W. Arathoon*, for the respondent, were not called upon.

JUDGMENT.

Afterwards, on the 26th July, their Lordships' judgment was delivered by

LORD HOBHOUSE.—The subject of this suit is the *talukh* with the estates of Bhatwamau, and other property said to have belonged to Badshah Husain Khan. The case can be stated more briefly and clearly by inserting a pedigree which is not disputed.

(1) 8 C. 769=9 I. A. 41.
(2) 14 M. I. A. 11.
(3) 3 C. 522=4 I.A. 178.
(4) 3 C. 645.

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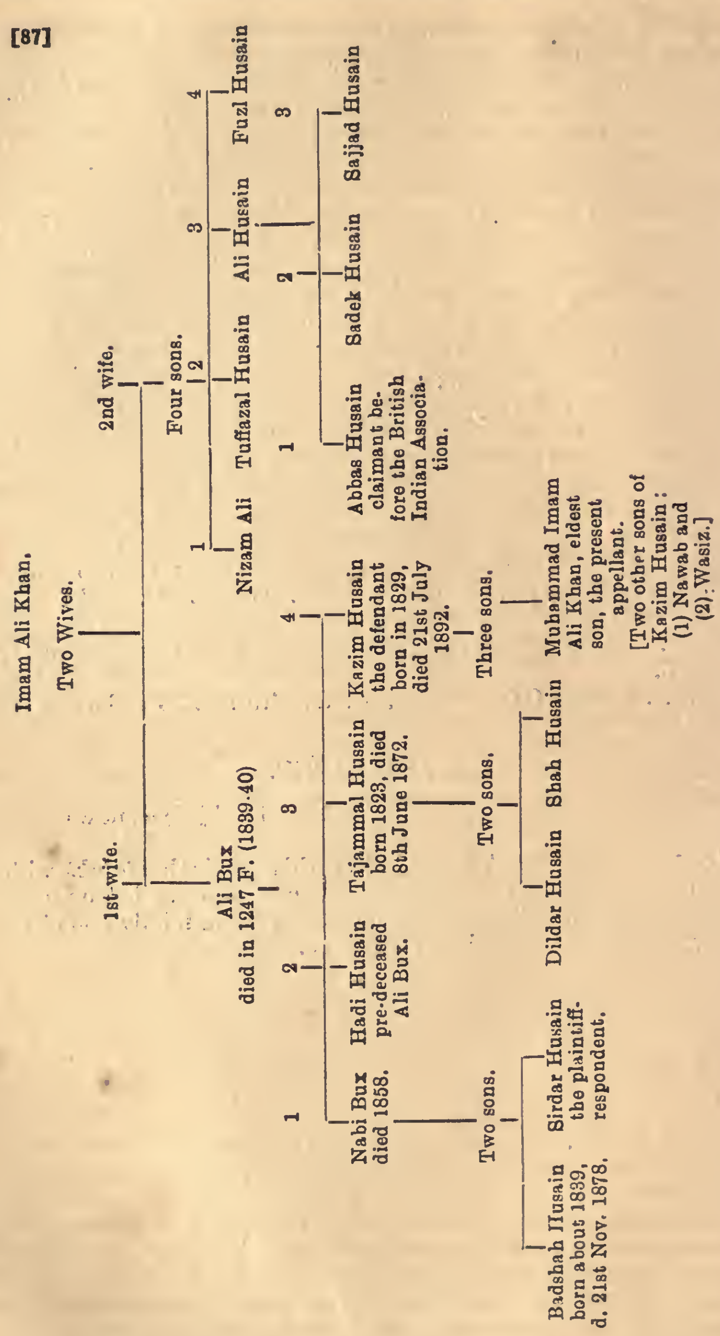

The plaintiff, now respondent, who sues for possession, is shown on the pedigree as the brother and heir of Badshah. The original defendant Kazim Husain, whose eldest son is now the appellant, is shown as the plaintiff's uncle. The *talukhdar* is [88] entered in List II of the Oudh

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Estates Act, *viz.*, as one whose estates, according to the custom of the family on and before the 13th February 1856, ordinarily devolved on a single heir. His title was either conferred or recognized by the Mahomedan Government before the annexation. After that event both summary settlements were made with him, and the *sanad* was granted to him. He remained legal owner until his death in 1878, when his legal title passed to the plaintiff. At that time Kazim was managing the estates and receiving the rents. The suit was commenced in March 1889. It is not now contended that the defendant has had any such possession as creates a bar by time. So far the facts of the case are undisputed.

The defendant's case is that before the death of Ali Bux this estate, like many others, was suffering from the misrule and disorder which was the proximate cause of the annexation. Rents were unpaid, tenants absconded, cultivation ceased, and the Government officers tried to extort revenue, which was not earned, by harsh measures against the persons of the proprietors. As regards this estate he says that after the death of Ali, Tajammal, then a youth, was seized and cast into prison, and Nabi, the heir, was frightened, and preferred seeking safety by deserting the estate, which the defendant describes as being "lost to the family." He adds that he and his brother Tajammal prevailed on the authorities to recognize Nabi's son Badshah then about 10 years old, and to take a *kabuliat* from him; but he alleges that the real benefit was given to Tajammal and himself who became joint proprietors, Badshah being in effect a *benamidar* for them. As for the settlements, he contends that the first was the consequence of Badshah's position as *kabuliatdar* at the annexation, and that the second and the *sanad* were arranged by Tajammal with the British officers, and that whatever legal interests were passed to Badshah were clothed with a trust for his two uncles. And he further contends that after the death of Badshah the plaintiff did acts by which the defendant's right of ownership was confirmed or fully recognized.

The questions thus raised are of a kind which is very familiar in Indian land litigation, and which happens to have come before [89] their Lordships frequently during the last few months: questions of *benami* where there is undoubtedly an ostensible or paper title on one side, and on the other side an allegation of possession in accordance with a real title. As regards the time prior to annexation it is a pure *benami* case. Afterwards a different element comes in, because the Oudh Estates Act introduces a mode of tenure more nearly resembling the English principle of distinction between legal and equitable estates, and the defendant has to meet the difficulty that the plaintiff possesses a legal estate by the force of which he must recover unless a trust can be fastened on it. Still the disputes are throughout strongly analogous to *benami* disputes, and both sides have adduced, as is usual, a great volume of evidence, including an amount of fiction and falsehood more than is usual even in controversies of this kind.

The District Judge, who tried the cause, believed the substance of the defendant's story, and dismissed the suit, but without costs. The Court of appeal consisting of the Judicial Commissioner and Additional Judicial Commissioner reversed that judgment, and gave the plaintiff a decree for possession and mesne profits. Their Lordships have now to decide whether the Court of appeal is right. They do not find it necessary to go into the numerous intricate discussions of subordinate points which have been elaborated with great care by the learned Judges below. They have been much aided by the fulness and accuracy with which all the

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broader features of the case have been presented by the counsel for the appellants. At the close of Mr. Ross's able argument they had arrived at the conclusion that the apparent title and the real title coincide, and both belong to the plaintiff.

The history divides itself into three stages: that which comes before the annexation, that which extends from the annexation to the death of Badshah, and that which comes after the death of Badshah.

The first question is what was the position of Badshah at the time of annexation; and it is perhaps the most important of the questions, because without understanding it rightly it is difficult to get a clear idea of the subsequent events. Is the position which Badshah obtained as *kabuliatdar* to be attributed to the [90] fact that the *talukh* descended according to the rule of primogeniture so that after Nabi Badshah would be the heir of Ali Baksh, or to the fact that Tajammal and Kazim themselves becoming beneficial owners chose him as their benamidar? The first step is to ascertain whether the rule of descent was that of primogeniture. That it descended by custom to a single heir is the common case of both parties. The District Judge is of opinion that it descended by primogeniture not lineal. The only alternative to lineal primogeniture is primogeniture by proximity of degree. But there is no evidence to prove such a mode of descent, and if there were it would not help the defendant's case. Among those who are equal in proximity the elder in line is to be preferred. During Nabi's life therefore he was heir by proximity, and if he were to be considered as dead his son Badshah would be heir to him. It has indeed been suggested in argument, mainly with an eye to the last part of the case, that the family could elect one of themselves to be sole owner, but first, such a custom is not primogeniture, and, secondly, there is no evidence of it except that of the defendant himself and a statement made in mutation proceedings which will presently be examined. Independently, however, of the failure to show an alternative there is good evidence in favour of lineal primogeniture.

In the record is a judgment, signed by Sir Man Sing, of the Committee of *talukhdars* who made many awards respecting the provisions to be made for relatives of *talukhdars* which, by s. 33 of the Oudh Estates Act, became, when duly approved and filed, legal decrees. Abbas, who was first cousin of Nabi, Tajammal, and Kazim, sued Badshah for partition; and thereupon arose an inquiry what was the descendible character of the estate. The judgment bears date the 2nd November 1868, and on this point it was as follows:

"*Secondly*—The statements made at the time of the Summary Settlement and the conclusion arrived at by the Settlement Officers from inquiries (made into the matter) and the statements made by the witnesses before the Committee, tend to show that the custom of succession by right of primogeniture did prevail in this family. After Imam Ali Khan his eldest son Ali Bakhsh Khan, after Ali Bakhsh Khan his eldest son Nabi Bakhsh Khan, [91] and after Nabi Bakhsh Khan his eldest son Badshah Husain Khan, respectively, succeeded to the estate and remained as sole proprietors."

The final award was that Badshah should "remain in possession under the rule of primogeniture and the ancient custom," and that Abbas and other cadets of the family should have a specified amount of land for maintenance.

Besides these decisions which seem to fall strictly within the province of the Committee, they addressed themselves to the question how it happened that the *kabuliat*, the summary settlements, and the *sanad* were

procured by or for Badshah. Leaving out Hindustani words they expressed themselves thus.— 1898 JULY 26.

"Looking into the circumstances of the case and from the information obtained from those acquainted with facts, it is found that Tajammal Husain Khan and others, brothers of Nabi Bakhsh Khan and others, brothers of Nabi Bakhsh Khan * * in spite of their having been themselves proprietors, * * and though it was on account of their loyal services that the estate was conferred and the *sanad* granted, out of their own free will, in order to keep their family usage intact, got the *kabuliat* made and the *sanad* granted in the name of Badshah Husain Khan. This is no secret and the fact is known to ourselves as well as to all the officers. It was for this that Badshah Husain Khan was declared to be the owner at the Summary Settlement, and Tajammal Husain Khan reserved no part of the estate for himself, although he had power to do what he liked, and it was quite possible to do so."

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It is not contended that any part of this award is binding on the parties in the present suit. But it cannot be doubted that a suit for partition in 1868, when Tajammal was at the head of affairs in this *talukh*, was one in which he took an active (probably the most active) part, though Badshah was the defendant on the record. In a question of family custom it is impossible to disregard the conclusions of gentlemen who discharged such functions as those of the Committee. Whether their statements as to the special incidents of the *kabuliat* and *sanad* should be looked at is another question. But the defendant relies on the passage just quoted as [92] showing that Tajammal was master of the situation, and might have had the *kabuliat* and the *sanad* made to him if he had pleased. The Committee have mixed up the two matters of *kabuliat* and *sanad* together, though they fall under different considerations. But taking it in the defendant's favour that the Committee really knew the facts and that we ought to receive their account, how does it bear on matters prior to annexation. They say in effect that Tajammal "and others" might have got the *kabuliat* in their names, but that they deliberately preferred to get it in the name of Badshah in order to keep their family "usage intact." That opinion does not support the defendant's claim, but is fatal to it. If Tajammal, or he and others, had really though secretly become proprietors, the family usage would have been destroyed.

There is no explanation what is meant by "others," nor in what sense the Committee meant to style them as proprietors. There is no proof or probability that Tajammal got any concession from the King of Oudh in his own favour; nor any evidence to support Kazim's story that it was he and Tajammal who got the *kabuliat* for Badshah because they thought that a young boy would not be so severely treated as Tajammal had been. Nabi was in the service of the King and so remained till the annexation. It is a much simpler explanation of the facts to suppose that the substitution of his son for himself was by his own wish.

Another piece of evidence on this part of the case is the *wajib-ul-arz* of the village Deokalia, which is part of the Bhatwamau estate. This class of document is always admissible, in evidence being an official village record. Its weight may be very slight or may be considerable according to circumstances. This record was made in June 1871, when Tajammal was still at the head of affairs in the *talukh*, and was verified by Karemat Khan, who is described in

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it as the agent of Badshah under a power-of-attorney, but is proved to have been the servant of Tajammal and of the defendant. If any misstatement was made, it could hardly have been one to the prejudice of Tajammal and Kazim. The document appears to their Lordships to [93] be of substantial weight on the question of descent, and it has been so treated by the Court of appeal. The history of Deokalia is part of the history of the *talukh*. The *wajib-ul-arz* traces the descent of the *talukh* to Ali Bux and then proceeds—

"After the death of Ali Bakhsh Khan, out of his sons the eldest son Nabi Baksh Khan became the owner of the estate; and Hadi Hasan Khan, Tajammal Husain Khan and Kazim Husain Khan lived in commensality with Nabi Bakhsh Khan. Nabi Bakhsh Khan in his own lifetime got the *kabuliat* of the estate executed in the name of his son Badshah Husain Khan, the present *talukhdar*, under whom the following new villages have been added to the estate."

The defendant, while admitting that the history of the *talukh* is correct, declares that the quoted passage is entirely false. But he has no ground for saying so except his own improbable and unverified story as to the mode in which the *kabuliat* was procured. The village record gives an intelligible explanation of the facts which Kazim does not. Their Lordships hold it to be proved, *first*, that the *talukh* was one which, according to the custom of the family, descended by lineal primogeniture, and, *secondly*, that Kazim's story of the loss of the estate, its re-acquisition by Tajammal and himself, and the introduction of Badshah as *kabuliatdar*, must be rejected. The evidence leads them to think it most probable that Badshah was introduced because his father Nabi was for some reason desirous of relinquishing his position as *talukhdar*, and wished the next in lineal succession to be substituted for him.

The events after the annexation lend at first sight more colour to the defendant's claim. Up to the first summary settlement of 1856 we have no more evidence than before. The Company's officers found Badshah, then a youth of about 17 years, in possession under the *kabuliat*, and for aught that appears they simply acted on the existing state of things. But then came the Mutiny and the confiscations which upset all the settlements of 1856. Nabi joined the insurgents and was killed in 1858. It may well be that when it came to be considered to whom the confiscated estates should be restored, difficulty was felt about [94] re-instating the eldest son of Nabi. About this time Tajammal came upon the scene, and took part in getting back the estate. He too had joined the insurgents, but he had come over to the British side and had made himself active and useful in restoring order. It is clear that he stood high in the opinion of Colonel Barrow, who was a valued and trusted officer of great weight in Oudh affairs. Tajammal was a man of strong character, and it is possible that his young nephew might not have succeeded in doing what he did. There is, however, no evidence or reason to believe that he could have got the estate for himself, as is intimated by the *talukhdars'* committee. It must be remembered that the British Government made a great point of recognising old titles and of restoring as many estates as they could with due regard for security. They felt that the position of the Oudh *talukhdars* was a very peculiar and painful one; that the inducement to take up arms was in many cases very strong; and that when the political necessity of putting down armed revolt had been satisfied, it was both the most prudent course, and the most consistent with a fair consideration of

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the case, to reinstate those who would enter frankly into the new conditions. It is possible and probable that on this point Tajammal was useful in satisfying Colonel Barrow and other officers.

The documents which bear directly on the reinstatement of Badshah are three in number. The first is a *rubkar* of the Collector of Lucknow, dated 9th January 1859.

"Badshah Husain Khan, *talukhdar* of Bhatwamau, Pargana Fatehpur, appeared before me in camp to-day. By reason of shelter having been given to Munshi Abdul Hakim, Extra Assistant Commissioner, sanction is hereby given that the *talukha* be restored to Badshah Husain Khan as heretofore, according to the settlement of 1264 Fasli, in case the Special Commissioner of Oudh does not sanction the *mustajari* (farming lease). Therefore it is ordered that the *tahsildar* be ordered to settle the *taluka* with Badshah Husain Khan, according to the terms of the Settlement of 1264 Fasli, and send the Settlement file with *kabuliat* within two days for my signature, and the Sadar Kanungo is to report, within one day, whether sanction for *mustajari* of the *ilaka* has been received from Major Barrow."

[95] The second is a letter from Colonel Barrow, dated 27th January 1859. He writes:—

"This *taluka* is re-settled with its old proprietor Badshah Husain Khan. Our total assessment is rather above the old Government *jama*.'

And on the 11th October 1860 the *sanad* was issued.

It is clear that in intention as well as in form the grant of the estate was made to Badshah. Tajammal probably rendered efficient service in getting it. Of what Kazim did, if he did anything, we have no evidence. There is much to justify the opinion of the *talukhdars*' committee that Tajammal was active in keeping the family custom intact; but there is nothing to show that others were concerned with him, or that he and others were ever proprietors except in the very restricted sense of having some share or interest in the estate for maintenance. We cannot suppose any ownership to have been conferred on him or Kazim unless we first suppose that the British Government lent itself to a *benami* grant or a secret trust—a thing which nobody has ventured to suggest.

It is certain that during his life Tajammal managed the affairs of the *talukh* and to a great extent disposed of its revenues. From his age, his character, and his services, he was naturally held in high honour by his nephews. Badshah appears to have been a weak, indolent and self-indulgent man, who with a concubine was kept in the residence at Bhatwamau on a sufficiently liberal scale to make him comfortable and who was satisfied with that position. The defendant indeed asserts that nearly the whole of the revenues were divided between himself and Tajammal, and that Badshah had a small fixed allowance. But he produced no accounts to support his assertion; or rather he did worse; he did tender some accounts which when the time for proof came were withdrawn. We must infer either that he had no accounts relevant to the question, or that having some he found that they would not suit his case. It is true that Tajammal was the principal acting personage; he was frequently addressed as *talukhdar*, and a great many instances are shown in which he was treated as representing the estate. But all that [96] is consistent with his being manager for Badshah, though his position as being eldest uncle, and his character and services, gave him exceptional predominance in the family and prominence in the eyes of the

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world. After his death it seems that Kazim enjoyed the same power and position, at least to a great extent.

Great reliance is placed by the defendant on two powers-of-attorney executed by Badshah in the years 1871 and 1873. The earlier of these was given to Tajammal, and it is a singular document. It commences with a recital:—

"Whereas the reins of management of the estate affairs, such as domestic affairs, administration of the *ilaka*, and the conduct of business appertaining thereto, in the Court detailed below, have always been in the hands and under the control of my respected and virtuous uncle, Raja Muhammad Tajammal Husain Khan Bahadur, who in every way is master of me and the estate in place of my father, but whereas by reason of the number (engagement for payment of the revenue) of the estate and the *sanad* being in my name, the said venerable has frequently to encounter difficulties in formal compliance with orders and conduct of cases relating to the estate, the necessity for executing the (*mukhtarnama*) general power-of-attorney has presented itself."

Badshah then covenants that "my respected uncle shall have "full proprietary powers like myself," and he personally binds himself to maintain his uncle in the engagement of all the powers specified in five following paragraphs. As to the first paragraph there is doubt about the translation which the Court below has thought of importance and their Lordships do not comment on it. The 2nd, 3rd, and 5th are ordinary powers. The 4th runs as follows:—

"4. That like myself, the declarant personally, he has absolute powers of making transfers by mortgage or sale, &c., of the whole or any part of my moveable or immoveable property, and of executing documents of every description, gift, *bakshishnama*, grant of cash or land, *tamliknama* (deed of settlement) and will and to have them duly registered."

The later power was given to Kazim after the death of [97] Tajammal. It is nearly the same with the earlier one, the only substantial difference being that the fourth paragraph asserts not only that Kazim enjoys, but that he has heretofore enjoyed, the powers therein mentioned.

These deeds, as is contended, and as the District Judge decided, confer the fullest proprietary powers and are a complete admission of the *benami* title. To their Lordships it seems that though obviously framed in the interest of Tajammal and of the defendant, they do not prove his case. If his story is true, Tajammal and himself were in the year 1871 actually in proprietary enjoyment. Why were such powers necessary? The reason given is that the settlement and *sanad* were in Badshah's name. But that, according to the defendant, was all a sham well known to the principals and not imposing on the rest of the world. In the ordinary case of *benami* the holding of a settlement or transfer by the *benamidar* would not interfere with the real owner's enjoyment. If the *sanad* did so, why not throw off the temporary mask and claim the full ownership? Why be at the pains of framing a circuitous and inconsistent document such as that of 1871? It professes to be a power-of-attorney, and yet has its permanence secured by covenant. It states that Tajammal had the reins of Government in various specified departments, whereas the claim now is that the recital recognizes and that the fourth paragraph confers full beneficial ownership. It states that Tajammal is "master of me and the estate in place of my father;" whereas the defendant's story is that Nabi never was owner and had nothing to do with Badsha's ownership. It purports at the outset to give full proprietary powers to Tajammal "like myself,"

and does the same thing in paragraph 4, so that he has only the powers which Badshah also has. If it was really intended to be an admission of full ownership, or to confer full ownership under the guise of a power-of attorney, it is a very insidious document, and such as would require satisfactory explanation before it could be permitted to operate as between uncle and nephew situated as Tajammal and Badshah were. Treating it as a power-of-attorney it goes to show ownership not in Tajammal but in Badshah.

[98] Another remark to be made on these powers is that they do not support, but tend to destroy, the defendant's theory of joint ownership. In the deed of 1871 Tajammal is treated as absolute owner, not as joint with Kazim. In that of 1873 Kazim is treated as absolute owner. How did he become so, seeing that Tajammal left sons? Nay, not only is he credited with having absolute powers, but with having "heretofore enjoyed" them. How is that reconciled with the enjoyment of absolute powers by Tajammal alone within a few months before? The phenomena are inexplicable on the theory of proprietorship in Tajammal and Kazim. But they are clear enough if we suppose the two uncles to have been managers in exceptional honour and moral authority, "with the reins of management of the estate affairs in their hands;" and that is what their Lordships conclude to be the true state of the case.

After the death of Badshah it seems that the mutual relations which subsisted between him and the defendant were continued for a while as between the plaintiff and the defendant; for how long, or when dissension began, it is not material to enquire. What is material is to see if the plaintiff's dealings with the estate after it vested in him have precluded him from making his present claim.

Badshah died on 21st November 1878. Four days afterwards the plaintiff and his cousin Dildar, the eldest son of Tajammal, presented an application for mutation of names. They stated as follows:—

"After compliments we beg to submit that Badshah Husain Khan, *talukhdar* of the Bhatwamau estate, breathed his last on 21st November 1878, and that according to the usage and custom of *gaddi-nashini* prevailing in our family, we, the heirs of the deceased *talukhdar*, have unanimously with our own consent appointed Muhammad Kazim Husain Khan, son of Ali Bakhsh Khan, our own uncle, the head of our family, our patron and protector, who is qualified in every way as a *gaddi-nashin* in place of the deceased."

And they prayed for mutation to Kazim.

In addition to this application the plaintiff on the 26th [99] February 1879 filed a written statement which, after reference to the application, proceeded thus:—

"Even now, without coercion and reluctance, and of my own free will and accord, I do affirm the application and give my cordial assent to the same being granted for these reasons, namely, first such a conduct on my part is the natural consequence of the cordiality, confidence and mutual love and affection prevailing in our family, and similarly it was due to the cordiality existing between my father and my uncles, that those persons, though themselves real owners of the estate, caused the *iambardari* of their ancestral and self-acquired estate to be recorded in the name of my deceased brother Badshah Husain Khan; and, secondly, on account of the same love and amity my said uncle was so thick and thin with my late brother, as if the two had only one soul for two bodies; and my deceased brother ratified and admitted for ever the absolute proprietary

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powers exercised, and formal proceedings taken by the said uncle under the power-of-attorney, dated 30th April 1873, executed in favour of my said uncle, which I may call a will. Under these circumstances the late Badshah Husain Khan shall, as it were, be alive during the life time of the said uncle. The affection and amity of feelings prevailing between my late brother Badshah Husain Khan and my said uncle were only equalled by the kindness shown me by the said uncle. I too cherish the same feelings of obedience and love to my said uncle, as it was my duty to cherish to the said two souls during the lifetime of my late brother. Therefore in my said uncle I recognize a living representation of my late brother in flesh and blood. I make this request with all pleasure and pray that the Government may accede to it, and the name of my said uncle may be recorded in the *lambardari* register. Because of his kindness I am quite certain of my becoming a proprietor on his demise. Being thus confident why should I make any other application than the one I make against the time-honoured customs?"

Upon these representations mutation was effected in favour of Kazim.

These proceedings seem to have caused great difficulty in the [100] Courts below. Apparently in both Courts it was considered that unless the plaintiff could displace his statements by showing his ignorance of their being made, or that he was pressed into making them by the defendant, his case would be defeated, or at least seriously damaged. Indeed, the District Judge thought that the plaintiff must procure formal cancellation of the mutation before he could maintain the suit. Accordingly those questions have been elaborately tried and argued. In order to show first his ignorance and secondly pressure by the defendant, the plaintiff has told stories which both Courts have found to be entirely false. The Court of Appeal thought that undue influence might be properly inferred from the relative positions of uncle and nephew, from the highly suspicious character of the application and statements, and from the false reasons assigned for mutation, especially the false statement of e family custom.

Their Lordships do not enter into this discussion. They do not see how the proceedings bar the right of the plaintiff to assert his legal title. Supposing that in 1878 he believed them to be true and made them spontaneously, why should he not assert the true state of the case after he has learned it? An Oudh *talukh* cannot be transferred like an ordinary estate under Mahomedan or Hindu law, because the Oudh Estates Act requires special modes of transfer. It is not now contended that the mutation operated as a transfer. It would be absurd to suppose that the plaintiff made any misrepresentation to the defendant; neither was the situation of the defendant altered in any way to his prejudice. No consideration was given by the defendant, nor is there anything in the transaction to create a trust. Possibly it might have given the defendant a possession on which time would run; but if so time has not run long enough to create a bar. Mr. Ross, who pressed this part of his case very earnestly though with great fairness, rested mainly, as their Lordships understood, on the admission of title made by the plaintiff; but a gratuitous admission may be withdrawn unless there is some obligation not to withdraw it; and there is not here any title on which such an admission can rest. If then there is no transfer, no estoppel, no bar by time, no trust, why [101] should not the plaintiff assert his legal rights, whatever he may, in ignorance of the facts or in deference to his uncle or for any other cause

not injurious to the defendant, have admitted? Their Lordships hold that he can assert them, and they will humbly advise Her Majesty to affirm the decree of the Court of the Judicial Commissioner and to dismiss the appeal. The appellant must pay the costs.

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Appeal dismissed.

Solicitor for the appellant: Mr. *J. F. Watkins.*
Solicitors for respondent: Messrs. *Young, Jackson, Beard & King.*

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ORIGINAL CIVIL.

Before Mr. Justice Jenkins.

RAJENDRO NATH SANYAL v. JAN MEAH.* [5th May, 1898.]

Summons, service of—Civil Procedure Code (Act XIV of 1882), ss. 79, 80—*Affidavit of service of summons, sufficiency of.*

Where a defendant cannot be found the affidavit of service must show—

(1) That proper efforts were made to find him; and

(2) That the copy of the summons was affixed on the door of the house in which the defendant *ordinarily* resided at the time of service.

Whether or not these conditions are established to the satisfaction of the Court must in each case depend on its own particular circumstances.

[F., 5 C.L J. 555 (557); R., 30 B. 623=8 Bom. L.R. 757.]

IN this case a question arose as to the sufficiency of the proof of service of the summons under the last paragraph of s. 80 of the Civil Procedure Code.

The defendant did not appear at the hearing.

Mr. *K. N. Sen Gupta*, for the plaintiff.

RULING.

JENKINS, J.—The sufficiency of service comes constantly before the Court in dealing with undefended cases, and as it appears to have been thought that I have laid down a rule of practice on the subject beyond the provisions of the Code, I am desirous of removing that misapprehension.

[102] Section 79 provides that "when the serving officer delivers or tenders a copy of the summons to the defendant personally, or to an agent or other person on his behalf, he shall require the signature of the person to whom the copy is so delivered or tendered to an acknowledgment of service endorsed on the original summons." Then in s. 80 it is further provided that, "if the defendant or other person refuses to sign the acknowledgment, or if the serving officer cannot find the defendant, and there is no agent empowered to accept the service of the summons on his behalf, nor any other person on whom the service can be made, the serving officer shall affix a copy of the summons on the outer door of the house in which the defendant ordinarily resides and then return the original to the Court from which it issued, with a return endorsed thereon or annexed thereto stating that he has so affixed the copy and the circumstances under which he did so."

It will be seen, therefore, that (leaving out of consideration the contingency of there being an agent) the primary method of service is by tendering or delivering a copy of the summons to the defendant personally and obtaining his acknowledgment. It is obvious, however, that this

* Original Civil Suit No. 182 of 1898.

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mode may fail for one of two reasons: either the defendant may refuse to sign the acknowledgment, or it may be impossible to find him, and accordingly a method of service by affixing a copy of the summons is provided. Apart from refusal to sign there are two necessary conditions to the validity of this mode of service: 1*st*, the serving officer must have been unable to find the defendant, and 2*ndly* he must have affixed a copy of the summons "on the outer door of the house in which the defendant *ordinarily* resides" and return the original to the Court in the manner prescribed by the Code.

I will shortly deal with these two conditions. For the purpose of establishing that the defendant cannot be found it must be shown that proper efforts to find him were made, as, for instance, that the serving officer went to the place or places and at the times at which it was reasonable to expect he would be found. Then to satisfy the second condition it must be shown that the copy was affixed on the door of the house in which the defendant *ordinarily* resided at the time of service.

[103] Whether or not these conditions are established to the satisfaction of the Court must in each case depend on its own particular circumstances. These requirements are prescribed by the Code and not by any rule of practice outside the Code, and having regard to the applications so frequently made under s. 108, I have always thought it necessary to closely scrutinize the mode of service on which reliance is placed. In this particular case I am satisfied that the service was in accordance with the provisions of the Code, and is therefore valid.

Attorneys for the plaintiff: Messrs. *Sen & Co.*

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26 C. 103 = 3 C.W.N. 38.

APPELLATE CIVIL.

Before Mr. Justice Banerjee and Mr. Justice Pratt.

SOURENDRA MOHAN TAGORE (*Defendant No.* 3) *v.* SURNOMOYI (*Plaintiff*).* [13th July, 1898.]

Landlord and Tenant—Liability for Rent—Regulation VIII of 1819, *s.* 6—*Liability of the transferee of a fractional share of* putni *to pay rent—Personal liability of* putnidar *for rent, notwithstanding a stipulation in the* putni *lease that arrears of rent should be realized by auction sale of the* putni—*Bengal Tenancy Act* (*VIII of* 1885), s. 65.

Although the transferee of a fractional share of a *putni* cannot enforce registration of his name on payment of the necessary fee and tender of the requisite security, yet the transfer is not altogether void, and he is liable for rent severally and jointly with the registered tenant, if the landlord chooses to recognize him as one of the joint holders of the *putni*, and he is also liable for the entire rent of the *putni* estate.

Notwithstanding a stipulation in the *putni* lease that on default of any instalment of rent, the landlord shall be entitled to realize the same by auction sale of the *putni mehal*, the *putnidar* is also personally liable for the rent of the said *mehal*.

Fotick Chunder Dey Sircar v. *Foley* (1) and *Tarini Prosad Roy* v. *Narayan Kumari Debi* (2), referred to.

[N.F., 18 C.L.J. 29 = 16 Ind. Cas. 355; F., 8 C.L.J. 554; R., 4 C.W.N. 590 (593); 6 C.W.N. 794 (796).]

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* Appeal from Original Decree No. 63 of 1897, against the decree of Babu Ananta Ram Ghose, Subordinate Judge of Nuddea, dated the 21st of January 1897.

(1) 15 C. 492. (2) 17 C. 301.

THIS appeal arose out of a suit brought by the plaintiff, respondent, for arrears of rent and cesses due in respect of a *putni* [104] tenure, Pergunnah Plassey, on the allegation that the *putni* was granted by the plaintiff's predecessor on the 10th of Sraban 1251 B. S. (25th July 1843) to Kesab Chandra Roy; that it passed by successive sales for arrears of rent under Reg. VIII of 1819, first to Tarini Prosad Ghose, and after him to Rakhal Das Mukerji, and then by inheritance to Sarat Moni Devi and Haridasi Devi, defendants 1 and 2; and that by some arrangement with defendants 1 and 2 the defendant No. 3, Raja Sir Sourendro Mohan Tagore, was in joint possession with them of the *putni* during the period for which rent was claimed, that is, the year 1301 (1894-95).

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The defence of defendant No. 1 was to the effect that she was entitled to eight annas, that is a moiety, of the *putni*; that the said eight annas share was leased in perpetuity to the defendant No. 3 in two equal halves, one by the defendant No. 1 and the other by her predecessor in title defendant No. 2, with a stipulation in each case that defendant No. 3 should pay to the zemindar the *putni* rent payable in respect of the said share; and that consequently the defendant No. 3 and not defendant No. 1 was liable for the rent claimed.

The defence of defendant No. 2 was denial of liability on the ground that she did not any longer own any interest in the *putni*.

The defence of defendant No. 3 was that he was not liable for the rent claimed, as he had not been recorded as *putnidar* in the plaintiff's *sherista*, and as he had made a gift of his interest in the tenure to one Danesh Prokas Ganguli in Kartick 1302 (October 1895).

The Court below exempted defendant No. 2 from liability and gave the plaintiff a decree making defendants 1 and 3 liable, for the amount claimed.

Against that decree the defendant No. 3 preferred this appeal making the plaintiff alone respondent, and it was contended on his behalf—*first*, that no decree ought to have been made against defendant No. 3, as the plaint disclosed no cause of action against him; *secondly*, that even if any decree could properly be made against him, it ought either to specify the extent of his liability, or to direct that the plaintiff should in the first instance proceed [105] against the *putni* tenure for realization of the amount decreed; and, *thirdly*, that the decree ought not to have allowed interest at the rate claimed during the pendency of the suit.

Dr. *Rash Behary Ghose*, for the appellant.

Babu *Sreenath Dass* and Babu *Promotha Nath Sen*, for the respondent.

The judgment of the High Court (BANERJEE and PRATT, JJ.) after stating the facts of the case as above, continued as follows:—

JUDGMENT.

At the hearing of the appeal an objection was raised on behalf of the plaintiff, respondent, that the appeal could not proceed in the absence of defendant No. 1, who was not made a respondent, and who was likely to be affected by the result of the appeal if it was decided in favour of the appellant. If the appeal had been likely to succeed, we should have felt bound to make defendant No. 1 a respondent under s. 559 of the Code of Civil Procedure. But as in our opinion the appeal fails on the merits, it becomes unnecessary to say more on this point.

With reference to the first contention of the appellant, it is enough to say that, in our opinion, the plaint discloses a sufficient cause of action

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against the defendant No. 3, when it alleges that defendant No. 3 was, by an arrangement with the other defendants, in possession of the *putni* jointly with them, and when it asks for a decree for the arrears of rent due in respect of the *putni*. Such a decree may be executed by the sale of the *putni* which will pass the entire tenure and not merely the right, title and interest of the judgment-debtor; and to a suit in which such a decree may be passed a party in the position of defendant No. 3, who has an interest in the *putni*, must clearly be a proper party.

Nor is there any good reason why the suit should not be decreed against defendant No. 3. It is not disputed that during the time in respect of which rent is claimed in this suit, defendant No. 3 held and owned an eight-anna share of the *mehal* Pergunnah Plassey as *putnidar*, and the remaining eight annas as *mourasi ijardar* under defendant No. 1. The only ground urged for exempting defendant No. 3 from liability is, that his name has not been registered as a tenant in the plaintiff's office, and that s. 6 of the Reg. VIII of 1819 stands in the way [106] of his name being so registered, he being a transferee of only a fractional share of the *putni*. Now, though it is quite true that the latter part of s. 6 of the Reg. VIII of 1819 provides that the right of the transferee to enforce registration of his name on payment of the necessary fee and tender of the requisite security does not extend to the case of transfer of a fractional share of a *putni*, yet it does not follow that the transfer of a fractional share of a *putni* is altogether void, or even that the transferee of such a share is not liable for rent jointly with the registered tenant, if the landlord chooses to recognise him as one of the joint-holders of the *putni*. The portion of the section to which reference is made runs thus: "It is hereby provided that the rules of this and of the preceding section shall not be held to apply to transfers of any fractional portion of a *putni taluk*, nor to any alienation other than of the entire interest; for no apportionment of the zemindar's reserved rent can be allowed to stand good unless made under his special sanction."

The true meaning and intention of the provision is, we think, not to make the alienation of a fractional portion of a *putni taluk* without the sanction of the zemindar absolutely void, nor even to exempt the transferee from liability for rent jointly with the transferor if the landlord chooses to recognise him as one of the joint holders of the *putni*, but only to prevent any splitting of the tenure and apportionment of the rent without the sanction of the landlord, as the concluding words of the section, which contain the reason for the provision, clearly shew.

The first contention of the appellant must therefore fail.

The second contention of the appellant has two branches, which we shall consider separately.

The first branch of the second contention, namely, that the decree against the defendant No. 3 ought to specify his liability, and as he is the purchaser of only one-half of the *putni* his liability should be limited to one-half of the amount decreed, is, we think, completely met by the provision of s. 6 of Reg. VIII of 1819 just quoted above. It is argued for the appellant that if the landlord sues the transferee, he by so doing waives the benefit of the provisions in s. 6 relating to alienation of a part only of the *putni*, and that if the decree [107] makes the transferee of a part only of the *putni* jointly and severally liable with the transferor for the entire rent it throws on the transferee a heavier liability than what should justly attach to him.

We do not consider this argument sound. By suing the unregistered transferee of a part of the *putni* jointly with the transferor, the zemindar

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only recognises him as one of the joint holders of the *putni*, but because he does so, he cannot be said to have waived the right secured to him by s. 6 of Reg. VIII of 1819 to preserve the unity of the tenure held under him without splitting it and apportioning its rent. And as for the hardship of throwing on the transferee of a part of the *putni* the joint liability for the rent of the whole, it is in the first place the result of the transferee's own act in accepting the transfer without the previous sanction of the zemindar to an apportionment of the rent. And in the second place, the hardship is only apparent and not real; whereas the opposite view would in a case like the present involve real hardship on the transferor. For if the transferee of a part of the *putni* is made to pay the rent of the whole he can always obtain contribution from the transferor or owner of the remaining part; and in this particular case the transferee has taken care to stipulate in the *mourasi* lease he has taken of the remaining share from the transferor or owner of that share, that he is to pay the zemindar's rent out of the amount payable by him as rent of the *mourasi* tenure; whereas if the transferor or owner of the remaining share, that is the defendant No. 1, were alone made liable for the entire rent, it would be throwing on her the burden of paying what the defendant No. 3 has already undertaken to pay for her. Moreover, if the entire rent be realized from defendant No. 3, no suit for contribution will be necessary, as that defendant can always set off the amount paid in excess of his liability and on account of defendant No. 1, against the *mourasi* rent due to defendant No. 1; whereas, if the decree is made against defendant No. 1 alone, a suit by her against defendant No. 3 would be inevitable; so that the decree made by the Court below may result in preventing a multiplicity of suits.

The first branch of the appellant's second contention should, in our opinion, therefore fail.

[108] The second branch of the second contention, namely, that the decree ought to direct the sale of the *putni* tenure in the first place, is sought to be based on the terms of the *putni* lease as well as on the provisions of the rent law. But the clause in the *putni kabuliyat*, which is relied upon and which runs in these words, namely, "If I fail to pay the money due for any instalment, you shall be entitled to realize the same with interest from the first day of the month following the one for which default shall be made by auction sale of the said *mehals* under the provision of Reg. VIII," is only an enabling clause and cannot be taken as restricting the landlord's right to hold the tenant personally liable for the rent. Nor is there anything in the *putni* Regulation (VIII of 1819) to support the contention urged, while, on the contrary, the third clause of s. 17 of the Regulation would go to show that arrears of *putni* rent other than those for the current year (and those claimed in this suit are of that description) become the personal debt of the *talukdar*. And s. 65 of the Bengal Tenancy Act, which is the provision of the rent law relied upon by the learned vakil for the appellant, has been held not to limit in any way the personal liability of the tenant for rent. See *Fotick Chunder Dey Sircar* v. *Foley* (1), and *Tarini Prosad Roy* v. *Narayan Kumari Debi* (2).

The third contention of the appellant is, in our opinion, equally unsustainable. There is no reason shown why interest should not run at the rate at which the Court below has allowed it during the pendency of the suit. The Court has by s. 209 of the Code of Civil Procedure full discretion to award interest at such rate as it considers reasonable during the pendency

(1) 15 C. 492. (2) 17 C. 301.

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of the suit; and having regard to the rate allowed, which is not very high, to the nature of the defence, and to the groundless objections upon which payment has been withheld, we do not think that there is any reason for reducing the rate of interest.

The grounds urged before us, therefore, all fail, and the appeal must consequently be dismissed with costs.

S. C. G. *Appeal dismissed.*

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26 C. 109 = 3 C.W.N. 76.

[109] APPELLATE CIVIL.

Before Mr. Justice Ghose and Mr. Justice Rampini.

H. W. HUDSON (*Defendant*) v. BASDEO BAJPYE (*Plaintiff*).*
[12th August, 1898.]

Parties—Adding parties on appeal—Respondents—Power of the appellate Court to add parties as respondents—Code of Civil Procedure (Act XIV of 1882), *s.* 559.

C, owner of a factory, executed a *hundi* in favour of *B*, and purchased land from *B* from the proceeds thereof. *C* then sold his factory to *H* who obtained possession of the land. In a suit brought by *B* upon the *hundi*, *C* and *H* were made defendants, but *C* did not appear in the first instance and an *ex-parte* decree was passed against him alone. *C* appealed against *B* without making *H* a party respondent, to his appeal. The lower appellate Court passed an order adding *H* as a respondent, and eventually passed a decree against *H*. On second appeal by *H* to the High Court,

Held, referring to s. 559 of the Civil Procedure Code (1882), that the lower appellate Court was right in adding *H* as a party respondent to the appeal.

Atma Ram v. *Balkishen* (1), dissented from. *Upendra Lal Mukerjee* v. *Girindra Nath Mukerjee* (2), and *Manickya Moyee* v. *Boroda Prosad Mookerjee* (3) referred to.

[**F.**, 35 C. 538 (539) = 12 C.W.N. 720; 3 Bom. L.R. 172; **Appr.**, 31 C. 643 (**F.B.**) = 8 C.W.N. 496; **R.**, 28 M. 229 (233) = 15 M.L.J. 212; 12 C.L.J. 137 (143) = 5 Ind. Cas. 654; 14 C.P.L.R. 46 (48); 18 M.L.J. 452 = 4 M.L.T. 104; 23 P.R. 1901 = 17 P.L.R. 1901.]

THE action, which gave rise to this appeal, was founded upon a *hundi*, executed by C. F. Carleton, owner of Byria Indigo Factory, in favour of the plaintiff Basdeo Bajpye, and the greater part of the loan was for the purpose of a purchase of certain land from the plaintiff himself. Carleton afterwards sold the factory with all its liabilities and dues to H. W. Hudson, who obtained possession of the land aforesaid. The present suit for recovery of money due upon the *hundi* was brought against C. F. Carleton as defendant No. 1, and H. W. Hudson as defendant No. 2. The defendant No. 2 alone appeared in the first instance and pleaded that there was no cause of action against him. The Munsif held that the defence was good. The defendant **[110]** No. 1 then applied for permission to file his written statement, but his application was refused and the suit was decreed *ex-parte* against him. The defendant No. 1 appealed against that decree making the plaintiff only respondent to the appeal. Subsequently, the defendant No. 2 was made a respondent by an order passed by the Court of appeal, and eventually the Munsif's decree was set aside and a decree passed against defendant No. 2, which provided that in case the

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* Appeal from Appellate Decree No. 309 of 1897, against the decree of Babu Gopi Nath Mattey, Subordinate Judge of Sarun, dated the 21st of December 1896, modifying the decree of Babu Jadupati Banerjee, Munsif of Motihari, dated the 13th of April 1896.

(1) 5 A. 266. (2) 25 C. 565. (3) 9 C. 355.

plaintiff failed to realize the entire amount from the defendant No. 2, defendant No. 1 should be liable for the balance. 1898 AUG. 12. — APPELLATE CIVIL. — 26 C. 109= 3 C.W.N. 76.

The defendant No. 2 appealed to the High Court, and one of the grounds urged was: "That the Court below was wrong in making the defendant No. 2 a party respondent and passing a decree against him, notwithstanding that the plaintiff did not appeal against the decree of the Court of first instance by which the defendant No. 2 was released."

The arguments and cases cited on both sides sufficiently appear from the judgment of the High Court.

Dr. *Rash Behari Ghose* and Babu *Satis Chandra Ghose*, for the appellant.

Babu *Saligram Singh* and Babu *Lakshmi Narayan Singh*, for the respondent.

The judgment of the High Court (GHOSE and RAMPINI, JJ.) was as follows:—

JUDGMENT.

This appeal arises out of a suit for recovery of certain money upon a *hundi* bearing date the 11th September 1892, executed by the defendant No. 1 Charles Frederic Carleton in favour of the plaintiff. It appears that, at the time of the execution of the *hundi*, Carleton was the owner of the Byria factory, and that the plaintiff had purchased at an execution sale the holding of a certain *raiyat*, which Carleton was anxious to buy from him, the plaintiff. Carleton, however, was rather short of money then, and he borrowed the amount required for the purchase of the property by the execution of the *hundi* in question. No conveyance of the property, however, was executed by the plaintiff at that time, for reasons to which it is not necessary for [111] us to refer. Subsequently, the Byria factory, with all the lands appertaining to it, was transferred by Carleton to the other defendant, Hudson; and the correspondence, to which our attention has been called by the learned vakils on either side in the course of the argument before us, shows distinctly that the land, which it was arranged should be conveyed by the plaintiff to Carleton, came into the hands of Hudson, and he held it for the purposes of raising indigo on it.

The suit, with which we are now concerned, was a suit instituted by the plaintiff against both Carleton and Hudson; and the relief that the plaintiff asked for was as against both the defendants. The Court of first instance, however, held that there was no cause of action, so far as the defendant Hudson was concerned, and that the decree should go against Carleton alone; and a decree was accordingly made. From that decree, the defendant No. 1, Carleton, appealed, and one of the grounds that was set out in his petition of appeal to the lower appellate Court was that, inasmuch as he had sold his right and interest in the Byria factory, together with the debts due by him to the defendant No. 2, Hudson, he (the appellant) could not be held liable for the debts due to the plaintiff, and that the liability was in the proprietor of the factory. The Subordinate Judge, before whom the appeal came on for trial, was of opinion that, having regard to the provisions of s. 559 of the Code of Civil Procedure, Hudson should be made a party respondent to the appeal, he not having been made a party to it by the defendant No. 1. Hudson was accordingly made a party, and the Sub-Judge in dealing with the merits of the case held that the defendant Hudson was liable to pay the plaintiff the money claimed. He, accordingly, modified the decree of the Court of first instance in this wise, namely, that a decree should be made against Hudson for

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payment of the money claimed with costs, and that, if by execution of such decree, the plaintiff be unable to realise the whole of the decretal amount from him, then the defendant No. 1 should be made liable for the balance.

The appeal before us is by the defendant No. 2, Hudson; and it has been urged by the learned vakil on his behalf that inasmuch [112] as no appeal had been preferred by the plaintiff against the decree of the Court of first instance, dismissing his claim as against the defendant, Hudson, the Subordinate Judge was wrong in law with reference to the provisions of s. 559 of the Code of Civil Procedure, in making him a party respondent to the appeal preferred by the defendant No. 1. It has been further contended that inasmuch as the suit of the plaintiff, so far as the defendant No. 2 is concerned, has been based upon the allegation that the defendant No. 1, when he sold the factory to the defendant No. 2, deposited with the latter the amount covered by the *hundi*, and gave instructions to him to pay that money to the plaintiff, and inasmuch as that allegation has not been held by the Subordinate Judge to be proved, and also, inasmuch as the documents referred to in the judgment of the lower appellate Court do not warrant the conclusion at which the Subordinate Judge has arrived, the decree passed by him is bad in law.

In support of the first contention raised before us, the learned vakil for the appellant has relied upon the case of *Atma Ram* v. *Balkishen* (1) as showing that the Subordinate Judge ought not to have added Hudson as a party respondent when no appeal had been made by the plaintiff against the decree of the Court of first instance. This case, however, has been considered in a recent case before this Court, namely, the case of *Upendra Lall Mukerjee* v. *Girindra Nath Mukerjee* (2), where a Division Bench of the Court, disagreeing with the view expressed by the Allahabad High Court in *Atma Ram* v. *Balkishen* (1), came to the conclusion, in circumstances somewhat similar to those in the present case, that it is quite open to the appellate Court, with reference to the terms of s. 559 of the Code, to add a party as respondent to an appeal when no appeal had been made against him. We must confess that the matter is not altogether free from doubt; but having given it our best consideration we must say that our doubt is not so very strong as to necessitate our differing from [113] the view expressed in the case of *Upendra Lall Mukerjee* v. *Girindra Nath Mukerjee* (2); and we think it is difficult to say that the defendant Hudson was not interested in the result of the appeal preferred by Carleton, or that his presence in that appeal was not necessary for the due adjudication of all the points arising in it. We might, in this connection, also refer to some of the observations of this Court in the case of *Manickya Moyee* v. *Boroda Prosad Mookerjee* (3), where, in a case where the appeal was preferred by the plaintiff, and the plaintiff omitted the name of one of the necessary defendants from the category of respondents, and this Court in appeal thought it necessary to add him as a party respondent, the learned Judges observed that they had the power to direct that *that* person be made a party to the appeal "inasmuch as the mortgagee-respondent" (that is, the person against whom the appeal had been preferred) "has in a way a right to relief over against him, and it is proper that all questions in dispute should be settled so as to prevent as far as possible further litigation." It seems to us in this case that it was necessary for the purpose of settling all questions in dispute between the

(1) 5 A. 266. (2) 25 C. 565. (3) 9 C. 355.

parties, and with a view to prevent future litigation in relation to the same matter, to make Hudson a party respondent to the appeal preferred by the defendant No. 1 to the lower appellate Court. We accordingly overrule the first objection.

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With regard to the other point raised before us, no doubt the main allegation upon which the suit was brought, so far as the defendant No. 2 was concerned, was that defendant No. 1, while selling to the defendant No. 2 the Byria factory, placed in his hands the money covered by the *hundi*, and instructed him to deliver the same to the plaintiff. We do not know whether there is any evidence upon this record in support of this allegation; but certainly the Subordinate Judge has not come to any finding upon it. What he does find is practically that the defendant No. 2 took upon himself the liability of paying the money due under the *hundi* to the plaintiff when the Byria factory, with all the lands appertaining thereto, was transferred [114] to him. The letters, however, to which he refers do not by themselves warrant the conclusion at which he has arrived. But we have examined the whole of the correspondence placed before us on behalf of the appellant in this connection; and it seems to us that the letters marked A and B, coupled with what the defendant No. 2, or rather his manager, wrote in reply to the plaintiff, do indicate clearly that the defendant No. 2 did understand that after the transfer had been made to him it was he who had to pay the money covered by the *hundi* to the plaintiff. That being so, and it being quite clear that the land for the purchase of which this money was borrowed from the plaintiff was indisputably in his possession, though it is alleged in one of the letters that he had given up the land and left it free to the plaintiff to resume possession thereof, it seems to us that in equity the plaintiff is entitled to maintain the judgment which has been pronounced in his favour, namely, that the defendant No. 2 shall be made liable for the money claimed, and that in the event of the whole amount of such money not being recovered by the plaintiff from him, the defendant No. 1 shall be liable for the balance.

With these observations we dismiss this appeal with costs.

S. C. C. *Appeal dismissed.*

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26 C. 114.

APPELLATE CIVIL.

Before Mr. Justice Banerjee and Mr. Justice Stevens.

BISHUN CHURN ROY CHOWDHRY AND OTHERS (*Defendants*) *v.* JOGENDRA NATH ROY AND OTHERS (*Plaintiffs*).*
[25th July, 1898.]

Civil Procedure Code (Act XIV of 1882), *ss.* 544, 559 *and* 561—*Cross-objection—Persons interested in the result of the appeal—Whether a respondent can prefer a cross-objection against another respondent—Added respondent.*

In a suit for possession of land the Court of first instance decreed the plaintiffs' suit in part against the defendants. Some of the defendants appealed to the High Court without making the other defendants party respondents. The plaintiffs preferred cross-objections under s. 561 of the Code of Civil Procedure. The non-appealing defendants were added [115] as respondents by an order of the High Court to the effect that they might be made parties without prejudice to

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* Appeal from Original Decree No. 170 of 1890, against the decree of Babu Khetter Prosad Mukerjee, Subordinate Judge of Faridpur, dated the 20th of February 1890.

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any objection that might be urged on their behalf at the hearing of the appeal. The non-appealing defendants at the hearing of the appeal contended that they were wrongly made parties, and that the plaintiffs could not urge their cross-objection as against them.

Held, that the non-appealing defendants were persons, who were interested in the result of the appeal, within the meaning of s. 559 of the Code of Civil Procedure, and that therefore they were rightly made parties.

Held, also, that as a general rule the right of a respondent to urge cross-objections should be limited to his urging them against the appellant, and it is only by way of exception to this general rule that one respondent may urge a cross-objection against another respondent, the exception holding good, among other cases, in those in which the appeal of some of the parties opens out questions which cannot be disposed of completely without matters being allowed to be opened up as between co respondents; but as there was nothing exceptional in this case, the plaintiffs were not allowed to urge their cross-objections against the non-appealing defendants.

[F., 28 A. 95 (97) = 2 A.L.J. 667 = A.W.N. (1905) 200; 30 C. 655 (658); 7 Ind. Cas. 505 = 218 P.L R. 1910 = 86 P.W.R. 1910; Commented on, 103 P. L. R. 1914 = 197 P.L.R. 1914 = 208 P.W.R. 1913 = 22 Ind.Cas. 785; R, 35 C. 538 (540) = 12 C.W.N. 720; 28 M. 229 (233) = 15 M.L J. 212; 12 C.L J. 137 = 5 Ind Cas. 654; 15 C.L.J. 61 = 16 C.W.N. 612 (614) = 13 Ind. Cas. 653 (654); 14 C.P.L.R 46 (47); 6 Ind. Cas. 430 (431) = 6 N.L.R. 50; 13 Ind. Cas. 906 = 11 M L.T. 157 = (1912) M.W.N. 198; 22 T.L.R. 183 (185).]

THE facts of this case, which fully appear from the judgment of the High Court, were as follow :—

This appeal arises out of a suit brought by the plaintiffs-respondents, to recover possession and mesne profits of four plots of land, some of which are covered with water, on the allegation that they appertain to their property, *mouzah* Dighalia, which they hold in zemindari and *putni* right, and from which they have been dispossessed by an order of the Joint Magistrate of Madaripore under s. 145 of the Code of Criminal Procedure, dated the 10th May 1884. After the institution of the suit certain persons were added as defendants. The defence was that the suit was barred under ss. 13 and 43 of the Code of Civil Procedure, the plaintiffs having sued the defendants in a previous suit in respect of a portion of the lands now in dispute in suit No. 9 of 1864 and lost their suit; that the suit was barred by limitation, the plaintiffs not having had possession within twelve years of the lands in dispute; that the lands in dispute did not appertain to *halka* No. 15 of the *thakbust* maps to which *halka* the plaintiffs alleged the lands appertained, nor were the plaintiffs entitled to *halka* No. 15, and that the lands appertained to the defendants' estate. On behalf of the added defendants a further objection was taken, that the suit [116] was barred by the rule of three years' limitation, those defendants having been added as parties more than three years after the date of the order under s. 145 of the Code of Criminal Procedure referred to in the plaint.

The Court below was of opinion that the claim of the plaintiffs was barred by the principle of *res judicata* as to certain of the plots of land in dispute; that upon the question of limitation, as the evidence was unsatisfactory on both sides, possession should be held to follow title; and that the plaintiffs had made out their title to a portion of plot No. 1. It accordingly gave the plaintiffs a decree in respect of a portion of the land in plot No. 1.

Against that decree some of the defendants preferred this appeal, and the plaintiffs filed cross-objections under s. 561 of the Code of Civil Procedure in respect of the portion of the claim that was disallowed. The appealing defendants made the plaintiffs alone respondents in their appeal; and at the hearing of the appeal the question was raised whether, in the

absence of the other defendants either as appellants or respondents, the cross-objections could be heard. Accordingly a rule was issued calling upon the non-appealing defendants to show cause why they should not be made parties to this appeal. The rule was disposed of by an order to the effect that they should be made parties without prejudice to any objection that might be urged on their behalf at the hearing of the appeal as to whether they ought to be made parties, and as to whether the cross-objections of the plaintiffs could be entertained as against them.

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Babu *Lal Mohun Das* and Babu *Horendra Nath Mookerjee*, for the appellants.

Mr. *C. P. Hill*, Babu *Sreenath Das*, Babu *Basant Kumar Bose*, Babu *Amarendra Nath Chatterjee*, Babu *Saroda Churn Mitter*, Babu *Pramatha Nath Sen*, Babu *Harakumar Mitter*, and Babu *Brojo Lall Chuckerbutty*, for the respondents.

The judgment of the High Court (BANERJEE and STEVENS, JJ.) (after stating the facts of the case as above) was, so far as is material to this report, as follows :—

JUDGMENT.

[117] The points urged in the appeal of the defendants are—*first*, that the Court below is wrong in holding that only a portion of the claim was barred by s. 13 of the Code of Civil Procedure, whereas it ought to have held that the whole of the claim was barred, partly under s. 13 and partly under s. 43 of the Code of Civil Procedure; *second*, that the Court below is wrong in holding that the plaintiffs' claim was not barred by limitation, whereas upon the evidence it was clearly so barred; and, *third*, that upon the question of title the Court below ought to have held that the plaintiffs have failed to make out their right to the lands in dispute.

For the plaintiffs, respondents, it is urged, by way of cross-objection, under s. 561 of the Code of Civil Procedure, *first*, that the Court below is wrong in holding that any part of the claim was barred under s. 13 of the Code of Civil Procedure; *second*, that the Court below is wrong in holding that the claim as against the subsequently added defendants was barred by the rule of three years' limitation; and, *third*, that the Court below was wrong in holding that the title of the plaintiffs was not made out with reference to a portion of the claim, whereas it ought to have held that the plaintiffs' title had been made out with reference to the whole of the land in suit.

A preliminary objection was taken on behalf of the defendants-respondents to the hearing of the cross-objections, on the double ground of these defendants having been wrongly made respondents in the case, and of the cross-objections not being tenable by the plaintiffs-respondents against their co-respondents.

We shall deal with the appeal first and then with the cross-objections, and before disposing of the cross-objections we shall consider the preliminary objection to their tenability.

In support of the first contention urged on behalf of the appellants no tangible ground has been shown why we should hold that the land of plot No. 1 on the Amin's map was either included in the claim in the previous suit, or that the claim in respect thereof had been relinquished in that suit. In the previous suit the present plaintiffs or their predecessors in title claimed three plots of land, all lying to the east of a certain *khal*. That *khal*, [118] notwithstanding some change in position and magnitude by the shifting of its banks by encroachment or recess, is

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clearly shown by the evidence to be the same as the *khal* running north and south as shown in the present Amin's map, to the west of which lie the lands that have been decreed in favour of the plaintiffs in this suit. It cannot therefore possibly be said that any part of the land decreed in favour of the plaintiffs by the Court below formed part of the subject-matter of the former suit. Moreover, the land which the plaintiffs claimed in the former suit they claimed as being included in *halkas* Nos. 64 and 16, which they alleged to be their property, and no part of the lands of *halka* No. 15 was then in dispute; nor is it shown that the plaintiffs were then out of possession of any portion of the land now in dispute; so that it was not necessary for them to include in the former suit the lands now claimed by them. We must, therefore, hold that neither s. 13 nor s. 43 of the Code of Civil Procedure can bar the plaintiffs' claim to the lands in respect of which a decree has been granted in their favour by the Court below.

With reference to the second point urged on behalf of the appellants, namely, that the Court below should have held that the plaintiffs' claim was barred by the twelve years' rule of limitation, we are of opinion that though the lower Court's statement of the rule of law applicable to such cases may not be quite correct, and though, where the evidence on the side of the plaintiffs is absolutely false and unsatisfactory, it may not always be safe to apply the principle that possession follows title, yet having regard to the nature of the lands in dispute, and to the nature of the evidence, we think that the safe rule to apply with reference to the claim in respect of plot No. 1 would be that possession followed title, as has been held in the cases of *Radha Gobind Roy* v. *Inglis* (1) and in *Mahomed Ali Khan* v. *Khaja Abdul Gunny* (2) in which the case of *Radha Gobind Roy* v. *Inglis* (1) has been explained.

[119] [The third contention was on the facts, and this portion of the judgment it is unnecessary to report.]

Coming now to the cross-objections of the plaintiffs-respondents, we must first of all dispose of the preliminary objection to the hearing of the same as against the defendants other than those who have preferred the appeal. It is urged on their behalf that the right of a respondent to prefer cross-objections under s. 561 of the Code of Civil Procedure is limited to urging them against the appellant, and that there is no right accorded to one respondent to prefer cross-objections against another respondent. In support of this contention the third paragraph of s. 561 is referred to, which speaks of the acknowledgment of the appellant or his pleader, or a notice to the appellant or his pleader, in respect of the cross-objections as being a necessary preliminary to their being entertained; and the cases of *Kkermukuree Dossee* v. *Niilambur Mundul* (3), *Hossain Buksh Putooah* v. *Baroo Beparee* (4), *Tarucknath Roy* v. *Taboorunnissa Choudhrain* (5), *Greesh Chunder Singh* v. *Gour Mohun Banerjee* (6), *Gudadhur Banerjee* v. *Monmohinee Dossea* (7), *Lallchand* v. *Kudmoo Koonwar* (8), *Goonomonee Dossia* v. *Parbutty Dossia* (9), *Anunto Dass Sein* v. *Ramjoy Sein* (10), *Anwar Jan Bibee* v. *Azmut Ali* (11), *Sharoda Soonduree Debee* v. *Gobind Monee* (12), and *Atma Ram* v. *Balkishen* (13), are relied upon by the learned vakils for the defendants-respondents. On the other hand, it is urged for the plaintiffs-respondents that the defendants-respondents being

(1) 7 C.L.R. 364. (2) 9 C. 744. (3) 2 W. R. 227. (4) 5 W.R. 49.
(5) 7 W. R. 39. (6) 7 W. R. 49. (7) 7 W.R. 366. (8) 7 W. R. 532.
(9) 10 W. R. 326. (10) 11 W. R. 435. (11) 15 W.R. 26. (12) 24 W. R. 179.
(13) 5 A. 266.

clearly interested in the result of the appeal, which necessarily includes the result of the cross-objections, at least as against the appealing defendants, they have been rightly made parties under s. 559 of the Code of Civil Procedure, and they being thus before the Court at the hearing of the appeal and of the cross-objections, if the Court is satisfied upon the cross-objections (which must be heard) that the judgment of the Court [120] below is wrong, there is nothing in the law to prevent it from doing full justice and from reversing or altering the decree of the Court below upon the cross-objections, not only as against the appealing defendants, but also as against the defendants who have been subsequently brought on the record as party respondents. It was further urged that the rule that one respondent cannot urge cross-objections as against another respondent cannot be correct in its broad generality, but must be taken subject at least to one exception, namely, that when a case in the Court below proceeds upon a common ground with reference to all the defendants, in an appeal by some of them only, cross-objections against all of them may be urged, just as in an appeal by some of them the entire decree may be set aside under s. 544 of the Code of Civil Procedure in favour of all the defendants. And in support of this view the case of *Anund Chunder Goopto* v. *Mohesh Chunder Mozoomdar* (1), *Pran Kishore Deb* v. *Mahomed Ameer* (2), *Timmayya Madu* v. *Lakshmana Bhakta* (3), and *Upendra Lal Mukerjee* v. *Girindra Nath Mukerjee* (4) have been referred to.

The question raised in the preliminary objection, which has given rise to some conflict of decisions, is not altogether free from difficulty. There are no doubt considerations both ways. On the one hand, it may be said that the right of urging cross-objections on the part of the respondent ought to be limited to urging them as against those of his adversaries in the Court below, who are dissatisfied with the decree of that Court, and who have preferred an appeal against the same, and that other parties, who have not preferred any appeal against the decree of the Court below, and against whom no appeal has been preferred, ought to be left unaffected by the appeal, except so far as it may benefit them under the provisions of s. 544. On the other hand, it may be urged that cases may arise in which the appeal of some only of the defendants or of the plaintiffs may open up matters which render it necessary for the ends of justice that the [121] whole case should be gone into, and some of the respondents should be allowed the opportunity of urging cross-objections against their co-respondents.

Upon a consideration of the cases cited and of the arguments on both sides, we think that there are two questions that have to be separately considered—*first*, whether the non-appealing defendants have been rightly added as respondents; and, *second*, whether, if they have rightly been added as respondents, it is open to the plaintiffs respondents to urge cross-objections against them.

With reference to the first question we think that the answer should be in the affirmative. Upon the appeal of the defendants appellants the plaintiffs have taken cross-objections which must be maintainable against the appealing defendants; and if they are successful, they may result in letting the plaintiffs into possession of the lands in respect of which the plaintiffs' claim has been dismissed in the Court below, at least to the extent of the shares of the appealing defendants, and may thus affect the non-appealing defendants by introducing strangers who may interfere with

(1) 1 W. R. 226. (2) 21 W.R. 338. (3) 7 M. 215. (4) 25 C. 565.

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their possession. It must, therefore, be held that the non-appealing defendants are persons who are interested in the result of the appeal within the meaning of s. 559 of the Code of Civil Procedure, and, if that is so, they have been rightly made parties.

Upon the second question, we are of opinion that no hard and fast rule can be laid down, and that the correct principle deducible from the cases cited may be shortly stated thus. As a general rule the right of a respondent to urge cross-objections should be limited to his urging them against the appellants; and it is only by way of exception to this general rule that one respondent may urge cross-objections as against the other respondents, the exception holding good (we do not attempt to lay down any definite exhaustive rule on the point) among other cases in those in which the appeal of some of the parties opens out questions which cannot be disposed of completely without matters being allowed to be opened up as between co-respondents. One instance of this kind is to be found in cases of the class considered in *Upendra* **[122]** *Lal Mukerjee* v. *Girindra Nath Mukerjee* (1). The view we take is in accordance with that taken in the case of *Anwar Jan Bibee* v. *Azmut Ali* (2), where the learned Judges observe: "It has been held in a long series of decisions that the cross-appeal cannot re-open any questions which have been decided between co-respondents, but must have reference to the appellant, and the points which are in dispute between the respondent, who takes the cross-appeal and the appellant. It is quite possible that there may be cases in which, when an appellant succeeds in his appeal, questions will be opened up as between the co-respondents, which would otherwise have been decided, and it is also possible when interests are identical that a respondent succeeding in his cross-appeal may open up questions as between himself and his co-respondents."

That being our view of the law, let us see whether there is anything exceptional in this case that would justify the plaintiffs respondents urging their cross-objections as against the non-appealing defendants. We are of opinion that the question ought to be answered in the negative. The plaintiffs respondents laid claim to certain plots of land. Their claim was decreed only in part. They did not prefer any appeal against that part of the decree which dismissed their claim, or more correctly speaking they preferred an appeal, but it was found to be out of time and the petition of appeal was returned. Thereupon they contented themselves with preferring cross-objections with reference to the portions of the claim that had been disallowed. The appeal, however, in which they urged these cross-objections was at the instance of some only of the defendants in the case, the remaining defendants having been apparently satisfied with the decree that was made against them. Is there any thing in justice which ought to entitle the plaintiffs to say that notwithstanding that they did not do that which was their proper course, namely, prefer an appeal against that portion of the decree, which went against them, they are entitled upon the appeal of some only of their adversaries in the Court below to open up the whole case as against the other defendants, **[123]** who were satisfied with the decree? As we have said above the ground upon which this right of theirs is sought to be based is that as the cross-objections must be heard as against the appealing defendants, and as the remaining defendants are on the record, if the Court is satisfied upon the cross-objections that the decree of the Court below is wrong on any point it ought not to allow

(1) 25 C. 565. (2) 15 W. R. 26.

the erroneous decree to remain in force and perpetuate an injustice when there is nothing expressly laid down in the law to prevent its doing full justice. We do not think that *that* is a correct way of stating the point. The correct way of stating it would be this, namely, whether upon the cross-objections of the plaintiffs, which must be heard as regards the appealing defendants, if the appellate Court finds that the decree of the Court below is wrong, it ought nevertheless to allow such erroneous decree to stand and to abstain from rectifying it in full and thereby doing complete justice on the ground of the plaintiffs having deprived themselves of such measure of justice by their default in preferring an appeal in time, and when the question is thus stated the answer to it should evidently be in the affirmative, unless there be any exceptional reasons in the case. We may add that there is one important consideration pointed out in the argument on behalf of the defendants respondents, which strongly supports the view we take, namely, that to allow the plaintiffs in such a case to urge their cross-objections against the non-appealing defendants would be to place those defendants in a situation of risk, without their having done anything to incur that risk, and without their being able to withdraw themselves from that position. In the case of the appellants if any cross-objections are urged against them by the plaintiffs respondents they have the option of withdrawing the appeal and thereby preventing the cross-objections being heard, if upon consideration they find it better for them to allow the decree of the Court below to stand as it is. In the case of persons in the situation of the non-appealing defendants, they have not the power of withdrawing from the position of risk in which they may be placed, not by any action of their own, but merely by the action of their fellow-defendants or fellow-plaintiffs as the case may be.

[124] In this view of the matter, it becomes unnecessary to consider the special argument, which was addressed to us on behalf of those of the defendants respondents against whom the suit was dismissed in the Court below on the ground of three years' limitation—a ground which is not common to them, and to the other defendants. If, however, it were necessary to say anything on this point, we should simply have said that the main reason upon which the learned Counsel for the plaintiffs respondents bases the right of his clients to urge their cross-objections against the non-appealing defendants, namely, the fact of the case in the Court below having proceeded upon a common ground, could not apply to those defendants.

[The Court then considered the cross-objections as against the appealing defendants, and the decision being on the facts it is unnecessary to report it. The judgment concluded as follows.]

This disposes of all the contentions raised by way of cross-objection.

The result is that the appeal must be dismissed with costs, subject to the modification referred to above, namely, that the decree of the lower Court should not extend beyond the *thak* line of mouzah Deghalia as shown on the Amin's map; and the cross-objections must be disallowed with costs.

The defendants respondents will get separate costs. The *chittas* must be treated as papers printed for the purposes of the cross-objections.

S. C. G. *Appeal dismissed, decree modified.*

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DEC. 9.

APPELLATE CIVIL.

26 C. 124= 3 C.W.N. 82.

26 C. 124=3 C.W.N. 82.

APPELLATE CIVIL.

Before Mr. Justice Ghose and Mr. Justice Rampini.

IN THE MATTER OF THE APPLICATION OF H.C. STUDD AND OTHERS.* [9th December, 1898.]

Practice—Remission of Process fees—Rules of High Court, Calcutta, chap. XIV—Process fees—Remission of fees in analogous appeals by the same appellants.

Where twenty-nine appeals were presented by certain appellants, and an application was made for remission of process fees, and that only five sets of process fees instead of twenty-nine should be charged under chap. XIV [125] of the Rules of High Court, on the ground that the appeals were analogous and on behalf of the same appellants, the Court (GHOSE and RAMPINI, JJ.) refused the application.

Held, by RAMPINI, J., that the High Court has no power to grant the remission, and that the fees prescribed by the rules *must* be levied.

THIS was an application on behalf of the appellants in twenty-nine analogous appeals, praying that five sets of process fees instead of twenty-nine might be charged for serving notices of appeal to the respondents in all the appeals.

Babu *Sorashi Charan Mitra*, for the applicant, contended that the practice of the Court was to grant remission in analogous appeals by the same appellant, and there was nothing in the Rules of the Court which prevented the Court from exercising its discretion in such matters. Under s. 93 of the Civil Procedure Code, the Court may pass any order it thinks proper as regards the process fees.

The following judgments were delivered by the High Court (GHOSE and RAMPINI, JJ.)

JUDGMENTS.

GHOSE, J.— I have considered the application of the petitioners for leave to put in five, instead of the twenty-nine, sets of process fees required by the Rules of the Court on the subject; and I think that no sufficient ground has been made out for the granting of such indulgence. I accordingly refuse the application.

I express no opinion upon the question whether or not the Court [has] the power to relax in any case the process-fee rules.

RAMPINI, J.—In this case, in consideration of his presenting twenty-nine analogous appeals, the applicant applies for a relaxation of the High Court process fee rules, and prays that five sets instead twenty-nine sets of process fees may be levied. There has hitherto been some diversity of practice in this Court in respect of this matter, some Benches readily granting a relaxation of these rules, and others refusing to do so.

I am of opinion that this Court has no power to relax the process fee rules in any way. Process fees are levied under the Rules framed by the High Court in accordance with the provisions of s. 20 of the Court-fees Act. These rules have the force of law and therefore must be followed, and though the [126] High Court may from time to time alter and add to the Rules, it is necessary that the altered Rules should before being put in force be confirmed by the Local Government and sanctioned by the Governor-General of India in Council.

* Civil Order No. 2773 of 1898.

1898 DEC. 9. — APPELLATE CIVIL. — 26 C. 124 = 3 C.W.N. 82.

Now, the Rules which have been drawn up by this Court on the authority of this provision of the law are to be found in chap. XIV of the High Court Rules for the appellate side of the Court, and it is by them prescribed that certain fees are to be levied on the processes issued in each case. It is to be observed that no power is given by these Rules to relax them or to remit the fees in any case whatever, and it appears to me that in these circumstances they cannot be relaxed, and that the fees prescribed by them must be levied, there being no power given to the Court to remit them. The absence in chap. XIV of all power to relax the Rules or remit the fees is the more noticeable, as in chap. IX of the High Court Rules, which relates to the preparation of the paper books in appeals from appellate decrees, by cl. 11 of Rule 8, power is given to the Court upon the application of any party and upon good and sufficient reason being shown to give such special directions, as to any of the matters to which the Rules in chap. IX relate, as it may deem fit and even by special order to exempt any party from the operation of any portion of those Rules. The absence of any analogous provisions in chap. XIV in my opinion points to the conclusion that no discretion is given to the Court in any way to remit the process fees or to depart from the rules relating to them in any respect.

The learned pleader for the applicant, however, argues that, though such power may not be given to the Court by the High Court Rules on the subject, such power is given by s. 93 of the Civil Procedure Code, which prescribes that "every process issued under this Code shall be served at the expense of the party on whose behalf it is issued, *unless the Court otherwise directs*." But this provision of the Civil Procedure Code does not appear to me to give a Court any power to depart from the Rules of the High Court on the subject of the levy of process fees, or to remit these fees. The section relates to the payment of process fees by the parties to a suit, and gives the Court [127] acting judicially power to make an order between party and party only, as to who should pay the process fees. It does not expressly give power to remit the fees, or what comes to the same thing, to order that the process should be served free, or, in other words, at the expense of Government, and in the present cases we cannot, I think, make such an order under s. 93 of the Civil Procedure Code, seeing that the Government is no party to the suits.

For these reasons I am of opinion that there is no power anywhere given under which we could comply with the application of the pleader for the appellants in these cases, and I would therefore refuse it.

S. C. C. *Application refused.*

1898 DEC. 12.

ORIGINAL CIVIL.

26 C. 127 = 3 C.W.N. 90.

26 C. 127=3 C.W.N. 90.

ORIGINAL CIVIL.

Before Mr. Justice Sale.

JOGENDRA NATH GOSSAIN AND ANOTHER *v.* DEBENDRA NATH GOSSAIN.* [12th December, 1898.]

Receiver—Mortgage decree—Execution of mortgage decree by sale of properties in the possession of the Receiver.

A judgment-creditor can sell properties in the hands of a Receiver of the Court in execution of a mortgage decree, although he cannot execute a decree against such properties by way of attachment and sale.

Semble—A proceeding by way of attachment is an interference with the possession of the Receiver.

Hem Chander Chunder v. *Prankristo Chander* (1), distinguished.

[R., 34 C. 427=4 C.L.J. 495=11 C.W.N. 1; 6 Ind. Cas. 214 (216)=14 C.W.N. 653.]

IN this case a Receiver had been appointed in a partition suit in which a decree had been made declaring the rights of the parties and directing the usual accounts and enquiries. During the partition proceedings and after the appointment of the Receiver two of the co-sharers mortgaged their interest in the undivided properties. The mortgagee obtained a decree on his [128] mortgage and sought to bring to sale certain properties which were included in his mortgage, but which were then in the hands of the Receiver.

A rule was obtained by the judgment-debtors calling on the judgment-creditor to shew cause why he should not be restrained from proceeding to a sale of the properties in the hands of the Receiver, on the ground that to sell the mortgaged properties without the leave or sanction of this Court would amount to contempt of Court.

At the hearing of the rule—

Mr. *L. P. Pugh*, for the judgment-debtor.

Mr. *A. M. Dunne*, for the judgment-creditor.

ORDER.

SALE, J.—This is a rule calling on the judgment-creditor, who has obtained a decree on his mortgage under the Transfer of Property Act in the Alipore Court, to shew cause why he should not be restrained from proceeding to a sale of certain properties which are included in his mortgage, but which are now in the hands of the Receiver of this Court.

The suit in which this application is made, and in which the Receiver was appointed, is a partition suit in which a decree was made declaring the rights of the parties and directing the usual accounts and enquiries.

It appears that pending the partition proceedings and after the appointment of a Receiver two of the co-sharers mortgaged their interest in the undivided properties to the judgment-creditor. Some of the mortgaged properties being within the jurisdiction of the Alipore Court the mortgagee instituted his suit in that Court, and seeks to bring to sale the particular properties mentioned in the rule, some of which are situated in Calcutta. The judgment-debtors, after obtaining several postponements of the sale for the purpose of paying off the judgment-creditor, now apply

* Original Civil Suit No. 407 of 1888.

(1) 1 C. 403.

to restrain the mortgagee from proceeding to a sale on the ground that to sell the mortgaged properties without the leave or sanction of this Court would amount to contempt of Court. But the sale of the properties under the provisions of the Transfer of Property Act can have no other effect, so far as the possession or [129] control of the Receiver is concerned, than a private sale by the mortgagors themselves. To obtain the benefits of his purchase and the rights incident thereto, the purchaser must seek the intervention of this Court, and he will be bound by all the proceedings in the partition suit in this Court.

1898 DEC. 12. — ORIGINAL CIVIL. — 26 C. 127 = 3 C.W.N. 90.

This is not a case where the judgment-creditor is proceeding to execute his decree by attachment. This Court does not permit and will not recognise attachment of the properties in the hands of its Receiver, under process issued without sanction or leave, by inferior Courts, the reason being that a proceeding by way of attachment is an interference with the possession of the Receiver. But as the element of interference with the possession of the Receiver is absent from the present case there is no reason for restraining the sale. The case of *Hem Chunder Chunder* v. *Prankristo Chunder* (1) is distinguishable, inasmuch as the judgment-creditor in that case, if he had proceeded to execute his decree in the Mofussil Court, could have done so only by way of attachment and sale.

Under the Transfer of Property Act no attachment is necessary, and the reason for the course adopted in the former case does not now exist.

The result is that the rule must be discharged with costs, and the judgment-debtors must in pursuance of their undertaking also pay all costs occasioned by the interim stay of the sale.

Attorney for the judgment-debtors: Babu *Sita Nath Dass*.

Attorneys for the judgment-creditor: Messrs. *Orr, Robertson & Burton*.

C. E. G.

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26 C. 130 = 3 C.W.N. 36.

[130] APPELLATE CIVIL.

Before Mr. Justice Ameer Ali and Mr. Justice Pratt.

BASANTA KUMAR ROY CHOWDHRY (*Plaintiff*) v. PROMOTHA NATH BHUTTACHARJEE AND OTHERS (*Defendants*).*
[8th July, 1898.]

Interest—Interest on arrears of rent—Bengal Tenancy Act (VIII of 1885), ss. 67, 178, sub-s. 3, cl. (h) and 179—Contract to pay interest at higher rate than allowed by s. 67 of the Act.

A contract by a tenant holding under a permanent *mokarari* lease to pay interest on the arrears of rent at a higher rate than 12 per cent. per annum is not enforceable in law.

[**Over**, 29 C. 674 (**F.B.**) = 5 C.W.N. 438; **R.**, 32 C. 749 = 1 C.L.J. 176 = 9 C.W.N. 466; **Disappr.**, 26 C. 611 = 3 C.W.N. 608; **D.**, 28 C. 166 (168).]

THE facts of the case, so far as they are necessary for the purposes of this report, appear sufficiently from the judgment of the High Court.

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* Appeal from Appellate Decree No. 50 of 1897, against the decree of Babu Rajendra Kumar Bose, Subordinate Judge of 24-Pergunnahs, dated the 5th October 1896, modifying the decree of Babu Hari Nath Roy, Munsif of Baripur, dated the 9th of April 1896.

(1) 1 C. 403.

1898 JULY 8.

APPELLATE CIVIL.

26 C. 130= 3 C.W.N. 36.

Babu *Nil Madhub Bose*, for the appellant.

Babu *Dwarka Nath Chuckerbutty*, for the respondents.

The judgment of the High Court (AMEER ALI and PRATT, JJ.) was as follows :—

JUDGMENT.

The question involved in this appeal is whether, having regard to the provisions of ss. 178 and 179 of the Bengal Tenancy Art, a contract by a tenant holding under a permanent *mokarari* lease to pay interest on the arrears of rent at a higher rate than 12 per cent. per annum is enforceable in law.

The plaintiff brought this suit to recover from the defendant a sum of Rs. 244 for arrears of rent and interest; the interest calculated being at the rate of one anna per rupee per month, according to the terms of a registered *kabuliat* executed by the defendants in favour of the plaintiff. This document is printed at p. 6 of the paper book. It purports to create a permanent *mokarari* lease, and was admittedly executed after the passing of the Bengal Tenancy Act.

[131] The Munsif made a decree in favour of the plaintiff in terms of his prayer. On appeal, the Subordinate Judge has varied the amount of interest awarded by the Munsif, and directed that the plaintiff should recover interest at the rate of 12 per cent. only. He was of opinion that s. 179 of the Bengal Tenancy Act does not override the provisions of cl. (*h*), s. 178, relating to the payment of interest on arrears of rent.

The plaintiff, has appealed to this Court, and the contention on his behalf is that under s. 179 the plaintiff is entitled to recover the interest agreed upon between the parties by their contract, and that the provisions of clause (*h*), s. 178, do not affect the express terms of s. 179. The sole question in this case is what is the meaning to be attached to the provisions of s. 179, and whether in the case of tenants holding permanent tenures a contract to pay interest not in accordance with the provisions of s. 67 of the Bengal Tenancy Act can be regarded as valid in law. No authority has been cited on either side, and we must therefore deal with the point on general principles. Sub-section 3, cl. (*h*), s. 178, provides as follows: "Nothing in any contract made between a landlord and a tenant after the passing of this Act shall affect the provisions of s. 67 relating to interest payable on arrears of rent." Section 67 provides that " an arrear of rent shall bear simple interest at the rate of twelve per cent. per annum from the expiration of that quarter of the agricultural year in which the instalment falls due to the institution of the suit." It will be observed that the expression " tenant " in sub-s. 3, cl. (*h*) is of a general character. Section 5, which defines the word "tenant," is as follows: " 'Tenant,' means a person who holds land under another person, and is, or but for a special contract would be, liable to pay rent for that land to that person." Sub-section 3, cl. (*h*), s. 178, therefore includes tenants holding under *mokarari* leases. Section 179 provides " that nothing in this Act shall be deemed to prevent a proprietor or a holder of a permanent tenure in a permanently settled area from granting a permanent *mokarari* lease on any terms agreed on between him and his tenant. " It is obvious that if the argument put forward [132] by the appellant be well-founded, we must hold that the Legislature intended by s. 179 to repeal what it had expressly enacted by cl. (*h*), sub-s. 3, s. 178. It may be observed that if this had been the intention of the Legislature nothing would have been easier than to include a saving

clause to that effect in the clause referred to. Now, it is a well recognised principle in the interpretation of Statutes that an Act of the Legislature should be so construed as to give effect, so far as possible, to all its enactments ; nor must it be so construed as to allow one provision to stultify the other. The question, which we have to determine, is whether there is anything in s. 179 by which the Legislature intended to override the provisions of cl. (*h*), sub-s. 3, s. 178. In order to answer the question it is necessary to bear in mind that ordinarily speaking the word "terms " used in connection with a lease does not include a condition relating to interest upon arrears of rent. In Redmond on Landlord and Tenant, p. 52, will be found a passage showing exactly the matter included in "the terms of a lease." Did the Legislature use the expression "terms" in s. 179 of the Tenancy Act in its ordinary legal acceptation, or did it intend to give the word a wider meaning ? Having regard to the provisions contained in s. 67 and cl. (*h*), sub-s. 3, s. 178, we are not prepared to say that it had the latter object in view. If that had been the intention it would have avoided the expression "terms," which conveys a distinctive signification in the treatises on the law relating to landlords and tenants, and employed instead the more comprehensive word "conditions." Then, again, it is to be observed that (apart from special legislation) it was considered at one time doubtful whether the holders of permanent tenures generally had the power to create permanent under-tenures. Under s. 3 of the Bengal Regulation of 1812 the proprietors alone were so authorised, and it is by no means improbable that the Legislature intended by s. 179 to vest the holders of permanent tenures generally with the right of granting permanent *mokarari* leases on any terms agreed upon between the parties which did not contravene the substantive provisions of the law. However that may be, it seems to us that we ought not to put such a construction on s. 179 **[133]** as would have the effect of nullifying, with respect to an important body of tenants, the enactment in the previous section.

1898 JULY 8.

APPELLATE CIVIL.

26 C. 130=3 C.W.N. 36.

For these reasons, as at present advised, we think that the conclusion arrived at by the Subordinate Judge in this case is correct, and this appeal must be dismissed with costs.

S. C. G. *Appeal dismissed.*

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26 C. 133=3 C.W.N. 91.

APPEAL FROM ORIGINAL CIVIL.

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, Mr. Justice Prinsep and Mr. Justice Ameer Ali.

IN THE MATTER OF FAKARUDDIN MAHOMED CHOWDHRY, A MINOR, HAFIZ AMINUDDIN AHMED (*Appellant*) v. G. L. GARTH AND ANOTHER (*Respondents*).* [7th December, 1898.]

Guardians and Wards Act (VIII of 1890), s. 14—Proceedings for appointment of a guardian in more Courts than one—Report by District Court to High Court—Direction by Chief Justice—Powers of High Court—Letters Patent, High Court, 1865, s. 17—Jurisdiction—Costs.

Section 14 of the Guardians and Wards Act (VIII of 1890) does not apply to the High Court in the exercise of its original civil jurisdiction ; and the term " report" in cl. (2) of that section refers not to a judicial reference, but to a ministerial act.

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* Appeal from Order No. 4 of 1898.

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Proceedings had been taken, for the appointment of a guardian of a minor, under that section, in the High Court and afterwards in a Mofussil Court. The latter reported the case to the High Court; and the Chief Justice thereupon directed that the proceedings in the Mofussil Court should be stayed, and that a Judge of the original side of the High Court should hear and determine the matter.

Held, that such direction was in order, and that the Judge who determined the matter had jurisdiction to do so.

Held, also, that although a petitioner had failed in his application on all points except the removal of the guardian, he was entitled to his costs up to and including the order removing the guardian, as he must be taken to have acted, so far, for the benefit of the minor.

[R., 8 C.W.N. 797 (800).]

THE appellant, the father-in-law of the above named minor, presented, before SALE, J., a petition for the removal of the minor's [134] mother from her position as guardian of the person of the infant. A rule issued, calling upon the mother to show cause why she should not be removed, and, after the hearing, it was made absolute. The respondent, Mr. Garth, who had, by an order of Court, been appointed guardian of a certain portion of the minor's estate, which was to be mortgaged under a scheme, was allowed to appear on the hearing of the rule. The order of SALE, J., further directed a reference to the Registrar to inquire and report who was a fit and proper person to be the guardian of the minor's person, and gave Mr. Garth leave to appear on the reference for the purpose of assisting the Registrar. By his report, the Registrar found that Moulvie Mahomed Wajid, of Barisal, was a fit and proper person to be the guardian.

Exceptions were taken to that report mainly on the ground that the minor having ceased to reside within the jurisdiction of the Court, SALE, J., could not entertain the matter. The report, however, was confirmed, but the learned Judge declined to allow the petitioner his costs. Afterwards, on the 13th September 1897, the petitioner presented a petition, in the District Court of Barisal, for the appointment of himself as guardian of the minor's person. The District Judge, acting under s. 14 of the Guardians and Wards Act (VIII of 1890) reported the case to the High Court on the 12th December. The Chief Justice directed that the proceedings in the Barisal Court should be stayed, and deputed SALE, J., to continue to hear and determine the matter; and, on the 7th January, the last named Judge confirmed the Registrar's report.

The petitioner appealed.

Mr. *K. N. Sen Gupta*, for the appellant.—The lower Court had no jurisdiction to make the order now appealed from, because the minor was residing not in Calcutta, but at Barisal; and the Barisal Court alone had jurisdiction to hear and determine the matter. The person appointed is not a fit and proper person; he intends to deal with the property of the minor in a manner prejudicial to the minor's interests. The order of the Chief Justice directing Sale, J., to hear and determine the application was *ultra vires*. Section 14 of the Guardians and Wards Act directs "the Courts" to refer the matter to the High Court; and all [135] references from a Provincial Court must be heard by a Division Bench of the High Court, under rule 3 of the Rules of the appellate side, and not by a Judge exercising original civil jurisdiction.

Mr. *Dunne*, for G. L. Garth (and who was allowed to address the Court only as *amicus curiæ*): It is impossible that the words "the Court" in s. 14 of the Guardians and Wards Act should apply, because such a meaning is repugnant to the context, inasmuch as a "Court

subordinate to the High Court" cannot be the High Court itself. Rule 51 of the Rules and Orders of the High Court provides that all the powers conferred on the High Court by the Letters Patent may be exercised by a single Judge. In this case, therefore, Sale, J., was "the High Court." Again, if s. 14, cl. (2), is to apply to the High Court, the High Court must "report the case"; but to whom could it report? The meaning of the section is that where there are proceedings in two Courts subordinate to the same High Court, they must stay their hands, and leave it to the appellate Court to decide which of them shall try the case. The "report" mentioned in cl. (2) does not mean a judicial reference; the word is not "reference" but "report," and it indicates a purely ministerial act; and the direction of the Chief Justice merely was that Sale, J., should continue to hear the matter, which was already properly before him, and that the proceedings at Barisal should be stayed; and it was perfectly in order. Section 47 of the Act also shows that the expression "District Court," as there used, is not intended to include the High Court.

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Mr. *Sen Gupta* in reply.—The term "the Court" must mean the High Court in the exercise of its ordinary original civil jurisdiction, and "District Court" is to bear the same meaning as is assigned to that expression in the Civil Procedure Code, *i.e.*, it includes the High Court. If this be held to lead to a repugnancy in the context, then cl. (3) of s. 14 of the Guardian and Wards Act which provides for "other cases" must apply.

Mr. *W. M. Dass*, for a relation of the minor, was not called upon.

[136] The following judgments were delivered by the Court (MACLEAN, C.J., and PRINSEP and AMEER ALI, JJ.) :—

JUDGMENTS.

MACLEAN, C.J.—Three points have been argued before us upon this appeal. The first is, that the Court below had no jurisdiction to make the order appealed from. The order was made upon the application of the present appellant himself, who is now, for most obvious reasons, saying that the Court had no jurisdiction to make it. In my opinion the Court had ample jurisdiction to make the order.

It is clear upon the evidence, the appellant's own evidence, that the minor ordinarily resided in Calcutta, and that being so, under s. 9 of the Guardians and Wards Act VIII of 1890, the Court below had ample jurisdiction to deal with the application.

The second point is, that having regard to the provisions of s. 17 of the Guardians and Wards Act, the gentleman appointed as guardian was not a fit and proper person for the purpose. Hardly any argument, or anything worth calling an argument, has been addressed to us upon this point, which is absolutely untenable.

The third point is one of more importance. It is urged that the direction given to Mr. Justice Sale by myself, as Chief Justice, to determine the matters in dispute, was unauthorised, having regard to the language of s. 14 of the Guardians and Wards Act. The short facts are these: The present appellant presented a petition on the original side of this Court, asking for the removal of the mother of the minor from her position of guardian of his person and property, and for the substitution of himself in her place. A rule was obtained calling upon the mother to show cause, and in the result the mother was removed, and Mr. Justice Sale, who tried the matter, directed an enquiry to be held before the Registrar, to ascertain and report who would be a fit and proper person to be appointed

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guardian in her place. That enquiry proceeded, and I do not think it is an unfair inference to draw from what appears in the case that the present appellant, finding that he was not likely to be appointed guardian (an office which he obviously desired) instituted fresh proceedings in the [137] District Court at Backergunge, asking for the same relief, which he had sought by his previous application before Mr. Justice Sale, alleging that the property of the minor was within the jurisdiction of the District Court and not of this Court on its original side. This was a most improper application. The District Judge, purporting to act under s. 14 of the Guardians and Wards Act, reported the matter to this Court on the 12th November 1897, and when the matter was brought before me, I determined that Mr. Justice Sale should deal with it; consequently the reference proceeded, the Registrar made his report, and Mr. Justice Sale, upon the matter coming before him on the 7th of January 1898, confirmed that report, and appointed a fit and proper person to be the minor's guardian.

It is from that order that the present appeal is preferred; and it is urged before us that Mr. Justice Sale had no jurisdiction to try the case, and that the reference of the case to him by myself was bad, inasmuch as the order of reference ought to have been made by a Division Bench of this Court under rule 3 of chap. II of the Rules of the High Court, appellate side. I will deal with this objection at once.

That rule deals with references, and "references" in the ordinary acceptation of that term. Under s. 14, the District Judge has only to *report* the case, not to refer it, and all the Judge did was to report it. The "references" referred to in Rule 3 are those which are to be heard and determined judicially, and do not apply to such a report as was made by the District Judge in this case.

However, as in my opinion s. 14 does not apply to a case such as the present, whether the matter ought to have been dealt with by a Division Bench or by the Chief Justice, is a matter of no real moment. In my opinion when proceedings have been taken on the original side of this Court and also in a District Court, the section does not apply.

Section 14 says this: "If proceedings for the appointment or declaration of a guardian of a minor are taken in more Courts than one, each of those Courts shall, on being apprised of the proceedings in the other Court or Courts, stay the proceedings [138] before itself." If the section had stopped there it would have been a difficult matter to contend, successfully, that the word "Courts" did not cover every Court, and consequently embraced a High Court in the exercise of its ordinary original civil jurisdiction. But to appreciate what the Legislature intended we must look at the whole section, and moreover, the whole Act. Sub-section 2 of s. 14 runs as follows: "If the Courts are both or all subordinate to the same High Court, they shall report the case to the High Court, and the High Court shall determine in which of the Courts the proceedings with respect to the appointment or declaration of a guardian shall be had."

"The Courts" referred to in this sub-section must mean the Courts referred to in sub-s. 1.

Then it is argued for the appellant that looking at the definition of "the Courts" in the definition clause (cl. 4) "the Court" means the "District Court" and the "District Court" includes "a High Court in the exercise of its ordinary original civil jurisdiction." This is ingenious, but it is fallacious. In the first place the definition only applies "unless there is something repugnant in the subject or context,"

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and in s. 3 "nothing in this Act shall be construed to take away any power possessed by any High Court established under the Stat. 24 and 25 Vic., c. 104." It is not disputed that this High Court in the exercise of its ordinary civil jurisdiction, having regard to s. 15 of the Letters Patent of 1865, had power to deal with questions relating to the appointment of guardians of a minor's person and property, and, if so, it could not have been intended that such a Court should be included in s. 14 of the Guardians and Wards Act, so as to make it compulsory on that Court to stay the proceedings before itself. If it were otherwise, we should be construing the Act so as to take away, and in a most direct form, a power, and a most useful and important power, possessed by the High Court, which s. 3 says is not to be done. If, then, this High Court in the exercise of its ordinary original civil jurisdiction is not within sub-s. 1 of s. 14, that Court was not bound to stay the proceedings before itself, and I am not conscious of any power either [139] in a Division Bench of the appellate side of the High Court, or in the Chief Justice to stay such proceedings.

In this view Mr. Justice Sale was clearly entitled to proceed with the case, and without any direction from myself.

In my opinion the case of two petitions being presented, one in a District Court and one in this Court exercising its ordinary original civil jurisdiction, is one not covered by, and not contemplated by the Legislature under, s. 14, and that section was never intended to interfere with the clear right of this Court on its original side, to deal with the question of the appointment of guardians to minors. If, then, the case be not within sub-s. 1 of s. 14, as, in my opinion, it clearly is not, sub-ss. 2 and 3 have no application. It is not necessary, in the view I take, to decide it; but had it been necessary, it is at least doubtful whether if "the Court," in sub-s. (2), be read as including a High Court in the exercise of its ordinary original civil jurisdiction, such a reading would not have been repugnant both to the subject and the context of the section.

The appellant, therefore, fails on all the above points and the appeal must be dismissed.

As regards the question of costs, loth as I am to interfere with the discretion exercised by the learned Judge in the Court below, I can see no good reason why the appellant should have been deprived of his costs up to and including the hearing of the rule. The learned Judge gives no reason for refusing the appellant these costs. He succeeded in his application to have the mother removed, and it must be taken that this, which was done at his instance, was for the minor's benefit.

In my opinion he is entitled to have his costs out of the minor's estate up to and including the hearing of the rule, but nothing more. The order must be modified to this extent.

As regards the costs of the appeal, there will be no costs: for there is no respondent properly served. We give liberty, however, as Mr. Justice Sale did, to the guardian of the minor to allow the costs of Mr. Garth, who has only been heard as *amicus curiæ*, and who has assisted the Court, out of the minor's estate which may come to his hands.

[140] PRINSEP, J.—I desire only to add a few words with reference to s. 14 of the Guardians and Wards Act (VIII of 1890). In all other respects, I agree entirely with the judgment that has been just now delivered by my Lord, the Chief Justice.

The present proceedings were commenced by an application made by the present appellant before the original side of this Court, under the

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provisions of the Guardians and Wards Act, for the removal of the guardian previously appointed by a Judge sitting on the original side of the High Court, and for the appointment of himself as guardian. After the case had so far proceeded that it had been referred for enquiry to the Registrar as to the appointment of some particular person as a fit guardian of the minor, the petitioner applied to the District Judge of Backergunge under the Act, for the appointment of a guardian, alleging that that Court had jurisdiction over the matter. On hearing that proceedings had already been taken on the original side of this Court, the District Judge of Backergunge stayed his proceedings under s. 14, sub-s. (1), and reported to this Court under sub-s. (2). There can be no doubt that the application made under such circumstances to the District Judge of Backergunge was not *bona fide*. The petitioner had already complained in his petition to the original side of the High Court, of the conduct of the guardian living with the minor in Calcutta, to the detriment of the estate. He, therefore, admitted the jurisdiction of this Court; but it appeared that in the course of the proceedings the mother of the minor removed with the minor to Backergunge. It does not appear whether she removed permanently or temporarily. At all events this Court had ample jurisdiction to try the case when the petition was made.

In regard to the application of s. 14 of the Act, that is to say, whether it applies to a matter before the original side of this Court, and to the same matter raised in the District Court outside of Calcutta, I should, myself, feel little difficulty in holding that it did apply, were it not for the terms of the last part of s. 3 of the same Act—that saves the jurisdiction of the High Court established under Stat. 24 and 25 Vic., c. 104; and a reference to that Statute shows that the powers previously conferred on and exercised [141] by the Supreme Court, to which the High Court has succeeded, were reserved for the High Court on its original side; and even having regard to the terms of s. 3 and the definition of "High Court" given in the General Clauses Act, 1868, I find myself unable to hold that s. 14 has in any way curtailed this jurisdiction of the original side of the High Court.

I, therefore, agree with the view expressed by my Lord, the Chief Justice, in holding that s. 14 does not apply to any case before the original side of this Court, and that the report made by the District Judge of Backergunge was properly dealt with by referring it to the learned Judge before whom proceedings had been taken on the original side.

AMEER ALI, J.—I agree in holding that s. 14 of Act VIII of 1890 (Guardians and Wards Act) does not apply to the original side of this Court. I only wish to add a few words with reference to Mr. Sen Gupta's contention that inasmuch as appeals are allowed from the Original Side of the High Court, it, that is, the Original Side, must, therefore, be regarded as subordinate to the Appellate Side of the same Court. Under s. 14 of 24 and 25 Vic. c. 104, the Chief Justice of the High Court had power to determine what Judge in each case shall sit alone and what Judges of the Court, whether with or without the Chief Justice, shall constitute the several Division Courts. Ordinarily the Chief Justice determines that two Judges shall sit separately to try the cases arising within the original jurisdiction of the High Court, but two Judges are sometimes appointed to sit together. Section 15 of the Letters Patent, 1865, gives a right of appeal from the judgment of one Judge of the High Court, or from the judgment of two or more Judges wherever such Judges

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are equally divided in opinion and do not amount in number to a majority of the whole of the Judges of the High Court at the time being, but not from other judgments except to the Privy Council. So that if one Judge of the High Court is appointed to sit alone in the exercise of original jurisdiction his decisions would be appealable to the High Court in its appellate jurisdiction. This would also be the case if two Judges sat together in the exercise of original jurisdiction and disagreed. If two or more Judges forming a Division Bench on the original side [142] are agreed there would be no right of appeal except to the Privy Council. Similarly on the appellate side, when two Judges sit together and they disagree, the judgment of the Court below is appealable to the High Court.

If the contention put forward with reference to the subordination of the original side of the Court, merely because an appeal was given from the decision of a single Judge, were correct it would follow that every Division Bench of this Court would be subordinate to some other Division Bench of the High Court. Again it must be remembered that rules of procedure, either for the original side or the appellate side, cannot be made except by the whole Court, thus showing that the original side of the Court is an integral part of the High Court. The mere statement of these facts is, it seems to me, sufficient to show that it could not have been intended that the High Court in the exercise of its ordinary original civil jurisdiction should be treated as subordinate to any other part of the same Court.

I, therefore, agree with my Lord in dismissing the appeal.

Appeal dismissed.

Attorney for the appellant: Mr. *C. A. Smith.*

Attorneys for the respondents: Messrs. *Sanderson & Co.* (for Mr. Garth), and Babu *Raj Mohon Dass* (for Golam Obad Chowdhry).

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26 C. 142 = 3 C.W.N. 116.

ORIGINAL CIVIL.

Before Mr. Justice P. O'Kinealy.

MOTICHAND AND ANOTHER v. FULCHAND AND ANOTHER.*
[20th, 21st and 22nd June and 13th July, 1898.]

Contract—Sale of goods—Offer of performance—Tender of railway receipts indorsed in blank—Goods not available—Goods subject to demurrage or freight—Duty of seller.

P agreed to sell and *F* to buy certain goods to be delivered to *F* in April-May 1897. The contract of sale contained (*inter alia*) the following clauses:—

"(10) The goods to be tendered fully 48 hours before the expiration of the present term of 72 hours granted by the railway company in order to [143] enable buyers to weigh, sample, and inspect the same; and the delivery not to be considered complete until the samples have been refracted and examined, and any dispute about quality, &c., settled.

"(11) If railway receipt be tendered, such to be handed to buyers 48 hours before the goods are liable to demurrage under the present term of 72 hours granted by the railway company."

P, not having, before the 31st May, goods of his own to meet the contract, arranged with *H* for certain goods of *H*'s to be delivered under it and tendered to *F*. On that day, certain railway receipts, which had been indorsed in blank by *H*, in respect of the said goods, were tendered to *F*. *F* was ready to pay for

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* Original Civil Suit No. 135 of 1898.

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the goods; but, before tendering the price, he insisted upon an endorsement of the railway receipts by *H* to *P* and by *P* to himself. *P* was unable to point out the goods to be delivered under the contract, nor could he indicate the wagon-numbers. *P* refused to procure the endorsements required by *F*, and thereupon *F* declined to take delivery as proposed, though he tendered the price in exchange for the goods.

Held, that, *F* not having had an opportunity of inspecting the goods as provided by the contract, the tender made as aforesaid by *P* was not such an offer of performance of the contract as *F* was bound to accept.

Held, also, that *F* was not bound to accept a tender of railway receipt for goods subject (as some of these were) to demurrage, nor for goods on which freight had not been paid (as was the case with some of these goods), nor for goods that were not available on the 31st May, as in the present case.

In order to establish a valid tender of the goods, it was for *P* to show that had *F* taken the railway receipts, the railway company would have been bound to deliver the goods upon production of the receipts; and *F* was under no duty to point out to *P* that the tender was defective. *F*'s duty under the contract arose when a sufficient tender was made to him, and not till then.

Failure to justify an alleged breach of contract upon one ground only, which is found insufficient, does not disentitle the defendant to rely upon other grounds which his rights under the contract entitle him to rely upon. *Cowan* v. *Milburn* (1), and *Mothoormohun Roy* v. *Bank of Bengal* (2), referred to.

[R., 3 Bom. L R. 260; D., 26 C. 585 (590).]

On the 29th September 1896 the defendant Fulchand contracted with one Pursottom Lall to purchase from him 50 tons of linseed; and on the 23rd October he contracted to buy 100 tons of wheat. Both the linseed and the wheat were to be delivered at the Howrah Railway Station in April-May 1897.

[144] The contracts contained (*inter alia*) the clauses set forth in the foregoing head note.

Until the 30th or 31st May, the seller had no goods to deliver; but on the 29th May he sent to the defendant separate delivery orders in respect of each contract. The defendant's *gomasta* took them to Howrah, with money to pay for the goods; but the seller's *gomasta*, who attended on his master's behalf, was unable to point out the goods or give the wagon-numbers, inasmuch as the delivery orders did not then, or at any subsequent time, indicate them. On the same day, however, the 29th May, a letter was written on the seller's behalf to the defendant offering that the seller's *gomasta* would point out the goods on the 31st May, and stating that the seller had made complete arrangements for delivery of the goods. The parties, accompanied by their respective attorneys, attended at Howrah accordingly, when Pursottom Lall handed over certain railway receipts covering goods belonging to one Hurdut Roy Chamaria, from whom Pursottom Lall had borrowed the goods in order to deliver them.

The plaintiff's attorney then handed over to the defendant's attorney seven railway receipts for the 100 tons wheat, and two railway receipts each for 25 tons of linseed. These receipts had been endorsed in blank by Hurdut Roy Chamaria. The defendant was ready to pay for the goods; but before tendering the price of them, the defendant's attorney required an endorsement of the railway receipt from Hardut Roy Chamaria to Pursottom Lall, and from Pursottom Lall to the defendant. The plaintiff's attorney refused to get the endorsements, saying that they were not necessary, and that the goods were deliverable on presentation of the railway receipts as they stood.

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(1) (1867) L.R. 2 Exch. 230. (2) 3 C. 392.

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The defendant's attorney then formally tendered the price in exchange for the goods; but the plaintiff's attorney offered in return only the railway receipts, which were refused.

The goods covered by the railway receipts belonged to Hurdut Roy Chamaria who had not been paid for them; nor had the freight on them been paid.

[145] After the defendant's refusal to accept the railway receipts, Pursottom Lall assigned his cause of action in respect of both ontrcacts, to the plaintiffs, who subsequently brought this action.

Mr. *Avetoom* and Mr. *Knight*, for the plaintiffs.

Mr. *Hyde* and Mr. *Sinha*, for the defendants.

The judgment of O'KINEALY, J. was as follows :—

JUDGMENT.

In this case the plaintiffs sue to recover the sum of Rs. 852-8-0 as damages for the neglect and refusal of the defendants to take delivery of 50 tons of linseed which they had contracted to purchase on the 29th of September 1896; and to recover the sum of Rs. 213-4-6 as damages for the neglect and refusal of the defendants to take delivery of 100 tons of wheat which they had contracted to purchase on the 23rd of October 1896. The contracts were made, the plaintiffs alleged, by the defendants with one Pursottom Lall, who was the seller of the goods, and after the date of the neglect and refusal relied on by the plaintiffs, Pursottom Lall, on the 13th of November 1897, assigned his causes of action in respect of both contracts to the plaintiffs for valuable consideration. The defendants are sued as partners in the firm of Hurnand Roy Fulchand, and the only ground upon which it is sought to make Sewmukh Roy liable is as a partner in that firm. I may say at once that the evidence before me is wholly insufficient to show that he is now, or was at the time the contracts were made, a partner in the firm and, therefore, as against him (he was not represented at the trial) the suit must be dismissed with costs.

The third paragraph of the plaint sets forth the circumstances upon which, in addition to the contracts and assignment, the plaintiffs rely in support of their claim. It is as follows: "That on or about the 26th and 31st days of May 1897 the said Pursottom Lall, in accordance with the said contracts, and in pursuance thereof, duly forwarded delivery orders in respect of the goods sold under the said contracts to the defendants, and offered to deliver, and at all due times was ready and willing to deliver, the said goods to the defendants, but notwithstanding the defendants neglected and refused to take delivery of the said goods or any part thereof."

[146] In the third paragraph of his written statement the defendant Fulchand traverses every one of these allegations, but admits that "the said Pursottom Lall tendered to this defendant certain railway receipts purporting to have been granted to one Hurdut Roy Chamaria and purporting to have been blank indorsed by him."

The fourth and fifth paragraphs of the written statement are as follows: "This defendant is informed and believes that the said Pursottom Lall was, at the dates mentioned in the last preceding paragraph, in insolvent circumstances, and that he was heavily indebted to, amongst others, the said Hurdut Roy Chamaria, and that the goods for which the said receipts purported to have been granted were the goods of the said Hurdut Roy Chamaria and not the goods of the said Pursottom Lall, and that

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he was not in a position to deliver or transfer the same to this defendant, and that the said Hurdut Roy Chamaria had not been paid for the said goods. This defendant was always ready and willing to take delivery of the said goods contracted for as aforesaid, and to pay for the same, and he offered to do so, and demanded delivery of the said goods, but the said Pursottom Lall refused to deliver the said goods, and only offered to this defendant the said receipts, and did not even show to this defendant or to any one on his behalf the goods for which the said receipts had been granted."

It is not necessary to refer to a further defence, having reference to the assignment of the 13th of November 1897, as that was abandoned at the hearing.

Both the linseed and the wheat were to be delivered in April-May 1897, and the whole of the evidence given in this case relates to what took place during the last week of May 1897 between Pursottom Lall and Fulchand, and with reference to the deliveries under these contracts.

It appears from this evidence that in the latter end of May Pursottom Lall's affairs became involved, and he was deeply in debt. His *gomasta* Dumun Lall, who was called, said he had paid off a sum of Rupees six lakhs by the end of May, and that he then only owed Rs. 60,000 or Rs. 70,000, and from the evidence [147] of Hurnand Roy, it is clear that Pursottom Lall was in great difficulties. He had, in fact, no goods to tender under these contracts at any time before the 31st of May. I am satisfied that this was so from the evidence of Dumun Lall and Hurnand Roy.

There is no doubt that the market was a falling market, and Pursottom Lall was anxious to obtain from his buyers the difference between the market rate and the contract rate, if he could do so without being under the necessity of making an actual tender of the goods, and he might have succeeded had he not been dealing with persons who knew he had no goods to deliver, and who were determined not to accept anything short of the actual goods contracted for.

The first action taken in respect of these contracts was by Pursottom Lall on the 26th of May. On that day he wrote to the defendant enclosing one delivery order for both the wheat and the linseed, and requesting him to send a man to the Howrah Station with money to take delivery of the goods.

On the 27th Pursottom Lall caused Babu A. K. Mukerjee, a pleader of the Small Cause Court, to write to the defendant pointing out that the delivery order had been sent to him, and that he had not taken delivery of and paid for the goods, and calling upon him to pay for and take delivery of them within twenty-four hours. The letter ends: "In default of compliance my client will look to you for the difference between the contract rate and the market rate." In the meantime the defendant had returned the delivery order to Pursottom Lall, enclosed in a letter, dated the 26th of May (but which Pursottom alleged he did not receive till the 28th), demanding separate delivery orders in respect of each contract, and these delivery orders were delivered to the defendant on the morning of the 29th of May. They were addressed to Dumun Lall, who was the *gomasta* of Pursottom Lall, and are in this form:—

"*Re* Contract No. 29, dated 23-10 96, for 100 tons wheat.

"Please deliver to Messrs. Hurnand Roy Fulchand 100 tons wheat under the above contract on receipt of the price thereof and of gunny bags."

[148] "*Re* Contract No. 1299, dated 29-9-96, for 50 tons linseed.

"Please deliver to Messrs. Hurnand Roy Fulchand 50 tons linseed under the above contract on receipt of the price thereof and of gunny bags."

When these delivery orders were received by the defendant, his *gomasta* took them to Howrah Station with money to pay for the goods. He says: "I took more money with me than the amount that I calculated." (Shown Ex. B.) "This is the calculation: It amounts to Rs. 11,602-8, on the contract for 1,092 bags of wheat, and Rs. 305-12 is the price of gunny bags." (Shown D.) "The price of the 50 tons linseed was Rs. 6,649-8-0 and Rs. 190-15-6 for the gunny bags. The total is not given. The wagon-number or pile-number is always given in delivery orders. These particulars were not written on the delivery orders I got. I said to Dumun, 'give me the goods, give me all the particulars,' that is, as to which shed they were in, where they were. He said he nad no information as to the goods. Then I went to Mr. Farr's office and had a letter written." This meeting with Luchminarain on the 29th at Howrah was put to Dumun Lall in cross-examination, but he denied that he saw Luchminarain at Howrah on that day. I have no doubt that this denial is untrue. Mr. Pugh's letter of the 29th of May, contains a circumstantial account of that meeting, and had that portion of Mr. Pugh's letter been an invention of his clients, I have no doubt that Mr. Leslie would have said so in his letter in reply of the 31st May and would not have confined himself to the colourless statement "without admitting any of the statements contained in your letter." Dumun Lall, in cross-examination, was forced to admit that he was not in a position to point out the goods on the 29th, or give the wagon or pile numbers, and I have no doubt that he admitted his inability to do so to Luchminarain at Howrah on that day.

When Luchminarain went to Messrs. Farr and Pugh's office, on the 29th, he instructed Mr. Pugh to write the letter I have referred to above, in answer to the pleader's letter of the 27th, and in this letter, after detailing the interview at Howrah between the defendant's *gomasta* and Dumun Lall, he states this: "Our [149] clients' *monib gomasta* will attend at the Howrah Station again on Monday morning, and will again take with him the cash for payment of the goods, and we have to request that the sellers will be good enough to be in attendance prepared to furnish the wagon, and pillar or pile numbers, and to point out the goods intended to be delivered to our clients under the contracts above mentioned in the usual and customary manner, and will be present when samples for refraction are drawn and sealed. Meanwhile we are instructed to return the two delivery orders, which we do herewith, with the request that the sellers will add thereto the wagon and pillar numbers and return the delivery orders to our clients before 5 o'clock this afternoon."

These delivery orders were not returned to the defendant till the 31st, and then they were apparently in the same condition as before. They were enclosed in a letter from Mr. Leslie to Mr. Pugh, in which he says: "We are instructed to say that if your clients will call at Howrah at any time between 12 noon and 5 P. M. to-day with the delivery orders, which we return herewith, our client Babu Pursottom Lall, or his agent Dumun Lall, will point out the goods and give your clients delivery. We may mention that our client has made complete arrangements with Babu Hurdut Roy Chamaria, one of the leading produce dealers, for delivery of the goods sold to your clients, and your clients will be

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expected to pay for and take delivery thereof. Should your clients, however, fail to pay for and take delivery of the goods in terms of the contract, our client will hold them liable for the difference between the market rate and contract rate, and for any other loss and damage, costs, charges, and expenses he may suffer or sustain by reason of your clients' breach of contract."

This brings us to the 31st of May, the last day for giving delivery under these contracts, and the important question in this case is whether, as the plaintiff contends, Pursottom Lall made an offer of performance of each of the contracts on that day, which the defendant was bound to accept, or whether, as the defendant contends, no such offer of performance was made to him at all.

What took place at Howrah on the 31st is deposed to by all [150] the witnesses who were called. Mr. Leslie, his assistant Debendra Nath Ghose, the Small Cause Court pleader A. K. Mukerjee, with Hurnand Roy and Dumun Lall, were there, with Pursottom Lall, for the purpose of enabling the latter to perform his part of the contract. Mr. Pugh, with a Small Cause Court pleader and his clients' *gomasta* Luchminarain, went there, to enable the defendant to perform his part of the contract. It is strange that such an array of legal talent should be required to give and take delivery of 50 tons of linseed and 100 tons of wheat, if either party were really desirous of carrying out the contract, and I have no doubt that both parties were playing a game. Pursottom Lall wanted to put himself in a position to claim the difference between the contract rates and the market rates on the 31st of May without being compelled to deliver the goods covered by the contracts, and the defendant, on the other hand, was prepared to insist upon the actual delivery of the goods, because he believed that Pursottom Lall had no goods to deliver.

After the interview at Howrah Station between Dumun Lall and Luchminarain on the 29th, and Mr. Pugh's letter of the same day, it became clear to Pursottom Lall that he must endeavour to procure goods for the purpose of making a tender under his contracts, and in order to do this he came to an arrangement with Hurdut Roy Chamaria, the *banian* to Messrs. E. D. Sassoon and Co. on the 30th of May.

Hurdut Roy says of this arrangement: "Before I went to Howrah on 31st May there had been an arrangement between me and Pursottom Lall. Babu Pursottom Lall is a friend of mine. He requested me to give him some help in giving delivery of certain goods from Howrah, and he also requested me to go to Howrah for this purpose. The goods were wheat and linseed. He said to me 'I have sold goods to certain parties. If my buyers ask me for delivery of the goods, will you deliver goods to them on my behalf?' I said 'all right.'" Then, afterwards, on the 31st, he made over railway receipts for linseed and wheat to Pursottom Lall. Probably some were made over on the 30th. The goods covered by these railway receipts were not his, but the goods of the consignees who handed him the receipts on the 30th or the 31st [151] of May. He knew nothing about these goods himself, and he could not swear that the goods covered by the railway receipts had arrived on the 31st of May, or when they arrived. The receipts were handed over to Mr. Leslie, and he says that at Howrah Mr. Pugh came to him and said that he had come on behalf of Hurnand Roy Fulchand. He then tendered to Mr. Pugh seven separate railway receipts for 100 tons of wheat in all, and two railway receipts each for 25 tons of linseed. He says: "I believe I told Mr. Pugh the goods were ready for delivery. Mr. Pugh went with his client upstairs to

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the Goods Superintendent. I waited for some time, and as Mr. Pugh did not return, I went upstairs and found Mr. Pugh in consultation with the Goods Superintendent. I asked him if he had not made up his mind yet. He said he wanted the railway receipts which were endorsed by Hurdut Roy Chamaria, who, I believe, was the consignee named in the receipt. He wanted these receipts to be endorsed to Pursottom Lall, and then endorsed by Pursottom Lall to his client. I told Mr. Pugh it was wholly unnecessary as the goods were deliverable on the receipts in their present condition, they being endorsed by the consignee. Mr. Pugh tendered me a bundle of notes, which he said was the price of the goods: showed me a bundle of notes, which he said was the price of the goods, which he said he would not pay till he had the railway receipts indorsed by the buyers."

Mr. Leslie says the goods were in the Howrah Station at the time he tendered the receipts, and he again says: "It is perfectly true, as stated in my day book, that the goods were ready for delivery, and would be delivered on production of the railway receipts." But it is clear that Mr. Leslie is here expressing his belief, and is not speaking from actual knowledge. He was under the impression that the goods were Pursottom Lall's, and that they were sold to him by Hurdut Roy Chamaria on credit. That we know is not the case. He says he was taken to the godown and was shown the bags for delivery, but he did not check the bags, and I think the result of this evidence is that he believed the goods had arrived from what he was told and from the entries in the railway receipts. From the entry in receipt No. 4 (Ex. No. 1) it appears that the goods covered by [152] that receipt were not available for delivery until the 2nd of June 1897. Mr. Leslie does not seem to have observed whether the freight was paid for the goods covered by the receipts which he tendered to Mr. Pugh; we know now that it was not paid in respect of any of the goods covered by the receipts which he tendered to Mr. Pugh, and which were put in evidence at the trial. Mr. Leslie made this further statement which I think is important in this connection: "It was not suggested that the money should be paid before the receipts were given up; but I would have refused to give the receipts without the money. I said: 'Here are the receipts, give me the money, and I will give you the receipts.' I would not have parted with the receipts without getting the money. Hurdut Roy Chamaria had not yet been paid for the goods." He was recalled the next day and asked to explain that statement, and he says this: "I meant I would not have given up the receipts for the purpose of taking delivery of the goods mentioned in them without being paid for them, but my impression is that Mr. Pugh asked me to let him take them upstairs to the Goods Superintendent for the purpose of making enquiry about them, and that I did give them to him, not for the purpose of taking delivery of the goods on them."

It does not appear that Mr. Leslie knew at this time what the terms of the contracts were, and I take the result of his evidence to be this: that he was of opinion, and that he acted upon the opinion, that the tender of the receipts in their then form, and under the circumstances then existing, was equivalent to a delivery of the goods contracted for, and was sufficient to entitle him to demand immediate payment of the price of the goods.

Mr. Pugh's evidence is to the same effect. He says: "When I got to Howrah I saw Mr. Leslie. I said I had come to get delivery of the goods and had the money. He said 'Here are the railway receipts for 341 bags of linseed' and asked me to state if I would take them."

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" Q. " Take what" ?
" A. " Take delivery."

" I looked at the receipts, and said they were blank-endorsed by Hurdut Roy Chamaria. I then asked Mr. Leslie if he would let [153] me have the receipts. He said : 'Yes, if you will pay for them." I then asked him if he would wait a few minutes while I went and saw the Superintendent. He said 'All right.' Then Mr. Pugh went upstairs and saw the Superintendent, and while in conversation Mr. Leslie followed them. He then goes on to say : " Then Mr. Leslie came upstairs and asked me if I was prepared to take the receipts. Then we went down-stairs, and I said " you must have the receipts endorsed by Hurdut Roy Chamaria to Pursottom Lall, and by Pursottom Lall to my clients." I told him that in consequence of the conversation I had with Mr. Burbridge. Mr. Leslie said, 'there is no use in doing that, you must take them as they are.' Mr. Leslie then tendered me the receipts for the wheat: seven receipts. They were in the same condition when I saw them as the linseed ones. I said ' you must have them endorsed in the same way.' He said he would not do that. On that I said, ' all right,' I have got the money for all the goods here, and I will tender it to you. Do you want to take the numbers of the notes ? He said, ' no.' He then asked me if I would take the railway receipts as they then stood. I asked him if he would wait till I had seen Mr. Burbridge again. He said, ' No.' You must pay for them and take them now as they are. 'I can't wait any longer.' On that I said I would not take them and went away."

It appears that Mr. Pugh did not make any enquiries as to whether the goods were in the Howrah Station, and he took no objection on that ground, neither did he take any objection on the ground that the freight on the goods covered by the receipts had not been paid, though he knew that the freight had not been paid for the linseed. He insisted upon the special endorsement in consequence of the Goods Superintendent telling him that such an endorsement was necessary, as otherwise the delivery of the goods might be stopped by notice from Hurdut Roy Chamaria or the consignees. And with reference to the non-payment of freight, he says in his cross-examination : " If freight had not been paid on the goods, there would, I suppose, have been no difficulty in deducting the freight from the money, or deducting the demurrage from the money. As far as I know it has never been done."

[154] Now that being what occurred at Howrah, the question arises whether the plaintiff is right in his contention, that what Mr. Leslie did on the 31st of May was a sufficient offer of performance which the defendant ought to have accepted. This brings me to the terms of the contracts and of the railway receipts which were tendered by Mr. Leslie.

Under the first clause of the contracts the goods are to be delivered in dry, sound, and merchantable condition. Clauses 10, 11 and 12 are as follows :—

" 10. The goods to be tendered fully 48 hours before the expiration of the present term of 72 hours granted by the railway company in order to enable buyers to weigh, sample, and inspect the same, and the delivery not to be considered complete until the samples have been refracted and examined, and any dispute about quality, &c., settled.

" 11. If railway receipt be tendered, such to be handed to buyers 48 hours before the goods are liable to demurrage under the present terms of 72 hours granted by the railway company.

"12. Sellers must be present at the time of delivery to inspect the weighing and sampling; should they fail to do so after notice to sellers or to selling brokers, buyers will weigh and sample within usual railway working hours, and sellers must abide by the result."

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It is contended by the defendant that under these clauses he was entitled to have the goods themselves delivered to him, and a sufficient opportunity given to him to examine the goods for the purpose of seeing whether what was tendered to him was of the description, quality and quantity contracted for, and that he was not bound to pay for the goods until he should have had this opportunity, and the delivery should have become complete. He says it is clear that no such opportunity was allowed him, that Mr. Leslie's procedure was intended to force him to pay the price of the goods unconditionally upon tender of the railway receipts, and that, therefore, such a tender was not an offer of performance, such as he was bound to accept.

I think the defendant's contention is sound. I gather from [155] the evidence that Mr. Leslie would not have given up the receipts in order to enable the defendant to obtain delivery of the goods without first paying the price of the goods, and I do not think he was justified in taking up that position under the terms of the contracts. Besides, even if he were justified in taking up that position on the 31st of May 1897, the plaintiff must, in order to succeed, show that the goods covered by the railway receipts tendered to Mr. Pugh on behalf of the defendant, were goods of the description contracted for, and there is no evidence before me, upon which I can rely, to show that that was the case.

Again, the defendant contends that he was not bound to accept a tender of railway receipts for goods subject to demurrage, nor for goods not available for delivery on the 31st of May, nor for goods in respect to which the freight had not been paid at the time the receipts were tendered to him, and I am of opinion these contentions are also sound. Now when we turn to the receipts which have been put in evidence, that is to say four of those tendered to Mr. Pugh by Mr. Leslie, we find this:

From Ex. No. 1 which is a railway receipt for 136 bags of wheat, it appears that the goods were not available for delivery until the 2nd of June, and there was a sum of Rs. 214-4-0 chargeable for freight.

From Ex. No. 2, which is a railway receipt for 135 bags of wheat, it appears that there was a sum of Rs. 189-14-0 to pay for freight, and the goods were under demurrage on and before the 31st of May. These are two out of the seven receipts tendered by Mr. Leslie under the contract for 100 tons of wheat.

The other receipts have not been put in evidence and there is no evidence of their contents before me. I think the tender made under the wheat contract was wholly insufficient, even assuming that a tender would be good if made of clear receipts for available goods not subject to demurrage.

I am of the same opinion with reference to the receipts tendered in respect of the linseed contract. These show that the linseed covered by them was available on the 31st, and was not subject to demurrage, but upon one receipt there was a sum of [156] Rs. 280-10-0 payable for freight, and upon the other a sum of Rs. 316-3-0. I do not think a tender of these receipts was a sufficient tender.

The defendant objects to the tender of the railway receipts generally upon the ground that there had been no attornment to him by the railway company. He contends that, at the very least, it lay upon the plaintiff

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to show that had the defendant taken the receipt tendered to him, the railway company would have been bound to have delivered the goods to him on production of the receipt. I think that is a sound contention. We know that the company would not have delivered the goods without prepayment of the freight, and it appears from Mr. Pugh's evidence that the Goods Superintendent told him that, if the railway receipts were only blank endorsed, he would not deliver the goods to the defendant in case a notice to detain the goods was given him by the consignee.

It is contended by the plaintiff that the evidence of Duman Lall shows that they were prepared to deliver on the 31st of May the goods contracted for; but I do not so read his evidence. No doubt he said the goods covered by the railway receipts were at Howrah on the 31st of May, but in his cross-examination when Ex. No. 1 was shown to him he admitted that he could not say whether on the 31st of May there were goods ready for delivery against any of the railway receipts. He never inquired whether the freight had been paid. He states expressly that his master Pursottom Lall had nothing to do with the goods covered by the railway receipts, and his investigation of the goods, even according to his own statement, amounted to this, that, with respect to the goods mentioned in one or two of them, he compared the marks on the goods and the receipts for the goods.

The truth seems to be that neither Pursottom Lall, nor those assisting him on the 31st of May, had their attention directed to the goods themselves to any extent. They were dealing with the railway receipts, and it is clear that it was upon the railway receipts they depended for putting the defendant in the wrong and making him liable for the differences under the contracts.

Then it was also pointed out, on behalf of the plaintiffs, that [157] on the 31st of May no objection was taken on behalf of the defendant, on the ground that the tender was not in accordance with the contract, or that the freight was not paid, or that the goods covered by some of the railway receipts were not then available for delivery, and that, if these objections had been then taken, they would have been dealt with, and the goods would have been delivered in strict accordance with the terms of the contract. Assuming those things would have been done, though the evidence does not seem to me to lend much support to those assertions, I do not think the defendant was under any duty whatever to point out to Pursottom Lall that his tender was defective, or to give him an opportunity to supplement it. His duty arose under the contracts, when a sufficient offer of performance was made to him, and not till then.

It was contended further that as the defendant, when the railway receipts were tendered to him, only required that they should be endorsed in the special manner, he was not entitled now to rely on anything but the refusal of Pursottom Lall to so endorse them, and that the plaintiff was entitled to recover if he could show that the railway company would deliver the goods without this special endorsement. I do not think he has shown that; but apart from that, I do not think the contention is a sound one. If by virtue of the contracts the defendant was entitled to have certain things done in order that the offer of performance made to him should be binding on him, then I think he is now entitled to rely upon the position which his rights under the contract empowered him to take up on the 31st of May, no matter whether he took up that position then or not. It can only be on some ground of estoppel that he is disentitled to do so, and no estoppel

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could arise under the circumstances of this case. That a person who justifies an alleged breach of contract upon one ground only, which is found insufficient, is not for that reason disentitled to rely upon other grounds, which his rights under the contract entitle him to rely upon, has been recognised in many cases. See *Cowan* v. *Milburn* (1), *Mothoor-mohun Roy* v. *Bank of Bengal* (2).

[158] The plaintiff also sued to recover a sum of Rs. 85-5 as *assignee* of Pursottom Lall under the following circumstances :—

On the 23rd of October 1896 the defendant contracted to purchase 50 tons of wheat from Pursottom Lall at Rs. 4-4-10 per bazaar maund, delivery April aud May 1897; and on the 23rd of November 1896, the defendants contracted to sell 50 tons of the same quality of wheat, delivery April and May 1897, at Rs. 4-3 per bazaar maund. This portion of the claim was disputed in the defendant's written statement, but was admitted at the hearing. There will, therefore, be a decree for the plaintiff for the sum of Rs. 85-5.

I think the defendant is entitled to the general costs of the suit, but the costs incurred by the plaintiff in consequence of the defendant's not admitting the claim for Rs. 85-5 should be deducted from the general costs.*

Attorneys for the plaintiffs : Messrs. *Leslie and sons.*

Attorneys for the defendants : Messrs. *Farr and Pugh.*

H. W.

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CRIMINAL REVISION.

Before Mr. Justice Stevens and Mr. Justice Pratt.

BAJOO SINGH (*Petitioner*) *v.* QUEEN-EMPRESS (*Opposite Party*).†
[2nd November, 1898.]

Public servant—Penal Code (Act XLV of 1860), s. 21 *and* s. 186—*Surveyor employed by the Collector.*

The Collector acting in the management of a *khas mehal*, the property of the Government, is as much the Government within the meaning of s. 17 of the Penal Code, as when he is exercising any other of the duties of his official position. A surveyor employed by the Collector in the *khas mehal* department to make a survey of a certain portion of a water course is a "public servant" within the meaning of s. 21 of the Penal Code.

[159] *Reg.* v. *Ramajirav* (3) and *Chatter Lal* v. *Thacoor Pershad* (4), referred to.

[R., 11 Cr.L.J. 667 (671) = 8 Ind. Cas. 531.]

ON the application of certain *raiyats* of Kamalkhap, which is a *khas mehal* estate of the Government, the Deputy Collector of Gya ordered the Office Surveyor to prepare a map of a water course within the *mehal*, which order was confirmed by the Collector. The accused came to the spot with four or five other persons and obstructed the surveyor in his work, and the latter was compelled to retire without making any survey

* An appeal was brought in this case, but was struck off for defaultin appearance.—ED.

† Criminal Revision No. 730 of 1898, made against the order passed by Babu Trailakya Nath Bhuttacharjee, Deputy Magistrate of Gya, dated the 3rd of August 1898.

(1) (1867) L.R. 2 Exch. 230. (2) 3 C. 392.
(3) 12 B. H.C. 1. (4) 18 C. 518.

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of the water-course. He submitted his report complaining against the accused, who was convicted by the Deputy Magistrate of Gya and sentenced to pay a fine of Rs. 20, or in default to undergo rigorous imprisonment for three weeks. The accused moved the High Court and obtained a rule.

Babu *Dasrathi Sanyal* appeared on behalf of the accused.

No one appeared on behalf of the Crown.

The judgment of the High Court (STEVENS and PRATT, JJ.) was as follows :—

JUDGMENT.

The petitioner in this case was convicted under s. 186 of the Indian Penal Code of voluntarily obstructing a public servant in the discharge of his public functions. The officer obstructed in the present case was a surveyor employed by the Collector in the *khas mehal* department, and the functions in which he was obstructed were making a survey of a certain portion of a watercourse which was in dispute. It has been contended before us that a distinction must be drawn between the Government in the exercise of its functions as a proprietor of an estate and in that of its duties of general administration, and that looking to the definition of the word "Government" in s. 17 of the Indian Penal Code, the surveyor obstructed in the present case was not a servant of the Government. In support of this contention, two cases have been cited to us, *Reg.* v. *Ramajirav* (1), *Chatter Lal* v. *Thacoor Pershad* (2). Neither of these cases is in point. Neither of them deals with the question before us. In each case it was decided that the particular person in question in that case was not a public servant within the definition in s. [160] 21 of the Indian Penal Code. We think that the contention is unfounded. We think that the Collector, acting in the management of a *khas mehal*, the property of the Government, is as much the Government within the meaning of s. 17 of the Indian Penal Code as when he is exercising any other of the duties of his official position. It seems to us that the 9th clause of s. 21, which contains the definition of the term "public servant," is intended to include officers whose business it is to care for the pecuniary interest of the Government. We think that the surveyor in the present case was a public servant, and that the duty upon which he was engaged, when he was obstructed, was a public duty. We therefore discharge the rule.

S. C. B. *Rule discharged.*

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(1) 12 B.H.C. 1. (2) 18 C. 518.

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APPELLATE CIVIL.

Before Mr. Justice Banerjee and Mr. Justice Stevens.

SHYAMA CHARAN MANDAL (*Plaintiff*) v. HERAS MOLLAH AND OTHERS (*Defendants*).* [15th July, 1898.]

Interest—Interest on arrears of rent—Waiver—Omission to claim rent for some years at the stipulated rate, whether amounts to a waiver—Evidence Act (I of 1872), s. 92—Evidence of conduct, whether admissible in evidence.

The mere omission to claim interest for some years from a tenant at the rate stipulated in the lease does not amount to a waiver of the landlord's right to claim interest at such rate.

Johoory Lall v. *Bullab Lall* (1), followed.

Evidence of conduct, as for instance return of the lease, is admissible in evidence under s. 92 of the Evidence Act to prove that such return was due to an intention to make the lease inoperative.

Preonath Shaha v. *Madhu Sudan Bhuiya* (2), followed.

[Cons., 13 C.L.J. 284 (287)=8 Ind. Cas. 47.]

[161] THIS appeal arose out of an action brought by the plaintiff to recover arrears of rent with interest and cesses. The claim for interest was in accordance with a *kabuliat* executed by the defendants. The defence was that, although the *kabuliat* was executed by the defendants, they were not liable to pay interest at more than 12 per cent. per annum, inasmuch as the *kabuliat* was not made over to them, and therefore it was not intended to be operative.

The Munsif decreed the plaintiff's suit in full and allowed interest at the rate stipulated in the *kabuliat*. On appeal, the Subordinate Judge varied the decision of the Munsif, holding that the plaintiff was not entitled to the interest at the rate stipulated in the *kabuliat*, inasmuch as it became inoperative on its having been returned to the executant immediately after registration, and that the stipulation for interest was rather hard and was never enforced. From this decision the plaintiff appealed to the High Court.

Dr. *Ashutosh Mookerjee*, for the appellant.

Babu *Saroda Churn Mitter*, for the respondents.

The judgment of the High Court (BANERJEE and STEVENS, JJ.) was as follows:—

JUDGMENT.

BANERJEE, J.—In this appeal, which arises out of a suit for arrears of rent, the question for consideration is, whether the Court of appeal below is right in disallowing the claim for interest at the rate mentioned in the *kabuliat*, dated the 21st Bysack 1280. The learned vakil for the plaintiff-appellant contends that the lower appellate Court is wrong in not allowing interest at the rate mentioned in the *kabuliat*, as the grounds upon which it has based its decision are wrong in law.

Now the grounds upon which the lower appellate Court has held that the plaintiff is not entitled to interest at the rate mentioned in the *kabuliat*

* Appeal from Appellate Decree No. 828 of 1897, against the decree of Babu Rajendra Kumar Bose, Subordinate Judge of 24-Pergunnahs, dated the 30th January 1897, modifying the decree of Babu Hari Nath Roy, Munsif of Baruipore, dated the 31st of July 1896.

(1) 5 C. 102. (2) 25 C. 603.

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are given in the following passage of the judgment: "The contention on the part of defendant-appellant is that this *kabuliat* became inoperative on its having been returned to the executant immediately after registration at his request by the zemindar's *naib* on the complaint of the [162] executant; that the stipulation of interest was rather hard; that this stipulation as to interest was never enforced; and that therefore the defendant is not bound to pay interest at the rate demanded. It appears to me that there is much force in this contention, regard being had to the fact that the original *kabuliat* has been produced in the case by the defendant, and to the absence of evidence on the side of the plaintiff as to interest having ever been realised at the rate specified in the *kabuliat.* There is no foundation for plaintiff's allegation that this *kabuliat* was conclusively made over by the defaulting *putnidar*, Mohendra, to the present defendant, with a view of thwarting plaintiff's claim. Taking all things into consideration, I am of opinion I would not be justified in allowing the exorbitant rate of interest provided in the *kabuliat*, which is now sought to be enforced against the defendant."

It is argued that the two grounds upon which interest at the stipulated rate has been disallowed are, *first*, that there has been a waiver of the right created by the *kabuliat* by reason of the non-realization of the interest at the stipulated rate: and, *second*, that the *kabuliat* has become inoperative by reason of the return of the document to the defendants; and it is urged that both these reasons are bad in law, the first, bad in law, because mere omission to claim interest at the stipulated rate cannot amount to waiver, as has been held in the case of *Johoory Lall* v. *Bullab Lall* (1), and the second, bad in law, because it is contrary to the provisions of s. 92 of the Evidence Act, as has been held in the case of *Umedmal Motiram* v. *Davu* bin *Dhondiba* (2).

No doubt, the case of *Johoory Lall* v. *Bullab Lall* (1) is authority for the contention that the mere omission to claim interest for past years from a tenant cannot amount to a waiver of the landlord's right to claim interest at the stipulated rate. The decision of the lower appellate Court is, however, based, not merely upon the omission of the plaintiff to claim interest at the stipulated rate, but is based upon another ground besides, *viz.*, the [163] return of the *kabuliat* to the tenant-defendant, the validity of which will be considered presently.

It was further argued that, in the absence of anything to show that any occasion arose for claiming interest at the stipulated rate, the Court of appeal below was wrong in attaching any weight to the mere absence of evidence on the side of the plaintiff as to interest having ever been realised at the rate specified in the *kabuliat.* But this objection is met by the finding of the first Court on point No. 1—a finding which has not been displaced by the appellate Court, from which it would appear that occasions did arise for claiming interest.

This brings us to the consideration of the second branch of the appellant's contention. No doubt s. 92 of the Evidence Act would exclude the evidence of any oral agreement or statement to rescind or to contradict the document in this case, having regard to the provisions of proviso 4 of that section. But as we understand the contention of the defendant and the judgment of the lower appellate Court, what has been given effect to as making inoperative the *kabuliat* relied upon by the plaintiff in this case is not any oral agreement or statement rescinding the

(1) 5 C. 102. (2) 2 B. 547.

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kabuliat, but the evidence of conduct amounting to waiver of the right created in favour of the plaintiff by the *kabuliat*; and such evidence is not, in our opinion, excluded by the provisions of s. 92 of the Evidence Act. The view we take is in accordance with the decision of the Full Bench in the case of *Preonath Shaha* v. *Madhu Sudan Bhuiya* (1), where it was held that oral evidence of the acts and conduct of parties, such as oral evidence, that possession remained with the vendor, notwithstanding the execution of a deed of out and out sale, is admissible to prove that the deed was intended to operate only as a mortgage.

Last of all it is contended that the lower appellate Court has not distinctly found any waiver of the right created by the *kabuliat*, and that in fact it does not find that the stipulation relating to interest contained in the *kabuliat* has become inoperative, all that it says being that it would not be justified in allowing the exorbitant rate of interest provided for in the *kabuliat*.

[164] The language of the Subordinate Judge may not be very happy, but his meaning, taking his judgment as a whole, is, in our opinion, very clear. For he sets out the contention of the defendant that by reason of the return of the *kabuliat* the stipulation about interest became inoperative; he observes that the contention has much force; and he comes to the conclusion that the rate of interest provided for in the *kabuliat* was not one that the plaintiff was entitled to enforce. He also finds that the case set up by the plaintiff that the return of the *kabuliat* was a fraudulent act on the part of the defaulting *putnidar* was unfounded.

Taking all this into consideration, we think that the lower appellate Court has, in effect, come to the conclusion that the stipulation in the *kabuliat* regarding interest has become inoperative.

The result is that the contentions urged before us fail, and the appeal must be dismissed with costs.

S. C. G. *Appeal dismissed.*

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26 C. 164 = 3 C.W.N. 290.

APPELLATE CIVIL.

Before Mr. Justice O'Kinealy and Mr. Justice Hill.

SHEODENI TEWARI AND OTHERS (*Plaintiffs*) *v.* RAM SARAN SINGH AND OTHERS (*Defendants*).* [13th December, 1898.]

*Transfer of Property Act (IV of 1882), s. 99—Sale of mortgaged property—*Zuripeshgi *mortgage—Purchase by the mortgagee.*

Section 99 of the Transfer of Property Act (IV of 1882) applies to *zuripeshgi* mortgages, and a purchase of the mortgaged property by the mortgagee in execution of a decree for rent due by the mortgagor under a *katkina* lease of the property, was held to be not merely irregular, but absolutely void.

[**Diss.**, 35 C. 61 = 6 C.L.J. 320 = 11 C.W.N. 1011 (**F.B.**); 8 O.C. 327 (334); **N.F.**, 27 A. 517 (522) = 2 A.L.J. 210 = A.W.N. (1905) 80; **F.**, 33 C. 113 (115); 33 C. 283 (285); **R.**, 4 O.C. 231 (233).]

THE facts material to this report and the arguments on both sides appear from the judgment of the High Court.

The plaintiffs appealed to the High Court.

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* Appeal from Appellate Decree No. 805 of 1897, against the decree of F. H. Harding, Esq., District Judge of Shahabad, dated the 8th of February 1897, affirming the decree of Babu Madhub Chundra Chakravarti, Subordinate Judge of that District, dated the 20th of December 1895.

(1) 25 C. 603.

1898 DEC. 13. — APPELLATE CIVIL. — 26 C. 164 = 3 C.W.N. 290.

Dr. *Rash Behari Ghose* and Babu *Jogendra Chandra Ghose*, for the appellant.

[165] Babu *Saligram Singh* and Babu *Raghunandan Prasad*, for the respondents.

The judgment of the High Court (O'KINEALY and HILL, JJ.) was as follows:—

JUDGMENT.

In this case one Kunj Behari Singh executed a mortgage in favour of the predecessor of the plaintiffs. He nevertheless held under a *katkina* lease, which was granted on the same day, and which covered the mortgaged property. The plaintiffs brought a suit for arrears of rent on the *katkina* lease, sold a 2 annas share of the mortgaged property, and purchased it themselves. They now sue for possession of the property as auction-purchasers.

Among other defences that have been raised in the suit is one that under s. 99 of the Transfer of Property Act the plaintiffs are prohibited from buying the equity of redemption in respect of the property over which they hold a mortgage, and that the remedy, if any, must be the remedy given by that section. This contention has received the approbation of both the lower Courts, where the suit has been dismissed.

In second appeal it has been argued that s. 99 of the Transfer of Property Act is a section of procedure, and the property in this case having been sold by a Court of competent jurisdiction at the instance of the plaintiffs and bought by them, the sale is not void or voidable; and, secondly, it has been contended that as the mortgage in question is a purely usufructuary mortgage, the mortgagees have no right to sell under s. 67 of the Transfer of Property Act, and consequently it is unreasonable to suppose that the provisions of s. 99 of the Act apply to such a mortgage.

Section 99 of the Transfer of Property Act runs as follows:— "Where a mortgagee in execution of a decree for the satisfaction of any claim, whether arising under the mortgage or not, attaches the mortgaged property, he shall not be entitled to bring such property to sale otherwise than by instituting a suit under s. 67, and he may institute such suit notwithstanding anything contained in the Code of Civil Procedure, s. 43."

[166] This section is to be found in chap. IV of the Act, which, as may be seen from s. 58, applies to all mortgages, a simple mortgage, a mortgage by conditional sale, an usufructuary mortgage, and an English mortgage. There are no words in the section limiting the word "mortgagee" to a mortgagee holding under a particular form of mortgage; and the ordinary meaning of the language of s. 99 would be that it prohibits the sale of the property mortgaged in all cases save in a suit brought under s. 67. Nor does there appear to us to be anything in the argument that s. 99 does not apply if a suit to sell does not lie under s. 67. The words of the section are general and uncontrolled. To accept the contention would be that, we should be compelled to read into the section the words "that if under the terms of the mortgage no suit can be brought under s. 67, the mortgagee can sell the equity of redemption." There are no such words in the section, and if we were to add them, instead of interpreting the law, we should be legislating. Nor do we think that the section contemplates merely a matter of procedure, and that a sale wrongly made would be merely irregular. The tenor of the decisions of the different High Courts is that the sale is void, and we are of the same opinion.

The appeal is dismissed with costs.

S. C. C. *Appeal dismissed.*

26 C. 166=3 C.W.N. 8.

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APPELLATE CIVIL.

26 C. 166= 3 C.W.N. 8.

APPELLATE CIVIL.

Before Mr. Justice Ghose and Mr. Justice Rampini.

LAL BEHARY SINGH AND ANOTHER (*Judgment-debtors*) *v.* HABIBUR RAHMAN AND OTHERS (*Decree-holders*).* [23rd August, 1898.]

Decree—Form of decree—Mortgage decree—Transfer of Property Act (*IV of* 1882), *decree regarded as mortgage-decree under—Sale of mortgaged property in execution of decree.*

In a suit for recovery of mortgage money by sale, brought after the Transfer of Property Act (IV of 1882) had come into force, the decree of the Court was: "that a decree be passed in favour of the plaintiffs in respect [167] of Rs. 5,387-10-13, together with costs and interest at the rate of 6 per cent. per annum up to the date of realization, and that the mortgaged properties be made liable (*pae band kea jae*) for realization of the decretal money."

Held, that the decree was to be regarded as a mortgage-decree governed by the Transfer of Property Act, though not made in the form prescribed by that Act; and it followed that it was not open to the decree-holder to proceed against properties other than the mortgaged properties before exhausting the latter, and without obtaining an order under s. 90 of the said Act.

Jogemaya Dassi v. *Thackomoni Dassi* (1); and *Fazil Howladar* v. *Krishna Bandhoo Roy* (2), referred to. *Chundra Nath Dey* v. *Burroda Shoondury Ghose* (3), distinguished.

[R., 22 A. 401 (403)=A.W.N (1900) 131; 8 A.L.J. 418=10 Ind. Cas. 481 (483); 4 C. L.J. 533; 16 C.L.J. 318 (320); 17 C.W.N. 1039 (1041)=20 Ind. Cas. 829; 18 C. L.J. 133=19 Ind. Cas. 971 (972); 2 O.C. 337 (339); 5 S.L.R. 71 (74)=11 Ind. Cas. 192.]

THE facts material to this report and the arguments on both sides appear sufficiently from the judgments of the High Court. The judgment-debtors appealed to the High Court.

Babu *Karuna Sindhu Mukerjee*, for the appellants.

Moulvie *Syed Shamsul Huda*, for the respondents.

The judgments of the High Court (GHOSE and RAMPINI, JJ.) were as follow:—

JUDGMENTS.

GHOSE, J.—The question raised in this appeal is what may be the true effect of a decree passed between the parties on the 24th June 1896. The suit, in which this decree was passed, was a suit for a certain amount of money, as rent based upon a mortgage bond. In execution of the decree, the decree-holder asked that certain properties, other than those mentioned in the mortgage, should be sold in satisfaction of his claim. The judgment-debtors opposed the application upon the ground that, as this was a mortgage-decree, it was not open to the decree-holder to sell these properties without exhausting the mortgaged properties.

The Court below has acceded to the prayer of the decree-holder, and the judgment-debtor has preferred this appeal impugning the correctness of that order.

It has been argued before us by the learned vakil for the decree-holder that the decree should be construed to be a simple [168] money-decree, a lien being declared on the properties mortgaged. The contention on the other side is that it should be regarded as a mortgage-decree under

* Appeal from Original Order No. 127 of 1898, against the order of Babu Hemango Chunder Bose, Subordinate Judge of Patna, dated the 13th of April 1898.

(1) 24 C. 473. (2) 25 C. 580. (3) 22 C. 813.

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the Transfer of Property Act though not in the form prescribed by that Act.

The suit was instituted upon the mortgage after the Transfer of Property Act came into force; and there can be no doubt that so far as the mortgagee, the plaintiff in the suit, was concerned, he asked for the reliefs indicated in that Act, one of the reliefs being "that the mortgaged properties be sold for satisfaction of his claim, if the mortgagor fails to pay up within the time which the Court may allow." But the Subordinate Judge, who made the decree, did not apparently follow the clear directions in the Act; and he worded the decree as follows: "It is ordered and decreed that a decree be passed in favour of the plaintiff in respect of the sum of Rs. 5,387-10-13, together with costs and interest at the rate of six per cent. per annum up to the date of realization, and that the mortgaged properties be made liable (*pae bund kea jae*) for realization of the decretal money." It is to be regretted that the Subordinate Judge should, in spite of the clear directions in the Transfer of Property Act, not have taken care to draw up a decree as the law directs. But, however that may be, the question that we have to consider in this appeal is whether the decree, as made, can be regarded as a mortgage-decree governed by the Transfer of Property Act, or whether it is a simple money-decree, with a lien only being declared upon the mortgaged properties.

In the case of *Jogemaya Dassi* v. *Thackomoni Dassi* (1), which was decided by a Bench of three Judges of this Court, a question similar to that which arises in this appeal was discussed, and the learned Chief Justice in delivering judgment, referring to the terms of the decree which then came before the Court for consideration, expressed himself as follows: "In my opinion this was a mortgage-decree, though not in the form prescribed by the Transfer of Property Act, which came into force on the 1st July 1882, but in the form in which, as I understand, such decrees had been for many years, and were drawn up in the Mofussil Courts. [169] The decree provides for the payment of the mortgage debt, for the realization of the mortgaged property and payment thereout of the mortgage debt. The claim in this suit, it may be observed, asks that the claim, *i.e.*, the money claim, should be realized out of the mortgaged property, and failing that, from any other property of the defendant. I think the decree of 1882 was a mortgaged-decree, *i.e.*, a decree made in a suit to enforce the mortgage in which the mortgagee asked, not merely for a personal judgment against his debtor, but for the realization of the mortgaged property to satisfy his claim." The terms of the decree which the learned Judges in that case were called upon to consider were as follows: "It is ordered that the suit be decreed, and that the defendant do pay to the plaintiff the amount claimed with interest thereon at the rate of 1 per cent. per month during the pendency of the suit and costs of this case; the whole to bear interest at the rate of ½ per cent. per month from this date to the date of realization, to be realized from the property mortgaged and other properties of the defendant." Mr. Justice Macpherson, who concurred with the Chief Justice in the view that he adopted, said as follows: "But it seems to me that the decree of 1882 is in substance a decree for the sale of the mortgaged properties. It sets out those properties, and directs that the sum decreed should be realized from them, which can only mean by the sale of them, and that was the relief asked for in the suit. Assuming that ss. 88 and 89 of the Transfer of Property Act, which came into force while

(1) 24 C. 473.

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the suit was pending, applied to the suit, the decree was not, it is true, made in conformity with them, as, instead of making a decree *nisi* followed by a decree absolute, the Court at once made a decree absolute. But the decree has never been questioned, and is now a final decree as between the parties. The case of *Chundra Nath Dey* v. *Burroda Shoondury Ghose* (1)" (to which I shall have to refer presently) "is distinguishable, as the Court there in effect held that there was no decree for sale," and so on. In a subsequent case before the learned Chief Justice and Mr. Justice Banerjee, *Fazil Howladar* v. *Krishna Bandhoo Roy* (2) the learned Judges [170] had also to consider the effect of a decree in somewhat similar terms; and they agreed with the decision come to in the case of *Jogemaya Dassi* v. *Thackomoni Dassi* and held that the decree was a mortgage-decree. The terms of the decree ran as follows: "It is ordered that the suit be decreed *ex parte*, and the sum of Rs. 323 claimed (in the suit), and the costs of this suit Rs. 34-8, with interest at six per cent. per annum from this day till the date of realization, plaintiff do get from the hypothecated property. If insufficient, defendant to remain personally liable." And it was held, as I have already said, that this ought to be regarded as a mortgage-decree in terms of the Transfer of Property Act.

In the case of *Chundra Nath Dey* v. *Burroda Shoondury Ghose* (1), referred to in the judgment of Macpherson, J., in *Jogemaya Dassi* v. *Thackomoni Dassi* (3), and upon which reliance has been placed by the learned vakil for the decree-holder, the terms of the decree which had to be considered by the Court were: "The suit is decreed *ex parte*. The plaintiff to obtain the amount of his claim and costs of the suit with interest at six per cent. per annum until the date of realization, and the mortgaged property to remain liable for the satisfaction of the debt, &c." And it was held that this was not a mortgage-decree, and that it was not, therefore, governed by the Transfer of Property Act.

It seems to me upon a consideration of the different rulings that the question for consideration in a case like this is, whether there is an order in the decree for sale of the mortgaged properties, or the decree simply declares a lien upon those properties. As already stated, the mortgagee in the present case unquestionably asked for a decree in terms of the Transfer of Property Act and for the sale of the properties mortgaged. The Court, however, did not make a decree in exact terms of that Act. But there can be no doubt that what the Court really meant to do, and did, was to make a decree ordering that the properties mortgaged be sold for the realization of the amount decreed to the mortgagee. The terms of the decree are more similar to those in the cases of [171] *Jogemaya Dassi* v. *Thackomoni Dassi* and *Fazil Howladar* v. *Krishna Bandhoo Roy*, to which I have already referred, than the terms which had to be considered in the case of *Chundra Nath Dey* v. *Burroda Shoondury Ghose*.

In this view of the matter, the decree in question should, in my opinion, be regarded as a mortgage-decree governed by the Transfer of Property Act, though not made in the form prescribed by that Act. It follows from this that it is not open to the decree holder to ask in the first instance for the sale of properties other than the properties mortgaged before exhausting the mortgaged properties, and without obtaining an order such as is prescribed by s. 90 of the Transfer of Property Act.

The result is that this appeal must be allowed, the decree-holder being at liberty to proceed against the mortgaged properties in the first instance,

(1) 22 C. 813. (2) 25 C. 580. (3) 24 C. 473.

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and then to take such steps as he may be advised, to sell the other properties of the judgment-debtor.

RAMPINI, J.—I cannot think that the decree in this case can properly be said to be a decree under the provisions of the Transfer of Property Act. The decree is to the effect that, "the mortgaged property shall be made liable (*pae bandh*) for the realization of the decretal amount." The vernacular expression *pae bandh* means "tied by the leg" or "fettered" —that is "*incumbered.*" It does not seem to me to imply *sale*. No doubt the decree directs that the mortgaged property shall be "*made*" liable. But this is certainly not a clear direction that the property is to be sold. The mortgagee undoubtedly in para. 3 of his plaint asked for a decree under the provisions of the Transfer of Property Act, but the Court, whether intentionally or through inadvertence, does not appear to me to have given him such a decree as he sought for. I am supported in this view by the case of *Chundra Nath Dey* v. *Burroda Shoondury Ghose* (1). The decree in that case was to the effect that the property was "to remain liable for the satisfaction of the debt." On the other hand the cases of *Jogemaya Dassi* v. *Thackomoni Dassi* and *Fazil Howladar* v. *Krishna Bandhoo Roy* have been referred to on behalf of the appellant. These are no doubt authorities for holding that a [172] decree, such as the present one, though not in form a decree under the provisions of the Transfer of Property Act, may yet be regarded and given effect to as such.

Personally, I am most reluctant to put any obstacle in the way of decree-holders who seek to recover monies, which Courts after full enquiry have held them to be entitled to. But in the face of the two last mentioned rulings, I do not think I would be justified in dissenting from the conclusion at which my learned brother has arrived in this case. I, therefore, concur in decreeing this appeal.

S. C. C. *Appeal allowed.*

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26 C. 172.

APPELLATE CIVIL.

Before Mr. Justice Ghose and Mr. Justice Rampini.

RAJBUNS SAHAI (*Defendant No.* 2) *v.* KAMESHAR PROSAD (*Plaintiff*) AND ANOTHER (*Defendant*).* [7th September, 1898.]

Public Demands Recovery Act (*Bengal Act VII of* 1880), *s.* 8, *cl.* (*b*) *and s.* 12—*Suit to set aside certificate and sale—Limitation.*

A certificate was issued under the Public Demands Recovery Act (Bengal Act VII of 1880), and notice under s. 10 of the Act was served on the 12th December 1895. The debtor objected under s. 12 on the ground that no arrears were due, but the objection was overruled, on his failure to produce evidence, on the 7th August 1895, and the sale took place on the 10th August 1895. In a suit brought on the 8th August 1896 to set aside the certificate and the sale,

Held, that the terms of s. 8, cl. (*b*) providing the limitation of one year from the date of service of notice are peremptory, and in no way controlled by the provisions of s. 12, and the suit in respect of the certificate was, therefore, barred by limitation.

Held, also, that if the certificate cannot be cancelled, the sale held in execution of it also cannot be cancelled.

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* Appeal from Appellate Order No. 343 of 1897, against the order of H. Holmwood, Esq., District Judge of Gya, dated the 24th of August 1897, reversing the order of Moulvie Abdul Bari, Munsif of Gya, dated the 27th of February 1897.

(1) 22 C. 813.

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THE respondent Kameshar Prosad brought this action against the Secretary of State for India in Council and one Rajbuns Sahai, the appellant, to set aside a certificate under the Public Demands Recovery Act (Bengal Act VII of 1880), and the [173] sale in execution of the certificate, at which Rajbuns purchased the property sold. The facts material to this report appear from the judgment of the High Court. The question argued was whether the suit was barred by limitation.

The defendant Rajbuns Sahai appealed to the High Court.

Babu *Durga Das Dutt*, for the appellant.—The plaintiff's case was based on the objection that no arrears were due; but the District Judge overruled the plea of limitation on the ground of informalities in the certificate—a ground not taken by the plaintiff in the plaint and not relevant to the decision of the plea of limitation. The certificate, however, substantially complied with the requirements of law. The suit is barred whether it is governed by s. 8, cl. (*b*) of Act VII of 1880 or by s. 15 of Act I of 1895.

Moulvie *Mahomed Yusuf*, (Babu *Umakali Mukerjee* with him), on behalf of the respondent Kameshar Prosad, contended that the suit was not barred. Section 8, cl. (*b*) should be read with s. 12 of Act VII of 1880. The question of liability was not decided either in February or in August 1895, as required by s. 12, and the provision of limitation in s. 8, one year from service of notice, does not apply to the present case. The suit having been instituted within one year from the date of sale is within time. The case of *Baijnath Sahai* v. *Ramgut Singh* (1) was cited.

Babu *Ram Charan Mitra* and Babu *Lal Mohan Das*, appeared for the Secretary of State for India.

The judgment of the High Court (GHOSE and RAMPINI, JJ.) was as follows:—

JUDGMENT.

This appeal arises out of a suit to set aside a certificate issued by the Collector under the provisions of the Public Demands Recovery Act (Bengal Act VII of 1880), and the sale which took place in execution of that certificate. It appears that the certificate in question was issued on the 12th November 1894, and notice was served upon the plaintiff in terms of s. 10 of the Act on the 12th December 1894. Subsequently, on [174] the 9th January 1895, the plaintiff applied to the Collector, apparently under the provisions of s. 12 of the Act, to have the certificate cancelled upon the ground that no arrears were due from him. An order was recorded on this application on the 28th February 1895, which may be taken to imply that the Collector meant to hold that the plaintiff was liable to pay the arrears demanded. But, however that may be, the matter was again placed before the same authority on the 7th August 1895, when the order recorded was that, no evidence having been produced on behalf of the petitioner, the objection must be overruled. Thereupon the property, which had been attached in pursuance of the provisions of the Act, was ordered to be sold, and the sale took place on the 10th August 1895. The present suit, however, was not instituted until the 8th August 1896, that is to say, within a year from the date of sale, but after a year from the date when notice under s. 10 of the Act was served upon the plaintiff.

The Munsif dismissed the suit. The learned District Judge on appeal has reversed the Munsif's decree, being of opinion that the certificate

(1) 23 C. 775 = 23 I. A. 45.

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issued by the Collector was not in accordance with the form prescribed by the Act itself; that therefore it ought not to be treated as a decree under the provisions of the Act, and that necessarily the sale that took place in execution of it was a bad sale, and should therefore be set aside.

It appears to us, however, that the plaintiff is not entitled to the remedy he seeks in this case, and for this simple reason: Referring to s. 8, cl. (*b*), of Bengal Act VII of 1880, it will be found that a "judgment-debtor may at any time within one year after service upon him of such notice as is mentioned in s. 10 bring a suit in the Civil Court to contest his liability to pay the amount stated in the said certificate, and to have such certificate cancelled, but no such suit shall be entertained unless such judgment-debtor has stated in a petition presented to the Collector under s. 12 the ground upon which he claims to have such certificate cancelled, or unless, having omitted to state such ground in such petition as aforesaid, he can satisfy the Civil Court that there was good reason for **[175]** such omission. If no such suit is instituted within the said period of one year, or if any such suit having been instituted is decided against such judgment-debtor, such certificate shall become absolute, and shall have, to all intents and purposes, the same force and effect as a final decree of a Civil Court."

The law seems to us to be clear enough. It provides that if the judgment-debtor desires to contest the propriety of the certificate served upon him under s. 10 of the Act, he must bring a suit for that purpose within a year from the date of the service of such certificate; but if he fails to do so, the certificate shall have the force and effect of a final decree of a Civil Court. In the present case the plaintiff did not bring his suit to have the certificate cancelled within a year as provided in cl. (*b*), s. 8, and therefore it seems to be obvious that it is not open to him to ask the Civil Court to determine any question as to the propriety or otherwise of the certificate.

The learned vakil for the respondent, however, has contended that s. 8, cl. (*b*) should be read as controlled by s. 12 of the same Act, and that unless there be a determination as prescribed by that section, it is not incumbent on the judgment-debtor to bring a suit within a year from the date of service upon him of the certificate.

There are, we think, two answers to this argument: *first*, there *was* a determination of the matter that was placed before the Collector by the plaintiff on the two dates that we have already mentioned, namely, the 28th February and 7th August 1895. It may be that the Collector did not fully give his reasons for thinking that the arrear demanded was due by the plaintiff, but that would not make his order in any way less a determination of the matter that was before him upon the petition made by the plaintiff. We think that there was a determination in accordance with the requirements of s. 12. The *second* answer to the respondent's argument is this: Supposing that there was no determination in accordance with the provisions of s. 12, still the terms of s. 8, cl. (*b*) are peremptory, when it prescribes that, unless a suit is brought within a year from the date of service upon the judgment-debtor of the notice issued under **[176]** s. 10, the certificate shall have the force and effect of a final decree of a Civil Court.

It appears to us that s. 8 is in no way controlled by the provisions of s. 12 of the Act. That being so, it seems to us that the adjudication of the matter which the plaintiff has asked for in the present case is barred by the provisions of s. 8, cl. (*b*), of Bengal Act VII of 1880. So far as the sale is concerned, it depends upon the question of the propriety

of the certificate issued by the Collector on the 12th November 1894. If that certificate cannot be cancelled, the sale which was held in execution of it cannot equally be cancelled.

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We set aside the order of the lower appellate Court and restore that of the Court of first instance dismissing the suit of the plaintiff.

We make no order as to costs.

S. C. C. *Appeal allowed.*

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26 C. 176.

APPELLATE CIVIL.

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, and Mr. Justice Banerjee.

KARUNA MOYI BANERJEE (*Decree-holder*) *v.* SURENDRA NATH MOOKERJEE AND ANOTHER (*Judgment-debtors*).*
[15th August, 1898.]

Bengal Tenancy Act (*VIII of* 1885), s. 148, *cl.* (*h*)—*Rent-decree—Decree for arrears of rent—Application for execution by the assignee of such a decree—Code of Civil Procedure* (*Act XIV of* 1882), s. 316.

An application for execution, by the assignee of a decree which was obtained by a landlord against a defaulting tenant, for arrears of rent which accrued due, between the date of the sale of the tenure in execution of a previous decree for arrears of rent, and the date of the confirmation of such sale, is barred by cl. (*h*) of s. 148 of the Bengal Tenancy Act, as being one for the execution of a decree for arrears of rent.

[**Rel.**, 10 C.W.N. 44 (46); **R.**, 7 A.L.J. 893=7 Ind. Cas. 409 (410); **Cons.**, 1 C.L.J. 500 (510).]

THIS appeal arose out of an application for execution by the assignee of a decree. The decree was obtained by the landlord against a defaulting tenant for rent which accrued due between **[177]** the date of the sale of the tenure in execution of a previous decree for arrears of rent, and the date of the confirmation of such sale. The judgment-debtors objected to the execution on the ground that it was barred by cl. (*h*) of s. 148 of the Bengal Tenancy Act, being an application for execution of a decree for arrears of rent. The Court of first instance dismissed the application for execution as being barred. On appeal to the District Judge, he confirmed the decision of the Court below. Against this judgment the decree-holder appealed to the High Court.

Babu *Saroda Churn Mitter* and Babu *Atul Krishna Ghose*, for the appellant.

Babu *Uma Kali Mookerjee* and Dr. *Asutosh Mookerjee*, for the respondents.

Babu *Saroda Churn Mitter*, for the appellant contended that the decree was not one obtained by a landlord against a tenant, and as such it was not a decree for arrears of rent. The relationship of landlord and tenant ceased, after the sale of the tenure in execution of a previous decree for arrears of rent. It was simply a money-decree; and that being so, the execution of such decree by the assignee is not barred by cl. (*h*) of s. 148

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* Appeal from Order No. 1 of 1898, against the order of F. F. Handley, Esq., District Judge of 24-Pergunnahs, dated the 13th of August 1897, affirming the order of Babu Bolloram Mullick, Subordinate Judge of that District, dated the 11th of May 1897.

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of the Bengal Tenancy Act. He referred to cl. (*c*) of s. 169 of the Bengal Tenancy Act, and also to the cases of *Adhur Chunder Banerjee* v. *Aghore Nath Aroo*(1); and *Dagdu* v. *Pancham Singh Gangaram* (2).

The respondents were not called upon.

The judgments of the High Court (MACLEAN, C.J. and BANERJEE, J.) were as follows:—

JUDGMENTS.

MACLEAN, C. J.—All we have to determine is whether the decree in this case is or is not a decree for arrears of rent or a mere money-decree, and, if the former, what is the effect of sub-s. (*h*) of s. 148 of the Bengal Tenancy Act. In my opinion this is a decree for arrears of rent. Then what is the effect of the sub-section in question which says in effect, [178] that any application to execute a decree for arrears of rent cannot be made by an assignee of the decree unless the landlord's interest in the land has become vested in him. The latter event has not happened, and the decree-holder is the assignee from the landlord of the arrears of rent. This being so I think the judgment of the Court below is right, and the appeal must be dismissed with costs.

BANERJEE, J.—I am of the same opinion. The only question raised in this appeal, which arises out of an application by the appellant, who is the assignee of a decree, to execute the same, is, whether the application is barred by cl. (*h*) of s. 148 of the Bengal Tenancy Act. The Courts below have held that the application is barred, under the clause referred to; and the only way in which the learned vakil for the appellant seeks to take this case out of the operation of that clause is by contending that the decree in this case was not one for arrears of rent obtained by a landlord within the meaning of the clause The decree was on the face of it one for arrears of rent claimed by the landlord against a defaulting tenant, as having accrued due between the date of the sale of the tenure in execution of a previous decree for arrears of rent and the date of confirmation of such sale, and it is argued that what was claimed as due to the landlord for the period intervening between those two dates was not an arrear of rent within the meaning of the Bengal Tenancy Act.

It is difficult to accept this contention as correct. What was decreed was decreed in favour of the landlord : of that there can be no question. The sum claimed was what was payable in respect of the tenure which was held by the defendant, and the only ground upon which it could possibly be said that the amount decreed was not an arrear of rent would be by maintaining that the defaulting tenant's connection with the tenure ceased with the sale and not with the confirmation of the sale. But s. 316 of the Code of Civil Procedure, which governs the case, is express on the point, and as between the parties to the suit, that is, as between the landlord and the defaulting tenant, the title to the property sold vested in the purchaser from the date of the certificate, that is the date of confirmation of sale, and not before. [179] That being so, the defaulting tenant still continued to be the holder of the tenure, and what was claimed from him must be treated as an arrear of rent.

It was argued by Babu Sarada Charan Mitter that the language of cl. (*c*) of s. 169 of the Bengal Tenancy Act would go to show that the Legislature intended the landlord's claim against the defaulting tenant for rent accruing due subsequent to a previous suit for arrears of rent to extend

(1) 2 C.W.N. 589. (2) 17 B. 375.

up to the date of sale of the tenure in execution of his decree, not up to any later date. I do not think that the language of cl. (*c*) of s. 169 can afford any sufficient basis for such a contention.

Then we were referred to the cases of *Adhur Chunder Banerjee* v. *Aghore Nath Aroo* (1), and *Dagdu* v. *Pancham Sing Gangaram* (2), as showing that even before the date of confirmation of sale, an auction-purchaser acquires an inchoate right, which dates from the date of sale, the confirmation of sale relating back to such date. I think that the cases cited are quite distinguishable from the present, as there the question arose, not between the parties to the suit in execution of the decree in which the sale took place, but as between some of the parties to the suit and third parties.

S. C. G. *Appeal dismissed.*

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26 C. 179.

REFERENCE UNDER STAMP ACT.

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, Mr. Justice Banerjee, and Mr. Justice Stevens.

SAMBHU CHANDRA BEPARI *(Plaintiff)* v. KRISHNA CHARAN BEPARI AND OTHERS (*Defendants*).* [2nd August, 1898.]

Stamp Act (I *of* 1879), *s.* 23—*Bond—Interest.*

A bond for a loan of Rs. 100 stipulated that the obligor should " pay twice the amount, including Rs. 100 for interest, total Rs. 200, in eight years from 1301 to 1308, according to *kists* given in the schedule."

[180] *Held*, that the amount secured by the bond was Rs. 200 and the bond must be stamped accordingly. Section 23 of the Stamp Act (I of 1879) did not apply to the instrument.

[N.F , 3 Bom. L.R. 133; R., 11 C.W.N. 1122; 4 N.L.R. 90 (94).]

THIS was a reference to the High Court under s. 49 of the Indian Stamp Act (I of 1879) by the Munsif of Sudharam in the district of Noakhali. The statement of the case and the opinion of the Munsif were as follow :—

" In suit No. 235 of 1898 (money) of this Court the plaintiff Sambhu Charan Bepari seeks to recover Rs. 220 on a registered instalment (simple, bond, dated the 25th Chaitra 1300 (7th April 1894). The suit was instituted on the 17th February 1898. In the plaint it is stated that the whole amount, including interest up to date of suit, is Rs. 271. But the plaintiff having given up his claim to Rs. 51, he sues to recover Rs. 220 only. The bond is written upon an impressed stamp paper for eight annas only. That part of the bond, which is necessary so far as this reference is concerned, runs as follows : ' We borrowed from you on the 29th day of Bhadra 1294 B. S., by a registered bond, the sum of Rs. 70 ; now in the account thereon we are indebted to you for interest and principal together the sum of Rs. 208-4; out of that deducting Rs. 103-4 for claim relinquished and Rs. 5 for payment in cash, total Rs. 108-4. We keep a loan of the balance Rs. 100 and execute this bond (and agree) to pay twice this amount including Rs. 100 for interest total Rs. 200 in eight years from 1301 to 1308 according to the *kists* given in the schedule ;

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* Civil Reference under s. 49 of Stamp Act (I of 1879) from Babu Sarat Chander Ghose, Officiating Munsif of Sudharam, dated the 18th of March 1898.

(1) 2 C. W N. 589. (2) 17 B. 375.

1898 AUG. 2. — REFERENCE UNDER STAMP ACT. — 26 C. 179.

if we make default in payment of *kist* we shall pay interest at the rate of 4 per centum per month; if instead of paying according to the *kistbundi* we make default in paying any one *kist*, instead of waiting for a future *kist* you shall be entitled to recover from us, and our heirs, either amicably or by suit, the whole amount due on all the *kists* with interest for default of *kists*.'

"I doubt if the bond has been 'duly stamped' as a bond. The question in this case principally is whether or not the sum of Rs. 100, the debt acknowledged to be subsisting at the date of the bond, or the sum of Rs. 200 agreed to be repaid in eight years for principal and interest, is to be considered the amount or value secured by the bond as stated in No. 13, sch. I, of the Indian Stamp Act, 1879.

"If the former view be taken the bond has been duly stamped, but if the latter view be taken it is not duly stamped, and the document cannot be admitted in evidence until the provisions of s. 34 of the said Act are complied with.

"In this case the amount of interest is *ascertained*, and not *to be ascertained* as in ordinary bonds. The plaintiff could sue for the whole of Rs. 200 even if default was made in payment of the first instalment, which fell due in Ashwin **[181]** 1301 B. S. A. case—*In the matter of Gojraj Singh* (1)—of a somewhat similar nature came up before their Lordships of the Allahabad High Court, and it was decided by a Full Bench. Taking the view expressed therein by his Lordship Justice Oldfield, I am of opinion that the amount secured, or in other words the amount limited to be ultimately recovered, 'under this bond' is Rs. 200, and it requires to be stamped accordingly * * *."

JUDGMENT.

The judgment of the High Court (MACLEAN, C. J. and BANERJEE and STEVENS, JJ.) was delivered by

MACLEAN, C. J.—In this case we are of opinion that the view taken by the Munsif is correct, namely, that the amount secured by the bond is Rs. 200, and that the bond must be stamped accordingly. In arriving at this conclusion we are not unmindful of the provisions of s. 23 of the Stamp Act I of 1879. The case referred to in the reference decided by the High Court at Allahabad does not appear to us to have any bearing upon the matter.

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26 C. 181.

CRIMINAL REFERENCE.

Before Mr. Justice Stevens and Mr. Justice Pratt.

BACHU LAL (*Complainant*) *v.* JAGDAM SAHAI AND THREE OTHERS (*Accused*).* [17th November, 1898.]

Compensation—Sanction to prosecute and award of compensation—Criminal Procedure Code (Act V of 1898), *ss.* 250 *and* 476—*Magistrate, Discretion of.*

It is an improper exercise of his discretion by a Magistrate to award compensation to the accused under s. 250 of the Criminal Procedure Code and also to direct or sanction the prosecution of the complainant under s. 211 of the

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* Criminal Reference No. 257 of 1898, made by A. E. Stanley, Esq., Sessions Judge of Tirhoot, dated the 11th of October 1898.

(1) 9 A. 585.

Penal Code for bringing a false charge. *Shib Nath Chong* v. *Sarat Chunder Sarkar* (1), followed. *Queen* v. *Rupan Rai* (2), referred to.

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[N.F., 37 B. 376=2 Bom. Cr. C. 5=15 Bom. L.R. 49=14 Cr. L.J. 75=18 Ind. Cas. 411; R., 30 C. 123 (130); 15 C.P.L.R 194 (195); 6 P.R. 1904 (Cr.); 18 P.R. 1901 (Cr.)=100 P.L.R. 1901; 18 P.R. 1903 (Cr.)=156 P.L.R. 1903.]

THIS was a reference under s. 438 of the Criminal Procedure Code by the Sessions Judge of Tirhoot.

[182] The facts of the case appear from the following portions of the letter of reference :—

"The complainant Bachu Lal prosecuted Jagdam Sahai and others for forcibly taking his children and Raghunandan's wife from them, when Bachu and Raghunandan were going to study the Bible. The Magistrate of Hajipur Sub-Division, who is admittedly a Magistrate of the 1st class, heard the evidence for the prosecution and acquitted the accused without calling on the accused for evidence. He then called on the complainant Bachu to pay Rs. 40 compensation under s. 250 of the Criminal Procedure Code to each of the accused, and on his failing to show cause why he should not pay the compensation condemned him in default of payment to thirty days' simple imprisonment. The Magistrate then passed the following order : 'Bachu Lal will be prosecuted under s. 211 of the Penal Code and his witness under s. 193 of the Penal Code. Bail of Rs. 100 each. Draw up proceedings and send to Sudder.' This last order was made without an application by the accused to prosecute, and must apparently therefore have been made under s. 476 of the Criminal Procedure Code. Bachu and Raghunandan have appealed against both orders, *viz.*, those under s. 476 and s. 250 of the Criminal Procedure Code. As, however, there is no appeal against the latter order, it can only be interfered with by way of revision.

"With regard to the order under s. 250 of the Criminal Procedure Code, it has been held in the case of *Shib Nath Chong* v. *Sarat Chunder Sarkar* (1) that if the Magistrate thought there was a case in which a prosecution under ss. 211 and 193 of the Penal Code should be sanctioned, he ought not to take action under the provisions of s. 560 of the Criminal Procedure Code and the same ruling applies to the provisions of s. 250 of the new Criminal Procedure Code. The Sub-Divisional Magistrate has referred to rulings, inconsistent apparently with the ruling quoted, but they are of earlier date. It is, therefore, recommended that the order of the Magistrate under s. 250 of the Criminal Procedure Code be set aside."

The judgment of the High Court (STEVENS and PRATT, JJ.) was as follows :—

JUDGMENT.

In dismissing a case under s. 363 of the Penal Code the Joint Magistrate of Hajipur directed the complainant Bachu Lal to pay each of the four accused persons Rs. 40 as compensation under s. 250 of the Code of Criminal Procedure and further ordered his prosecution on a charge under s. 211 of the Penal Code.

[183] The learned Sessions Judge of Tirhoot has reported the case to this Court with a recommendation that the order for payment of compensation be set aside, and he refers for authority to the case of *Shib Nath Chong* v. *Sarat Chunder Sarkar* (1).

In the case of *Queen* v. *Rupan Rai* (2), which is referred to by the Joint Magistrate in his explanation as supporting the legality of his

(1) 22 C. 586. (2) 6 B.L.R. 296=15 W.R. Cr. 9.

1898 NOV. 17. — CRIMINAL REFERENCE. — 26 C. 181.

proceedings, Jackson, J., remarked : "It appears to me that in this case the Magistrate was competent to award compensation to the persons accused by Rupan, notwithstanding that he afterwards committed, and even if he had then made up his mind to commit, Rupan to take his trial on the charge of giving false evidence ; " . . . . but he added : "whether the Magistrate in making this order exercised a proper discretion is a different question, on which I think we need not give an opinion."

In the case of *Shib Nath Chong* v. *Sarat Chunder Sarkar* (1) the learned Judges observed : "We are of opinion that it was never intended that recourse should be had to the provisions of s. 560 [now s. 250] of the Code of Criminal Procedure in a case in which the trying Magistrate is of opinion that the complaint was wilfully and maliciously false, and that the complainant should be prosecuted for an offence under s. 211 of the Penal Code. If, therefore, the Joint Magistrate thought that this was a case in which a prosecution for an offence under s. 211 of the Penal Code should be sanctioned, he ought not to have taken action under the provisions of s. 560 of the Code of Criminal Procedure. To sanction or direct a prosecution, *and also* to proceed to award compensation under s. 560 of the Code of Criminal Procedure, was, we think, an improper exercise of his discretion. By such action the Joint Magistrate was, in point of fact, prejudging the issue of the charge which he was submitting for trial."

These authorities are not in conflict, but are quite reconcilable. While, on the one hand, there is nothing in the Code of Criminal Procedure which makes it illegal for a Magistrate **[184]** both to award compensation to the accused and also to direct or sanction the prosecution of the complainant for bringing a false charge, yet a Magistrate who adopted this course would be exercising his discretion improperly.

The reason why the learned Judges who disposed of the case of *Queen* v. *Rupan Rai* confined themselves to dealing with the question of the strict legality of the orders before them was doubtless because they were proceeding under Act XXV of 1861, the Code of Criminal Procedure which was then in force. A reference for revision could under s. 434 of that Act be made only where the referring Court was of opinion that a sentence or order was "contrary to law," and similarly under s. 404 of of the Act the general revisional powers of this Court were limited to "determining any point of law arising out of the case and thereupon passing such order as to the Court might seem right."

In the present case we understand that the direction to prosecute is in full force, and we therefore set aside the order awarding compensation to the accused persons. The compensation, if paid or levied, will be refunded.

S. C. B.

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(1) 22 C. 586.

26 C. 184.

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APPELLATE CIVIL.

26 C. 184.

APPELLATE CIVIL.

Before Mr. Justice Ameer Ali and Mr. Justice Pratt.

SARIATULLAH SARKAR AND OTHERS (*Defendants*) v. PRAN NATH NANDI AND OTHERS (*Plaintiffs*).* [26th August, 1898.]

Right of Occupancy—Transfer of occupancy rights—Bengal Tenancy Act (VIII of 1885), *ss.* 178, 183—*Usage or custom—Evidence Act* (*I of* 1872), *s.* 48—*Admissibility of opinion as to existence of custom or usage.*

In this suit the plaintiffs by virtue of *putni* settlements sought to obtain *khas* possession of certain *jote* lands which purported to have been conveyed by the *jot dars*, the first set of defendants, to the second set of defendants, although there was no custom or usage in the village recognising the transferability of occupancy rights.

[185] *Held*, that in order to establish *usage* under ss. 178, 183 of the Bengal Tenancy Act, it was not necessary to require proof of its existence for any length of time.

Held, also, that the statement made by persons who were in a position to know of the existence of a custom or usage in their locality were admissible under s. 48 of the Evidence Act. *Dalglish* v. *Guzuffer Hassain* (1), followed.

[R., 8 C.W.N. 235 (237); 22 Ind. Cas. 577=16 O.C. 290.]

THE facts of this case are sufficiently set out in the judgment of the High Court.

Babu *Dwarkanath Chuckravarti* and Babu *Joygopal Ghose*, for the appellants.

Babu *Gyanendra Mohun Das*, for the respondents.

The judgment of the High Court (AMEER ALI and PRATT, JJ.) was as follows :—

JUDGMENT.

This appeal arises out of a suit brought by the plaintiffs under the following circumstances. The plaintiffs own a twelve anna share of Mouzah Mobouli by virtue of *putni* settlements, some acquired in 1297 (1893) and some in the year 1300 (1893), and they seek in this action to obtain *khas* possession of certain *jote* lands, on the ground that the defendants Nos. 8 and 9, who were the holders of the *jotes* in question had conveyed, or rather purported to convey, the same to the defendants 1 to 7, although there was no custom or usage in the village recognising the transferability of occupancy rights, and that consequently the plaintiffs were entitled to obtain *khas* possession of the said lands.

The principal defendants, who had obtained the transfer of the *jotes*, averred in their written statements the existence of a custom of transferability in that village and other villages in its vicinity, and contended that the plaintiffs' suit should be dismissed. It is unnecessary to refer to the other pleas taken in their answers.

The Munsif framed several issues and, in a careful and, as it seems to us, a well considered judgment, came to the conclusion that the defendants had successfully established the custom or usage alleged by them recognizing the transferability of occupancy *jotes*. In dealing with this question, he relied not only [186] upon the evidence adduced on the defendants' side, but also on certain *kobalas* executed in favour of the

* Appeal from Appellate Decree No. 939 of 1897, against the decree of K. N. Roy, Esq., District Judge of Pubna and Bogra, dated the 26th of February 1897, reversing the decree of Babu Bimala Charan Mozumdar, Munsif of Serajgunge, dated the 14th of December 1895.

(1) 23 C. 427.

1898 Aug. 26. — APPELLATE CIVIL. — 26 C. 184.

plaintiffs themselves by which they had obtained transfer of occupancy *jotes*, and in conclusion he added : "As the tenants do not pay rent at the rates demanded by the plaintiffs, the latter have betaken to themselves the contrivance of harassing the tenants and coercing them to submission by such suits like the present, which unfortunately have become too common in this part of the country."

The plaintiffs appealed to the Officiating Judge of Pubna who has, in an elaborate judgment, dealing with a variety of questions which do not seem to us to be really pertinent to the matter, come to the conclusion that the plaintiffs were entitled to recover in this action. The grounds upon which he held against the defendants seem to be of a three-fold character: *firstly*, he is of opinion that the evidence given by the defendants regarding the custom or usage of transferability being limited to only ten or twelve years or even less is worthless; *secondly*, that the evidence, which the defendants purported to give under s. 48 of the Evidence Act, was inadmissible; and, *thirdly*, regarding that portion of the case upon which the Munsif relied with some reason, namely, the transactions in favour of the plaintiffs themselves, he was of opinion that they could not support the allegation of custom or usage, inasmuch as the plaintiffs were themselves the proprietors, and might be supposed to have assented to the transfers in their own favour.

The question which the District Judge had to try was dealt with in the case of *Dalglish* v. *Guzuffer Hassain* (1) by Trevelyan and Beverley, JJ., and although he does not seem to approve of that decision, we consider ourselves bound to follow the principle enunciated by those learned Judges. In that case also the Munsif had held against the plaintiffs, who were seeking to recover *khas* possession. He had held that the defendants as *ryots* had sufficiently established that there was a usage in the neighbouring villages, recognizing the transferability of occupancy *jotes*. In that case also the Subordinate Judge had thought that the evidence regarding [187] usage, being limited to a very short period of time, was of no value. This Court in construing ss. 183 and 178 of the Tenancy Act, held in effect that in order to establish "usage" at all events it was not necessary to require proof of its existence for any length of time. With that view we desire to express our entire concurrence. They say "the word 'usage,' at any rate, would include what the people are now or recently in the habit of doing in a particular place. It may be that this particular habit is only of a very recent origin, or it may be one which has existed for a long time. If it be one regularly and ordinarily practised by the inhabitants of the place where the tenure exists, there would be 'usage' within the meaning of the section. The evidence which the learned Subordinate Judge has excluded on the ground that it does not refer to ancient custom is, we think, evidence which requires consideration, inasmuch as it may establish local usage."

The Judge, in the present case, has done exactly what the Subordinate Judge had done in the case before Trevelyan and Beverley, JJ., and we think that the evidence which the District Judge thinks to be of little or no value, required consideration in connection with the other circumstances and facts appearing in the case.

In the second place the District Judge is of opinion that, in order to make a statement admissible under s. 48 of the Evidence Act, it must relate to custom. The learned Judges in *Dalglish* v. *Guzuffer Hassain* (1)

(1) 23 C. 427.

held that the evidence to which they were directing their minds, and which related to usage, was admissible under s. 48 of the Evidence Act. We think in the present case also the statements made by persons who were in a position to know of the existence of a custom or usage in their locality were admissible. For example, a person, who had been in the habit of writing out deeds of sale, or one who had been seeing transfers frequently made, would certainly be in a position to give his opinion whether there was a custom or usage in that particular locality, and we think that the opinion of such persons [188] would be admissible, as pointed out by the learned Judges, under s. 48 of the Evidence Act.

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Then, again, it seems to us the District Judge is in error in putting aside from consideration the transfers made in favour of the plaintiffs on the ground that they may be supposed to have been assented to by the plaintiffs by virtue of their being proprietors. Admittedly one of the *kobalas*, namely, that of the year 1296, was executed prior to the *putni* settlement obtained by them in 1297. On the whole, therefore, we think that the judgment of the District Judge ought to be set aside, and the case sent back to him for a determination of the question at issue in the light of the observations we have made. Costs to abide the result.

N. C.

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26 C. 188=3 C.W.N. 49.

CRIMINAL REVISION.

Before Mr. Justice Prinsep and Mr. Justice Ameer Ali.

HURBULLUBH NARAIN SINGH (2*nd party, Petitioners*) *v.* LUCHMESWAR PROSAD SINGH (1*st party, Opposite Party*).*
[2nd December, 1898.]

Superintendence of High Court—Charter Act (24 *and* 25 *Vic., cap.* 104), *s.* 15—*Criminal Procedure Code* (*Act V of* 1898), *ss.* 145-435—*Dispute concerning a ferry including the land and water over which it plies—Order purporting to be made under s.* 145.

The local Legislature has power to overrule a statutory power conferred on the High Court; but this was not the object and result of the legislation expressed in s. 435 of the Criminal Procedure Code of 1898. *Empress* v. *Burah* (1), referred to.

The terms of s. 435 mean that orders under the exempted sections mentioned in cl. (3) must have been passed with jurisdiction. If such orders are challenged as made without jurisdiction, the mere fact of their purporting to be passed under the exempted sections would not bring them within those sections so as to debar the exercise of powers by the High Court under s. 15 of the Charter Act.

[189] *Abayeswari Debi* v. *Sidheswari Debi* (2), *Ananda Chandra Bhuttacharjee* v. *Stephen* (3), *Roop Lal Das* v. *Manook* (4), and *Queen-Empress* v. *Pratap Chunder Ghose* (5), followed.

The right to a ferry, *i.e.*, the right to carry passengers to and fro, cannot be treated apart from the possession of the lands used on either side of the stream for the purpose of landing them. It is a proper case to be dealt with under s. 145 of the Criminal Procedure Code (Act V of 1898) where the subject-matter of dispute is a ferry including the land and water upon which the right of ferry is exercised.

[**Diss.**, 26 A. 144 (147); **F.**, 27 C. 892 (918); **Appl.**, 27 C. 259 (260); **R.**, 25 A. 537 (538)=23 A.W.N. 102; 33 C. 68=2 C.L.J. 241=9 C.W.N. 1046 (1047); 12 Bom.L.R. 1029=11 Cr.L.J. 705 (706)=8 Ind. Cas. 747; 13 Cr. L J. 495=15 Ind.

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* Criminal Revision No. 647 of 1898, made against the order passed by P. H. O'Brien, Esq., District Magistrate of Purneah, dated the 6th of August 1898.

(1) 4 C. 172=5 I.A. 178. (2) 16 C. 80. (3) 19 C. 127.
(4) 2 C.W.N. 572. (5) 25 C. 852.

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CRIMINAL REVISION.

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Cas. 495; 36 M. 275=13 Cr.L.J. 753=17 Ind. Cas. 65=23 M.L.J. 499=12 M. L.T. 439=(1912) M.W.N. 1154; 2 L.B.R. 239 (241); 5 O.C. 1 (3); D., 30 C. 112 (118); 17 C.P.L.R. 133 (137)]

THIS case related to a dispute regarding the possession of certain lands and water over which a ferry was plied. On a previous occasion proceedings under s. 145 of the Criminal Procedure Code (Act X of 1882) with regard to the disputed property had been taken by the Deputy Magistrate of Bhagulpur and an order was passed in favour of the first party, which was set aside on revision by the High Court on the ground that the Magistrate of Purneah had no jurisdiction. The High Court also expressed an opinion that disputes regarding a ferry came more properly within the scope of s. 147 of the Code of 1882.

The subject-matter of the dispute was situated in the vicinity of the common boundary between the districts of Purneah and Bhagalpur. On the 6th of August 1898 the District Magistrate of Purneah again took proceedings and passed an order under s. 145 of the Criminal Procedure Code (Act V of 1898), also declaring the first party to be in possession. The second party moved the High Court and obtained a rule.

The Advocate-General (Sir *Charles Paul*), Mr. *Jackson* and Babu *Jogendro Chunder Ghose*, for the petitioners.

Mr. *J. T. Woodroffe*, Sir *Griffith Evans*, Mr. *Garth* and Babu *Ram Churn Mitter*, for the opposite party.

Mr. *Woodroffe.*—The High Court has no longer any power to revise orders under chap. XII of the Code. The language used in cl. (3) of s. 435 makes it quite clear. The Magistrate's order in such cases is final, and the aggrieved party [190] must seek his remedy in the Civil Courts. [PRINSEP, J.—But may not cases of this kind come under s. 530, and can we not interfere under the Charter Act?] Section 530 deals only with irregularities which vitiate proceedings, such as want of local jurisdiction. As to the power of the High Court to interfere the Privy Council have held in *Queen* v. *Burah* (1) that the exercise of the power under the Charter Act by the High Court was meant to be subject to, and not exclusive of, the general legislative power of the Governor-General in Council. As to the facts the Magistrate has found that the subject-matter of dispute is a ferry including the land and water upon which the right of ferry is exercised. This comes clearly within the scope of s. 145 as it now stands. The section no longer relates to disputes concerning "tangible immoveable property," but to disputes concerning "any land or water or the boundaries thereof."

The *Advocate-General.*—The order passed in this case is without jurisdiction. The dispute is about the right to use a ferry. The owner of a ferry need not be the owner of the land and water over which it plies. The case does not fall under s. 145; the proceedings should have been drawn up under s. 147 of the new Code. If an order purports to be made under s. 145 in a case where such order ought not to be made, then nothing contained in s. 435 of the new Code can deprive the High Court of its power of interference under s. 15 of the Charter Act. See *Abayeswari Debi* v. *Sidheswari Debi* (2), *Ananda Chandra Bhuttacharjee* v. *Stephen* (3), *Roop Lal Das* v. *Manook* (4), and *Queen-Empress* v. *Pratap Chunder Ghose* (5).

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(1) 4 C. 172=5 I.A. 178. (2) 16 C. 80. (3) 19 C. 127.
(4) 2 C.W.N. 572. (5) 25 C. 852.

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CRIMINAL REVISION.

26 C 188= 3 C.W.N. 49.

The judgment of the High Court (PRINSEP and AMEER ALI, JJ.) was as follows:—

JUDGMENT.

A rule was granted by a Bench of this Court requiring the [191] Maharaja of Durbhunga to show cause why an order passed under s. 145 of the Code of Criminal Procedure should not be set aside—*first*, on the ground that that section was not applicable to the subject of the dispute between the contending parties, and, *secondly*, on the ground that the Court had no jurisdiction to make the order under s. 145. Proceedings under that section were instituted by the District Magistrate of Purneah in consequence of a dispute between the Maharajas of Durbhunga and Sonbarsa which, he found, was likely to cause a breach of the peace, arising out of claims to use certain land for the purposes of a private ferry; and the objection taken, on which that rule was granted, may be shortly stated to be that a claim to a ferry is not cognizable under s. 145 of the Code of Criminal Procedure, the Magistrate's action, therefore, being without jurisdiction, and that consequently the preceedings should be set aside under s. 15 of the Charter Act, irrespective of the Code of Criminal Procedure, which, as expressed by s. 435 of the Code of 1898, ordinarily bars the exercise of revisional powers by this Court. The subject-matter of dispute is said to be on the boundary of the districts of Bhaugulpore and Purneah, and we find that, in the earlier part of this year, and before the Criminal Code of 1898 became law, proceedings under s. 145 of the Code of 1882 were instituted by a Magistrate of the District of Bhaugulpore, and an order passed in favour of the Maharaja of Durbhunga was set aside by a Bench of this Court as a Court of Revision, on the ground that the dispute regarding possession of a ferry was not a dispute regarding tangible immoveable property within the terms of s. 145 of the Code of 1882. The Court at the same time expressed an opinion that questions relating to disputes regarding ferries were intended to come within the scope of s. 147. The Court also held that the order under s. 145 was bad on the ground that on the affidavit of the Maharaja of Sombarsa, which was not contradicted, the land on both banks was outside the jurisdiction of the Magistrate of Bhaugulpore, and that, therefore, he had no jurisdiction to deal with the matter. An application was subsequently made to this Court for a correction of this finding as erroneous as a statement of fact. It was then held by the Court that it had no power to reconsider the [192] order, even if erroneous, and that the point was immaterial, since the finding of the Magistrate was to the same effect, so that in either case the Magistrate had no jurisdiction. The present proceedings have been taken in Purneah under the Code of 1898, and s. 145 of that Code has been amended, in so far that it has been differently expressed in some respects from the corresponding section of the former Code of 1882. It does not limit the action of the Magistrate to disputes relating to the possession of "tangible immoveable property," but it empowers him to take cognizance of disputes likely to cause a breach of the peace "concerning any land or water or the boundaries thereof," and it gives an explanation of the meaning of the expression "land or water."

We have consequently now to consider whether this dispute falls within s. 145 of the Code of 1898. But Mr. Woodroffe, who appears against the rule for the Maharaja of Durbhunga, contends that, by reason of the terms of s. 435 of the Code of 1898 in amendment of the former law, this Court has no jurisdiction as a Court of Revision, or even under

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s. 15 of the Charter Act, inasmuch as s. 435 as amended removes any power that this Court may have had under the latter. Mr. Woodroffe relies on the well known case of *Queen* v. *Burah* (1), in which it was held that the local Legislature had power to overrule a statutory power conferred on this Court, and he contends that this was the object and result of the legislation expressed in s. 435 of the Code of 1898. Of the power of the local Legislature we have no doubt, but we do not agree that the power has been exercised as contended by Mr. Woodroffe, or that the terms of s. 435 must be so understood. Matters under chap. XII of the Code, that is, under s. 145, such as the case now before us, are by s. 435 placed in the same category as orders under s. 143 and s. 144, in respect of which s. 435 of the Code of 1898 is expressed in the same terms as in the same section of the Code of 1882; and in regard to an order under s. 143 or s. 144, it has been held in many cases, so as to have become [193] settled law, that though powers as a Court of Revision under the Code cannot be exercised, still, if an order challenged be without jurisdiction, that is to say, if it be outside those sections, the mere fact of the order purporting to be so passed would not bring it within those sections, so as to debar the exercise of powers under s. 15 of the Charter Act to set it aside as null and void and without jurisdiction. The terms of s. 435 have, in this respect, been held to mean that an order must have been passed under the exempted sections with jurisdiction. As the most recent cases on this subject, we need only refer to *Abayeswari Debi* v. *Sidheswari Debi* (2), *Ananda Chandra Bhuttacharjee* v. *Stephen* (3), *Roop Lal Das* v. *Manook* (4), and *Queen-Empress* v. *Pratapa Chunder Ghose* (5). The matter for consideration then is—is the subject-matter of dispute within the terms of s. 145 of the present Code? We may first of all observe that, with every respect to the learned Judges who decided the former case, we do not feel bound by the expression of the opinion that the matter properly comes within s. 147, inasmuch as its relates to what may be shortly termed an easement, for that was not a matter properly coming under consideration in that case, and their finding was *obiter*. At the same time we are bound to give that opinion every consideration and respect in dealing with this case.

The proceedings taken show that the dispute has arisen, because the river has gradually altered its course, and the Magistrate has found as a fact that the two landing places are in the possession of the Maharaja of Durbhunga. The right to the ferry, that is, the right to carry passengers to and fro, cannot be treated apart from the possession of the lands used on either side of the stream for the purpose of landing them. No such questions as has been attempted to be raised on the judgment of this Court in the previous proceedings, relating to s. 147, therefore, arises in this case. As we understand the Magistrate's preliminary order, he mean to deal with the dispute in this manner; for he describes [194] the subject-matter as the ferry, "including the land and water upon which the right of ferry is exercised," &c. It is not described as a right to use the ferry, and it cannot, therefore, be so regarded.

We are of opinion that the rule should be discharged, inasmuch as the proceedings have been properly taken under s. 145 of the Code of Criminal Procedure, 1898.

S. C. B. *Rule discharged.*

(1) 4 C. 172=5 I.A. 178. (2) 16 C. 80. (3) 19 C. 127.
(4) 2 C.W.N. 572. (5) 25 C. 852.

26 C. 194=3 C.W.N. 108.

1898 AUG. 26.

APPEL-LATE CIVIL.

26 C. 194=3 C.W.N. 108.

APPELLATE CIVIL.

Before Mr. Justice Ameer Ali and Mr. Justice Pratt.

MAHOMED NASIM (*Defendant No.* 8) *v.* KASI NATH GHOSE AND ANOTHER (*Plaintiffs*).* [26th August, 1898.]

Assam Land and Revenue Regulation (*Act I of* 1886), *ss.* 65, 68, 70, *sub-s.* (2), *sub-s.*(3) *and s.* 71—*Act XI of* 1859, *s.* 37—"*Estate*"—"*Property*"—Shikmi haziram *rights.*

A purchaser of a part of a permanently settled estate is entitled to the benefit of s. 71 of the Assam Land and Revenue Regulation, inasmuch as in s. 71 the words used are "property sold under s. 70," and the property to which reference is made in s. 70 includes both an estate as well as a share in respect of which revenue has been separately apportioned.

The object of s. 37, Act XI of 1859, is the same as that of s. 71, Reg. I of 1886. Those sections cannot be said to have different meanings, for if it were to be held that the incumbrance which could be set aside under s. 71 of the Reg. I of 1886 must be an incumbrance actively created by the previous holder, it would amount to this, that any acquiescence or laches, either wilful or arising from pure negligence on the part of the holder, by which the *taluk* or estate becomes incapable in the hands of the purchaser of yielding the Government revenue, would be outside the scope of that section.

[F., 3 C.L.J. 387 (388); R., 14 C.L.J. 136=11 Ind. Cas. 453 ; 20 C. L. J. 210= 23 Ind. Cas. 119.]

THIS suit was with respect to 16 plots of land, the area of which amounted to 2 *hudas*, 6 *khadas* and odd, said to be comprised in that portion of *taluk* No. 1, Rai Gour Hari Singh, which [195] subsisted after separate accounts had been opened. It was brought on the allegation that the plaintiffs had purchased that portion of the *taluk* sold for arrears of Government revenue and local rates due thereon on the 14th September 1892, and that they were consequently entitled to set aside the *shikmi haziram taluk* alleged by the defendants to be held by them under the said *taluk* Gour Hari Singh. The defendants contended that their *shikmi haziram taluk* had been in existence from the time of the Permanent Settlement.

The Munsif found that the defendants had succeeded in establishing their *shikmi haziram* rights in respect of 7 *kanis* odd of the lands in their possession, and passed a decree in respect of plots Nos. 1 to 13 in favour of the plaintiffs, dismissing the suit relative to plots Nos. 14 to 16 which came within 7 *kanis* odd.

The plaintiffs and the defendants both appealed to the Subordinate Judge, and the Subordinate Judge dismissed both appeals. The defendant No. 8, Mahomed Nasim, alone appealed to the High Court from the judgment of the Subordinate Judge.

Dr. *Ashutosh Mookerjee*, for the appellant.

Babu *Tara Kishore Chowdhry*, for the respondents.

The judgment of the Court (AMEER ALI and PRATT, JJ.) was as follows :—

JUDGMENT.

This is an appeal from the decision of the Additional Subordinate Judge of Sylhet, affirming the judgment of the Munsif of Moulavi Bazar,

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* Appeal from Appellate Decree No. 791 of 1897, against the decree of Babu Shoshi Bhushan Sen, Additional Subordinate Judge of Sylhet, dated the 29th of January 1897, affirming the decree of Babu Nistaran Banerjee, Munsif of Moulavi Bazar, dated the 28th of February 1895.

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by which the plaintiffs' suit has been in part dismissed and in part decreed. The suit was brought by the plaintiffs upon the allegation that they had purchased a *taluk* called Rai Gour Hari Singh at a revenue sale, and that they were consequently entitled to set aside the *shikmi haziram taluk* alleged by the defendants to be held by them under the said *taluk* Gour Hari Singh.

The defendants contended that their *shikmi haziram taluk* had been in existence from the time of the Permanent Settlement.

The area held by the defendants amounted to 2 *hudas*, 6 *khadas* odd. Without entering into a detailed statement of all the facts [196] of the case, we may mention that the Munsif found that the defendants had succeeded in establishing that they held a *shikmi haziram taluk* within *taluk* Gour Hari Singh from the time of the Permanent Settlement in respect of 7 *kanis* odd of the lands in their possession, but inasmuch as they failed to show that the remaining portions of the land included in plots Nos. 1 to 13 had been in their possession as part and parcel of their said *shikmi haziram taluk* from the time of the Permanent Settlement, he made a decree in respect of those plots in favour of the plaintiffs, dismissing their suit with respect to plots Nos. 14 to 16 which comprised 7 *kanis* odd.

The plaintiffs as well as the defendant appealed to the Subordinate Judge, who dismissed both the appeals.

The defendant No. 8, Mahomed Nasim, has preferred a second appeal to this Court from the judgment of the Subordinate Judge, and Dr. Ashutosh Mookerjee has taken three points on his behalf. He contends, in the first place, that the plaintiffs, who were admittedly the purchasers, not of the entire estate but only of a part thereof, were not entitled to maintain this action in respect of the lands of the *taluk* which the defendants failed to show had been in their possession by virtue of *shikmi haziram* rights from the time of the Permanent Settlement; secondly, that, upon the words of s. 71 of the Assam Land and Revenue Regulation, the plaintiffs were not entitled to a decree in respect of the lands covered by plots Nos. 1 to 13, inasmuch as the right under which the defendants claim to hold them does not amount to an incumbrance created by any person other than the purchaser; and, thirdly, that the defendants had, at least, acquired an occupancy right in respect of these lands.

With reference to the first contention, it is to be observed that there is a great difference in the language of the Act in force in Bengal and the Assam Regulation. Chapter V of the Assam Land and Revenue Regulation (I of 1886) declares the joint and several liability of all persons in possession of an estate or any part thereof for land revenue. Section 65 provides that when there are several recorded proprietors of a permanently-settled estate, any one of them, whether he is [197] entitled to a share of the estate or to particular lands comprised therein, may, by a written application to the Deputy Commissioner specifying his share of the estate or the particular lands therein to which he is entitled, get his revenue apportioned. Section 68 declares what is to be done when an arrear has accrued, and s. 70 proceeds to provide that, when an arrear has accrued in respect of a permanently-settled estate or of an estate in which the settlement-holder has a permanent heritable right of use and occupancy, the Deputy Commissioner may sell the estate by auction. Sub-section 2 of that section runs as follows: "If the arrear has accrued on a separate account opened under s. 65, only the shares or lands comprised in that account shall, in the first place, be put up to sale, and if the highest bid does not cover the arrear, the Deputy Commissioner

shall stop the sale and direct that the entire estate shall be put up for sale at a future date, to be specified by him ; and the entire estate shall be put up accordingly and sold." Sub-section (3) says : "No property shall be sold under this section for any arrear which may have become due in respect thereof while it was under the management of the Court of Wards." From sub-section (3) it would appear that the word 'property' was used intentionally to cover both the entire estate as well as the shares or lands in respect of which separate accounts had been assigned.

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Section 71 provides that property sold under s. 70 shall be sold free of all incumbrances previously created thereon by any person other than the purchaser. It will be noticed that, in Act XI of 1859, the word used is "estate." In s. 71 of the Assam Regulation the words used are "property sold under s. 70," and the property to which reference is made in s. 70 includes both an estate as well as a share in respect of which revenue has been separately apportioned. In view, therefore, of the express term "property" used in s. 71, we are unable to accede to the contention put forward by Dr. Ashutosh Mookerjee that the purchaser of a part of a permanently-settled estate is not entitled to the benefit of s. 71. In this particular case, what seems to have happened is that revenue in respect of certain lands had been separately apportioned, arrears fell due in respect of the remaining portion of *taluk* Gour Hari Singh, [198] and the *taluk* minus those lands was put up to sale and purchased by the plaintiffs. Having regard to the terms of s. 71, it seems to us that the view taken by the lower Court is correct, and that the plaintiffs are entitled to maintain this action.

We now come to the second contention, namely, that the right, under which the defendants hold the lands in respect of which their claim has been disallowed, does not come under the expression "incumbrances previously created thereon by any other person than the purchaser." This contention proceeds upon the difference in the language of s. 37, Act XI of 1859, and of s. 71, Reg. I of 1886. Section 37 of Act XI of 1859 says that "the purchaser of an entire estate, sold under this Act for the recovery of arrears due on account of the same, shall acquire the estate free from all incumbrances which may have been imposed upon it after the time of settlement." In s. 71 of the Assam Regulation the words are "incumbrances previously created thereon." It is contended that as it has been found in this case the defendants had obtained possession of these extra lands over and above what they held from the time of the Permanent Settlement as their *shikmi haziram taluk*, by adverse possession against the owners of the *taluk*, it could not be said that it was an incumbrance created thereon. Now, in considering this matter, we have to keep in view the purpose of the provision that an auction-purchaser at a revenue sale shall get the estate free from incumbrances. The object, as we understand it, is that he should get the estate in such a condition that he may be able to pay the Government revenue assessed thereon at the time of the settlement, and that no act on the part of the holders of the property or estate after the settlement by which the estate becomes deteriorated or rendered incapable of yielding the revenue fixed upon it at the time of the settlement, should be allowed to affect him. The words of Act XI of 1859 and of Reg. I of 1886 cannot be said to have different meanings. If we were to hold that the incumbrance which could be set aside under s. 71 must be an incumbrance actively created by the previous holder, it would amount to this, that any acquiescence or laches, either wilful or arising from pure negligence on

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[199] the part of the holder, by which the *taluk* or estate becomes incapable, in the hands of the purchaser, of yielding the Government revenue, would be outside the scope of this section. As at present advised, it seems to us that we cannot acquiesce in that view. We think that the conclusion of the Subordinate Judge was right and we must accordingly overrule this contention.

As regards the occupancy right claimed by the defendants, it is to be observed that this claim was never put forward in their written statement, nor, so far as we can gather, at any previous stage of this suit. They claimed to hold the lands covered by plots Nos. 1 to 13 as part and parcel of their *shikmi haziram taluk*, and not as cultivating *raiyats*. It seems to us therefore that it would not be right to allow them to change their ground in this Court. Such a contention requires to be dealt with upon evidence, and it does not seem that there is any fact shown in the case which would enable us to come to the conclusion that the defendants hold or cultivate those lands as *raiyats*. We accordingly dismiss the appeal with costs.

N. C. *Appeal dismissed.*

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26 C. 199.

APPELLATE CIVIL.

Before Mr. Justice Ameer Ali and Mr. Justice Pratt.

GURU DASS SHUT (*Plaintiff*) *v.* NAND KISHORE PAL AND ANOTHER (*Defendants*).* [29th July, 1898.]

Bengal Tenancy Act (*VIII of* 1885), s. 48, *cl.* (*a*), *ss.* 66 *and* 79—*Under-raiyats—Permanent mokurari lease—Ejectment.*

Section 48, cl. (*a*) of the Bengal Tenancy Act is retrospective.

Ram Kumar Jugi v. *Jafar Ali Patwari* (1), approved of.

[200] Where a suit is brought before the expiry of the Bengali year in respect of the arrears of rent for that year, the landlord is not entitled to eject the tenant under s. 66 of the Bengal Tenancy Act.

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* Appeal from Appellate Decree No. 911 of 1897, against the decree of Babu Probode Chandra Dutta, Subordinate Judge of Tipperah, dated the 24th of February 1897, affirming the decree of Babu Tara Charan Sen, Munsif of Chandpur, dated the 31st of July 1896.

26 C. 199-N.

(1) *Before Mr. Justice Banerjee and Mr. Justice Stevens.*

RAM KUMAR JUGI (*Defendant*) *v.* JAFAR ALI (*Plaintiff*).†

In this appeal the plaintiff (respondent) sued the defendant (appellant) for the rents of an under-*raiyati* holding upon a registered *kabuliat*, which [200] was executed after the Bengal Tenancy Act was passed, but before it became law or came into operation. The Munsif held that s. 48 of the Bengal Tenancy Act had a retrospective effect, but on appeal the Subordinate Judge held that s. 48 of the Bengal Tenancy Act had not a retrospective effect, and decreed the appeal. From this judgment the defendant appealed to the High Court.

Moulvie *Zahadur Rahim Zahid*, for the appellant.

No one appeared for the respondent.

The judgment of the High Court (BANERJEE and STEVENS, JJ.) was as follows:—

† Appeal from Appellate Decree No. 508 of 1897, against the decree of Babu Srinath Pal, Subordinate Judge of Backergunge, dated the 14th December 1896, modifying the decree of Babu Pankaja Kumar Chatterjee, Munsif of that District, dated the 2nd March 1896.

[F., 28 C. 166 (168); R., 2 C.L.J. 540 (542).]

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THE facts of this case appear sufficiently from the judgment.

Babu *Basanta Kumar Bose*, for the appellant.

Moulvie *Serajul Islam*, for the respondents.

The judgment of the High Court (AMEER ALI and PRATT, JJ.) was as follows :—

JUDGMENT.

This appeal arises out of a suit brought by the plaintiff for arrears of rent for the years 1299-1302, and the facts upon which he bases his claim are shortly these: On the 20th Kartick 1291, the plaintiff acquired by purchase a *raiyati* holding bearing the [201] annual rent of Rs. 14-1. On the same date, the plaintiff leased out the holding he had purchased to defendant No. 1 who executed in his favour a *kabuliat* which is on the record of this suit. Some four or five years after the execution of the *kabuliat*, the defendant No. 1 sold his under-*raiyati* holding to defendant No. 2, and the plaintiff states that he has accepted the defendant No. 2 as his tenant, but he sues both the defendants for the rent of the years 1299-1302.

The defendants took several objections to the plaintiff's suit and the Munsif framed issues covering those objections. The third issue

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JUDGMENT.

BANERJEE, J.—This appeal arises out of a suit for arrears of rent claimed by the plaintiff as a *raiyat* against the defendant who is a *dar-raiyat* or under-*raiyat* under the terms of a written lease, and the only question that arises for consideration is whether s. 48 of the Bengal Tenancy Act limits the claim in this suit.

The first Court held that the section applied to the case, and it accordingly gave, the plaintiff, a decree for an amount less than that stipulated for in the lease, and being within the limits prescribed by s. 48. On appeal by the plaintiff, the lower appellate Court has reversed that decree and given the plaintiff a decree in full, on the ground that s. 48 of the Bengal Tenancy Act was not applicable to this lease, the lease having been granted previous to the date on which the Bengal Tenancy Act came into operation, though subsequent to the date on which the Act was passed.

In second appeal it is contended, for the defendant, that the lower appellate Court was wrong in holding that s. 48 does not govern the [201] case; and in our opinion this contention is correct. Section 48 says: "The landlord of an under-*raiyat* holding at a money rent shall not be entitled to recover rent exceeding the rent which he himself pays by more than the following percentage of the same, namely, when the rent payable by the under-*raiyat* is payable under a registered lease or agreement, fifty per cent."

The suit was brought after the Bengal Tenancy Act had come into operation, and the plaintiff seeks to recover rent from his under-*raiyat*. Can he do so, except within the limits prescribed by s. 48? We think that the question must be answered in the negative. The objection urged on behalf of the defendant, appellant, does not seek to give to the section any retrospective operation beyond what its language expressly provides for. It only seeks to confine the plaintiff's right to recover rent by suit within the limits within which alone the same can be recovered under s. 48 in a suit brought after that section came into operation. We may add that the language of s. 178, sub-s. 3, cl. (*e*) gives support to the view we take.

As for the cases cited by the lower appellate Court in support of its decision, namely, *Prafullah Chunder Bose* v. *Samiruddin Mondul* (1) and *Tejendro Narain Singh* v. *Bakai Singh* (2), they relate to provisions of the Bengal Tenancy Act, the language of which is very different from that of s. 48.

For these reasons we think that the decree of the Court of appeal below is wrong, and it must be set aside, and that of the first Court restored, with costs in this Court and in the Court below.

N. C.

[F., 28 C. 166 (168); Appr., 26 C. 199; R., 2 C.L.J. 540 (542).]

(1) 22 C. 337. (2) 22 C. 658.

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practically involves the question which has been argued in this appeal, namely, whether the rent payable to [202] the plaintiff by the defendants or either of them is liable to be reduced under s. 48, cl (*a*) of the Bengal Tenancy Act. The Munsif found that the defendant No. 1 was not liable, but that defendant No. 2, having been accepted by the plaintiff as his tenant, was liable for the rent of the under-*raiyati* holding. He also found that the plaintiff was a *raiyat* and defendant No. 2 an *ausut-raiyat*, in other words an under-*raiyat* under the plaintiff, and that the entire *raiyati* of the plaintiff was covered by the defendants' *ausut-raiyati*. It was admitted before the Munsif that the rent of the plaintiff's *raiyati* was only Rs. 14-1. And that officer being of opinion that under s. 48, cl. (*a*) of the Bengal Tenancy Act, the defendants' rent could not exceed 50 per cent. of the plaintiff's rent, he made a decree in favour of the plaintiff at Rs. 21-1-6 per year.

The plaintiff appealed to the Subordinate Judge, and the four points raised before him are thus stated in the judgment of the learned Subordinate Judge : *First*, whether plaintiff is entitled to get rent for the period claimed at the rate of Rs. 37-1 per year ; *second*, whether the lower Court is wrong in awarding damages instead of the interest claimed ; *third*, whether the defendants can be ejected from the holding in arrears; *fourth*, whether the lower Court is wrong in not decreeing the suit against both defendant Nos. 1 and 2 ?

In this appeal we are only concerned with points one and three. Before the learned Subordinate Judge it was admitted that the plaintiff's was a *raiyati* holding, and that defendant No. 2 held under him as an under-*raiyat*. The learned Subordinate Judge states that in express terms, and he was of opinion that s. 48, cl. (*a*) was retrospective in its effect, and that the plaintiff was not entitled to recover more than 50 per cent., in excess of the rent payable by himself to the zemindar. He also held that s. 66 of the Tenancy Act requires for the purpose of ejectment that the arrears of rent should remain due at the end of the Bengali year, and as in the present case the plaintiff did not wait till the end of the year 1302 to institute his suit for the arrears of that year, the defendant could not be ejected from his holding for those arrears. He accordingly [203] upheld the decree of the first Court, giving to the plaintiff what had been found by the Munsif to be properly recoverable by him.

In second appeal to this Court two points have been raised by the learned pleader for the plaintiff-appellant. In the first place it is contended that s. 48 (*a*) is not retrospective in its effect. This question came up before this Court in another case—*Ram Kumar Jugi* v. *Jafar Ali Patwari*—decided by Banerjee and Stevens, JJ., on the 14th July 1898 (1). There the learned Judges held that s. 48, cl. (*a*) was retrospective and operated as a bar to a *raiyat* recovering from his under-*raiyat* rent more than 50 per cent in excess of the rent payable by him to his own landlord. Suffice it to say that we are entirely in accord with that judgment, and we, therefore, overrule this objection taken by the appellant to the judgment of the Court below.

It was next contended that this was a permanent *mokurari* lease coming under s. 179 of the Bengal Tenancy Act. In our opinion this contention is wholly untenable. In the first place, the plaintiff is not the holder of a permanent tenure. He never alleged himself to be such. His suit is founded upon the allegation that he was only a *raiyat*, and his

(1) 26 C. 199, *note*.

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holding was a *raiyati* holding. Nor is the defendant the holder of a permanent *mokurari* lease, for throughout the proceedings he has been mentioned as being only an under *raiyat*.

It was also argued that under s. 66 of the Tenancy Act, the plaintiff was entitled to eject the defendant, inasmuch as the rent of the previous years had not been paid. We agree with the Subordinate Judge that as the suit was brought before the expiry of the year 1302 in respect of the arrears for that year, the plaintiff is not entitled to eject the defendant from his holding under the provisions of s. 66. On these grounds we think that the careful and well-considered judgment of the lower appellate Court should be upheld, and this appeal dismissed with costs.

N. C. *Appeal dismissed.*

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26 C. 204=2 C.W.N. 718.

[204] ORIGINAL CIVIL.

Before Mr. Justice P. O'Kinealy.

RUNGO LALL LOHEA AND OTHERS *v.* WILSON AND OTHERS.*
[22nd, 23rd, 24th, 27th, 28th and 29th June and 13th July, 1898.]

Landlord and tenant—Nature of tenancy—Lease for construction of permanent works—Permanent tenure—Conduct of lessor—Suit for rent—Alternative claim for compensation for use and occupation of land—Suit for land—Jurisdiction of High Court—Limitation—Acknowledgment of debt—Limitation Act (XV of 1877), s. 19, and sch. II, art. 110.

The defendants and their predecessors in title held of the plaintiffs and their predecessors certain land under a *pottah*, which, though not expressly stated to grant a permanent lease, was granted for the purpose of constructing "a brick-built dock, buildings, &c., and workshops." The works were constructed; and during a period of 42 years the interest of the lessees was from time to time transferred, without any conduct on the part of the lessors or their successors indicating that they regarded the interest of the lessees as not permanent. Some years after the construction of the dock it ceased to be used as such.

Held, that the tenure created by the *pottah* was of a permanent nature.

A suit by a landlord against a tenant for rent at a rate agreed upon for one period, and for rent on the basis of use and occupation for a subsequent period is not a suit for land; and therefore the High Court may have jurisdiction to try such a suit even when the land is situate outside the local limits of its jurisdiction.

The plaintiffs sued the defendants for arrears of rent from the 4th December 1889 to the 31st July 1894, relying upon the following letter as an acknowledgment sufficient to take their demand out of the Limitation Act: "As we have informed your client, we are quite willing to pay him the rent due under our *mourasi pottah* if he can show a title to give us a good receipt for it that will satisfy our lawyers. If he is in the same position that his father was up to the time of his death, unable to produce a perfect title, we are still willing to pay him the rent on his giving us a substantial indemnity similar to that which we had from his father."

Held, that this was a sufficient acknowledgment within s. 19 of the Limitation Act.

Secretary of State for India v. *Luchmeswar Singh* (1), distinguished.

[R., 4 Ind. Cas. 626=86 P.W.R. 1909; 6 Ind. Cas. 948=55 P.R. 1910=136 P.L.R. 1910; D., 36 C. 59=1 Ind. Cas. 472]

[205] THE following are the main facts of this case:—

The defendants, Messrs. Anderson, Wright and Co. (represented by the defendant Wilson) and their predecessors were for many years tenants

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* Original Civil Suit No. 531 of 1894.

(1) 16 C. 223=16 I. A. 6.

1898 JULY 13. — ORIGINAL CIVIL. — 26 C. 204 = 2 C.W.N. 718.

to the plaintiffs and their predecessors in title of certain premises known as No. 7, Haripore Lane, Sulkea, in the suburbs of Howrah, at a monthly rent of Rs. 60-10-9 until the end of December 1889. The plaintiffs in this suit alleged that they duly determined the tenancy by a notice in writing on the 4th December 1889; but those defendants, claiming that they held a permanent lease, and that their rent could not be enhanced, continued in occupation of the said premises. The defendants had constructed a dock and other permanent works on the land in their occupation, under the terms of the *pottah* granted to them.

On the 31st July 1894 the plaintiffs brought this suit, claiming rent for the month of December 1889 at the rate of Rs. 60-10 9, and for the subsequent period to the end of June 1894 at the rate of Rs. 150 a month as a reasonable rent for the defendants' use and occupation of the said premises. A portion of the claim would, therefore, be barred by limitation unless the Court should hold that a sufficient acknowledgment of liability was contained in a letter, dated 5th November 1891, written by the defendants to the plaintiffs' solicitor, containing the following terms:—

"As we have informed your client, we are quite willing to pay him the rent under our *mourasi pottah*, if he can show a title to give us a good receipt for it that will satisfy our lawyers. If he is in the same position that his father was up to the time of his death, unable to produce a perfect title, we are still willing to pay him the rent on his giving us a substantial indemnity similar to that which we had from his father."

In June 1893 the defendants' attorney satisfied himself that there was no flaw in the plaintiffs' title, and offered to pay the rent from December 1889 if the plaintiffs would sign a receipt admitting that the defendants held a *mourasi pottah*; but this the plaintiffs refused to do. The defendants on their part refused to give the plaintiffs inspection of their *pottah*.

[206] On the 24th January, 1898, Rajah Sew Bux Bogla was added as a defendant on the allegation that he had purchased the premises from the plaintiffs at a Registrar's sale held on the 7th August 1897.

When the case came on for hearing, the plaintiffs applied for and obtained leave to amend the prayer of the plaint by claiming in the alternative a decree for the rent from the beginning of 1890 to the end of June 1894 at the rate of Rs. 60-10-9 per month. The facts will be found stated at length in the judgment of the Court.

Mr. *Sinha* (with him Mr. *R. N. Mittra*), for the plaintiffs.

Mr. *Hill* and Mr. *J. G. Woodroffe*, for the defendants Messrs. Anderson Wright and Co.

Mr. *Pugh* and Mr. *Chuckerbutty*, for the defendant Rajah Sew Bux Bogla.

Mr. *Sinha* having opened the case,—

Mr. *Hill* objected that the Court had no jurisdiction to try the suit, inasmuch as it was, in effect, a suit for land situated beyond the territorial limits of the Court's jurisdiction. He argued as follows:—

If the plaintiff sues for damages for the use and occupation of the land, the question of the title arises; because one can only claim compensation for use and occupation on the basis of a claim that the land is his. This, therefore, is a suit for land; and, if so, the Court has no jurisdiction, and the plaintiff gets nothing. [O'KINEALY, J.—At least he gets Rs. 60-10-9 for which he sues.] That is doubtful. Can he, on a suit for compensation for use and occupation, get a decree for rent? A suit for rent is a suit on a contract; whereas a suit for compensation for

use and occupation is a suit in tort, on the ground that the landlord has been deprived of the land to which he is entitled. A claim for rent of land cannot be changed into one for compensation for use and occupation; and we submit that a claim based on use and occupation cannot be changed into one for rent.

Next, the claim is barred by limitation, unless the plaintiff can prove an acknowledgment within s. 19 of the [207] Limitation Act. True, the defendants offered to pay the rent; but on the condition that the plaintiff showed a good title to give a sufficient receipt. That was merely a statement that they would pay the rent upon the happening of an uncertain event, and was not an acknowledgment of a debt, but a mere allegation of an incident out of which a debt may arise, *Young* v. *Mangala-pilly Ramaiya* (1). It was not an acknowledgment that the rent was due. It does not come within s. 19 of the Limitation Act, for it is not in any sense an acknowledgment of any such liability as is set forth in the plaint. It was simply a promise to make a payment in a certain contingency, not an admission such as is contemplated by s. 19. The claim is, therefore, barred as to a large part of it.

As regards the nature of the holding, these defendants claim to have a permanent lease. There are numerous decisions of this Court showing from what data a permanent tenure may be inferred. Where land is leased for the construction of permanent works, it is a fair inference that the lease was intended to be a permanent one.

Mr. *Sinha*, for the plaintiffs.—A conditional promise to pay does not prevent the promise from being an acknowledgment within s. 19 of the Limitation Act. An acknowledgment need not specify the amount of the debt acknowledged; indeed it need not specify anything at all, and need not be made to the person to whom liability is acknowledged, and therein it differs from a promise to pay. The defendants' letter is clearly an admission of their liability to pay rent, or compensation for use and occupation, to the person entitled to it. They say: "We are quite willing to pay the rent due under our *mourasi pottah*;" but that is their statement of how the liability arises, the admission of liability is there just the same. The admission is clear; the only question is, to whom are they to pay the rent? And it may reasonably be held that there is an admission of liability to pay compensation for use and occupation. The case of *Young* v. *Mangalapilly Ramaiya*(1) does not apply; because there the plaintiffs had to do something to create a liability, whereas, in the present case, the existence of the [208] liability is admitted; but the defendants want proof of the plaintiffs' title. In former legislation as to limitation the word "promise" was used; in the present Act the word "acknowledgment,"—a much wider term—is substituted. The English doctrine that an acknowledgment, in order to be effectual, must amount to a fresh promise to pay has never been adopted by the Indian Legislature. And if the debtor accompanies his acknowledgment with a promise to pay upon a condition, it is not necessary to prove fulfilment of that condition—*Mohesh Lal* v. *Busunt Kumaree* (2).

As to the notice to quit, we rely upon s. 106 of the Transfer of Property Act. This is not a lease for agricultural or manufacturing purposes, and a lease for any other purpose is deemed to be a lease from month to month; this tenancy was, therefore, terminable on fifteen days'

(1) 3 M.H.C. 308. (2) 6 C. 340 (353).

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notice. And the words of the notice were sufficient for the purpose—*Ahearn* v. *Bellman* (1).

The defendants, therefore, by holding over, impliedly agreed to pay the enhanced rent— *Janoo Mundur* v. *Brijo Singh* (2).

[Mr. *Sinha* on a subsequent day abandoned his position as regards the sufficiency of the notice.]

Mr. *Pugh*, on behalf of the defendant Raja Sew Bux Bogla, contended that this suit was a suit for land, and that the Court had no jurisdiction to try it. The suit is for rent up to a certain date; the plaintiff says that as he gave due notice to quit, he is entitled to compensation for use and occupation of the land. Now, however, the contention as to the sufficiency of the notice has been abandoned. There is therefore an end to the suit. [O'KINEALY, J.—There is no need to go into the question of notice if I find for the other defendants on the title.] But if upon the question of title the Court has no jurisdiction, the parties would not be bound by its decision. [O'KINEALY, J.—That is, if this is a suit for land.] Yes, and undoubtedly the claim for Rs. 60-10-9 is a claim for rent. Apart from the question of notice, I submit the Court cannot dispose of the question of title between the plaintiffs and the [209] defendants, Anderson, Wright & Co. It cannot, under colour of decreeing damages, decide the question of title to land outside the local limits of its jurisdiction. The question of title is purely an issue between the co-defendants; and this defendant is here simply to see that no decree is passed which would confirm as against him a permanent tenure in favour of the other defendants. [Mr. *Sinha*: If Mr. *Pugh* now goes into his case as to this, the plaintiffs ought not to be kept here; or, if so, I shall ask for the costs subsequent to this day. O'KINEALY, J.—I cannot decide anything on that point yet; nor can I decide whether I have jurisdiction until I have heard Mr. *Pugh*.] A purchaser would no doubt have notice of the ordinary incidents of the tenure. But in this case it is not an incident; because a permanent lease would be more in the nature of an alienation, and this defendant could hardly be affected with notice of that. He is not bound by any equities that may have arisen between the other defendants and the plaintiffs; that is all that he is concerned about.

Further, the *pottah* does not cover the whole of the premises in suit; but only two annas of it. The other defendants claim through Newaz Bibee, the widow of Sheik Imam Bux. According to the lady's own statement, what she took on the death of her husband was only a two-annas share of the land,—which, indeed, was all that she could take according to Mahomedan law. So that, as regards the other 14 annas of the land, the defendants were, at best, but monthly tenants. Moreover, the lease was granted to them only for the purpose of constructing a dock and works connected with it. Many years ago, the defendants ceased to use the dock as such, and filled up a part of it. Therefore the lease has determined—*Secretary of State for India* v. *Luchmeswar Singh* (3).

[A discussion arose as to the costs of the suit.]

Mr. *Hill*.—The plaintiffs could easily have ascertained that the defendants Anderson, Wright & Co. held this land as building land, and that it had passed from hand to hand under a number of recent transactions. They have not made any such inquiries and are [210] not entitled to the

(1) (1879) L.R. 4 Ex. D. 201. (2) 22 W.R. 548. (3) 16 C. 223 = 16 I.A. 6.

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costs. This was a suit for rent to which they are not entitled. It might have been different if they had claimed the original rent and not an enhanced one. They denied our *mokurari* title; and now that we have proved it as against them, we ought to have our costs. [O'KINEALY, J.—They may succeed on their amendment, and it would be hard to give costs against them.] That was not the case we came to meet.

Mr. *Sinha*: The defendants are not entitled to the costs. The issues they raised were (1) as to the jurisdiction; (2) as to whether the plaintiffs were entitled to the sums claimed or any portion thereof. The written statement was filed three years after their attorney had satisfied himself of the plaintiffs' right to receive the rent, and yet in it they denied the plaintiffs' right to any portion of the rent claimed. Further they say they will only pay Rs. 728 per annum subject to the law of limitation, and if this Court shall hold that the plaintiffs are entitled thereto. They have all along refused to give inspection of their *pottah* and have driven the plaintiffs into Court. They have never paid any sum into Court, and the offer they made was no offer at all. In England, a tender without payment into Court is no defence,—Order XXII, rule 3.

C. A. V.

The judgment of the Court was as follows:—

JUDGMENT.

O'KINEALY, J.—In this case the plaintiffs claim to have been the owners of the premises No. 7, Haripore Lane, in Sulkea, in the suburbs of Howrah. They allege that the defendants Messrs. Anderson, Wright & Co. had been tenants under them in occupation of those premises at a monthly rent of Rs. 60-10-9 down to the end of the month of December 1889; that the plaintiffs by a notice to quit, dated the 4th of December 1889, determined the tenancy then existing between them and the defendants at the end of that month: but that the defendants nevertheless continued in the occupation of the premises down to the time of the institution of this suit, that is to say, the 31st of July 1894. The plaintiffs claimed Rs. 150 per month for use and occupation of the premises from the end of December 1889 to the filing of the plaint.

The plaintiff Rungo Lall Lohea is one of four brothers, the [211] others being Nahrmull, Sew Bux and Bhaniram, who constituted a joint Hindu family, and it appears that they carried on business in Calcutta under the style of Nahrmull Bhaniram, and while carrying on business under that name they purchased the premises No. 7, Haripore Lane. The other plaintiffs are the representatives of the three brothers of Rungo Lall Lohea.

The plaintiffs state that the defendants had paid the rent of the premises for the period ending with the month of November 1889 only, and they claim to recover the rent for the month of December 1889 at the rate of Rs. 60-10-9 per month and the rent for the subsequent months down to the end of June 1894 at the rate of Rs. 150 a month, which rent was claimed by them as a fair and reasonable rent for the defendants' use and occupation of the premises during that period.

It is apparent from the above statement that a portion of the plaintiffs' claim would under ordinary circumstances be barred by the law of limitation, as the suit was not instituted till the 31st of July 1894. The plaintiffs, to obviate this difficulty, relied upon a letter written by the defendants to the plaintiffs' attorney on the 5th of November 1891, to the terms of which I shall hereafter refer.

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With regard to the claim put forward by the defendants the plaintiffs say, in the fifth paragraph of the plaint, that the defendants objected to the notice claiming,—to use the words of the plaint,—"that the rent payable in respect of the said lands could not be enhanced by reason of some rights which they," the defendants, "said they possessed under an alleged deed which they stated to be a perpetual *pottah*, but though endeavours have been made by and on behalf of the plaintiffs to ascertain from the defendants the nature of the said rights claimed, and to obtain an inspection of the said document, the defendants have persistently refused to give any such information or any such inspection."

The defendants in their written statement took a variety of objections: *firstly*, they said this Court had no jurisdiction to try this suit; *secondly*, they did not admit the title upon which the plaintiffs relied to maintain this suit; *thirdly*, they claim to hold [212] the premises under a *mourasi potta* or permanent lease granted in the year 1847 to their predecessors in title, and they allege in the fifth paragraph of their written statement that they had paid the rent under this *pottah* down to the end of November 1889, but that from the month of September 1881 they had paid the rent "to a person as they believe named Nahrmull Bhaniram, but they state that they did so without admitting the title of the said Nahrmull Bhaniram to the said premises and only upon an indemnity granted to them by one Sewbux, a broker in their employ, inasmuch as the said Nahrmull Bhaniram was unable or unwilling to satisfy them that he had a complete or valid title to the said premises."

In the 6th paragraph of their written statement the defendants say "that they had no personal knowledge as to whether the said Nahrmull Bhaniram was in fact a person as they believe or a firm as alleged in the 2nd paragraph of the plaint, but in any case they do not admit that if a firm it was composed of the members therein mentioned, or that the persons on whose behalf the plaintiffs purport to sue are the legal representatives of the members of the said firm," that is to say, the defendants in this paragraph again raise the question of the plaintiffs' title to maintain the suit which they had previously done in the 3rd paragraph of their written statement.

The defendants admitted the receipt of the notice to quit relied upon by the plaintiffs, but they did not admit that it emanated from the plaintiffs. They say they have always been ready and willing to pay rent at the rate of Rs. 60-10-9 per month, but they do not say to whom; they allege that this rent, though tendered, was refused, they do not say by whom; and they also say in the 9th paragraph of the written statement that "they are willing to pay the said rent at the rate of Rs. 728-2-10 per annum (subject to the law of limitation) if this Hon'ble Court should hold that the plaintiffs are entitled thereto;" that is to say, the defendants avow themselves willing to satisfy the decree of this Court in case they are not successful in preventing the plaintiffs from obtaining decree against them.

In the 10th paragraph of their written statement the [213] defendants say this: "The defendants deny that they have refused to disclose to the plaintiffs the nature of the rights claimed by the defendants under the *pottah* above mentioned or that they have declined to allow inspection of the said *pottah* as alleged." It will be seen from the evidence, which I shall deal with hereafter, that the defendants made no attempt to support this paragraph of their written statement. Indeed, that evidence shows that the statements in this paragraph are not correct.

This written statement was filed on the 13th of June 1896, nearly two years after the filing of the plaint, and the suit remained as then constituted until the 24th of January 1898, when by an order of this Court Rajah Sewbux Bogla was added as a defendant, he alleging himself to be the purchaser of the premises in question from the plaintiffs at a sale held by the Registrar of this Court on the 7th of August 1897.

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Hitherto in stating the questions, which have arisen between the parties, I have treated the case as if Messrs. Anderson, Wright & Co. were the sole defendants, and I shall continue to do so until I come to deal specifically with the claim put forward by Rajah Sew Bux Bogla. It is convenient in this case that I should in the first instance determine the questions which arise between the plaintiffs and the original defendants in the suit.

When the case came on for hearing I gave the plaintiffs leave to amend the prayer of the plaint by claiming in the alternative a decree for the rent from the beginning of the year 1880 to the end of June 1894 at the rate of Rs. 60-10-9 per month. In this position of matters the questions, which arise between the plaintiffs and the defendants, [leaving aside for the moment the question of jurisdiction which I shall deal with in considering the case of Rajah Sew Bux Bogla] are these :—

1st.—Did the relation of landlord and tenant exist between the plaintiffs and the defendants?

2nd.—If so, what was the nature of the tenants' interest in the land. That is to say, was it a monthly tenancy as contended for by the plaintiffs, or a perpetual lease as contended for by the defendants?

[214] *3rd.*—If the tenancy were a monthly tenancy was that tenancy put an end to by the notice to quit, dated the 4th of December 1889?

4th.—Is the plaintiffs' claim under the plaint, as amended, or any portion thereof, barred by the law of limitation?

Upon the first question Byjnath Lohea, one of the plaintiffs, was called. He is the adopted son of Nahrmull, and from his evidence it appears that Nahrmull and his three brothers Rungo Lall, Bhaniram and Sew Bux formed a joint Mitakshara family. They carried on business in Calcutta under the name of Nahrmull Bhaniram.

[His Lordship proceeded to discuss the evidence bearing on the first issue, and stated his reasons for coming to the conclusion on the facts that the relation of landlord and tenant did exist between the parties in 1889. He then went on to say :—

I am of opinion therefore that the plaintiffs have shown that the relation of landlord and tenant did exist between them and the plaintiffs in 1889, or at least they have shown sufficient to entitle them to call upon the defendants to prove that such a relation did not exist between them, and this the defendants have not done.

The next question which I have to consider is what was the nature of the tenancy between the plaintiffs and the defendants, and upon this question I have come to the conclusion that it was a permanent tenure not subject to be determined by the notice of the 4th of December 1889, assuming that to be a valid notice in other respects.

The defendants have produced a document, dated the 27th of Assin 1254, corresponding with the 12th of October 1847. This purports to be a *pottah* of ten *bighas* of land in Sulkea granted by Mussamut Newaz Bibee to James Cockrell, Thomas Gladstone, Alexander Robert, and Pitamber Banerjee. The defendants shew by a series of title deeds that the

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premises covered by the *pottah* were mortgaged and conveyed from time to time by the lessees for the time being, and these deeds show that about the year 1861 those premises were known by the name of the Albion Docks and conveyed as such. The defendants also show that the premises [215] covered by the *pottah* were conveyed to the West's Patent Press Company by a conveyance of the 22nd of July 1876. The defendants were the managers of that Company, and Mr. Anderson proves that under that conveyance he got possession of the premises in question in this suit, and he also swears that these same premises were known in former days as the Albion Docks. There is, therefore, no doubt whatever that the lands covered by the *pottah* are the lands in question in this suit, and the next question I have to determine is, what interest does the *pottah* purport to convey from the lessor to the lessees. The *pottah* is expressed to be granted for the purpose of the lessees constructing "a brickbuilt dock, buildings, &c., and workshops," and after stating the boundaries of the land goes on to say: "You shall, without excuse, pay the rent hereof into my *sarkar* year by year at the rate of Rs. 90 (ninety rupees) per *bigha* per annum (amounting to) the sum of company's 900 (nine hundred rupees) for 10 *bighas* by instalments according to the details of instalments. If there be default in (payment of) *kist*, you shall pay interest according to law. Further if there be (any) alluvial accretion of land over and above the land aforesaid in future, you will duly make (arrangement) with regard to the same separately. To this effect, I grant this lease in writing after taking (a) *kabuliat*." The details of instalments show that the rent was payable yearly in six instalments of Rs. 150 each.

The conveyances and mortgages, which were put in evidence by the plaintiffs, show that the dock and other permanent buildings were erected on the land, and that the land was dealt with by the original lessees and their successors as if their interest therein were a permanent one. Mr. Anderson states the value of the pucca buildings on the land when he took possession of the premises in 1873 to be about a lakh of rupees. There is no direct evidence of the cost of building the dock, but there is no doubt it must have been very large. In the year 1870 there was a suit for rent instituted by the heirs of Newaz Bibee against the then holders of the *pottah*, and the occupiers of the premises. In this suit the original *kabuliat* was filed by the plaintiffs, and from the record it appears that after the *pottah* had been granted a decree was obtained, apparently by the owner of some land adjacent [216] to the premises covered by the *pottah* for possession of a portion of those premises, and in consequence of that decree and by an arrangement between the lessor and the lessees the yearly rent of Rs. 900 payable under the *pottah* was reduced to Rs. 728-10-9, and this reduced rent continued to be paid to Newaz Bibee and after her death to her son-in-law and her grandsons Sadut Ally and Futteh Hossain, and subsequently to these grandsons alone down to the year 1880 by the lessees for the time being. During the whole of this time there is no trace of any conduct or any assertion on the part of the lessors for the time being inconsistent with the fact of the *pottah* being a permanent one, which the lessees show from their dealings with it they considered it to be. In fact, the arrangement come to between the lessors and the lessees in 1861 for the reduction of the rent owing to the loss of a portion of the land would rather show that the lessors at that time did not consider they could reject the lessees by means of a notice to quit. If such an idea had entered their minds, it is extremely unlikely that they would agree to any reduction. We have therefore a lease of this

land for the purpose of erecting structures of a permanent and costly character thereon. This of itself would, according to the decisions of this Court, be sufficient to stamp this lease as a permanent lease. But we have more than that here: we have a uniform payment of rent based on the *pottah* for a period of over forty-two years, and transfers of the lessees' interest to various persons within that period, while no conduct or assertion of the lessors during that period can be pointed to as indicating that they looked upon the lease as not a permanent one. I do not think the form of the receipts can be taken as such an indication. It is true that in the receipts of 1874, 1875, 1876, the names of the original tenants appear, and there is nothing to indicate that the tenancy is permanent, but there is a distinct admission in each of them of the transfer by purchase to West's Patent Press Co. or to the defendants Anderson, Wright and Co. The receipts given by Nahrmull Bhaniram seem to me to carry the matter no further. I have no doubt, therefore, that the tenancy from its inception was and was intended to be a permanent one, and that the plaintiffs could not determine it by a notice to quit.

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[217] I am also of opinion that even if the tenancy were only a monthly tenancy, the notice given by the letter of the 4th of December 1889 was not sufficient to determine such a tenancy. The result, therefore, is that the plaintiffs are not entitled to a decree for anything except the rent from the month of November 1889 down to the filing of the plaint at the rate of Rs. 60-10-9 per month, and I think they are entitled to that, as the defendant's letter of the 5th of November 1891 is sufficient to prevent any portion of this claim being barred by the law of limitation.

The next question is as to the costs of this suit. The defendants did not admit the plaintiffs' title to the rent from November 1889. They did not agree to pay the rent to the plaintiffs unless the latter would admit their *pottah* to be a *mourasi mokurari pottah* at a time when the plaintiffs had not had inspection of that pottah. It is true that the plaintiffs made no claim for the rent from the beginning of the year 1890 at the rate of Rs. 60-10-9 until this case came on for hearing, but this part of the claim stands in the same position as the claim for the rent of December 1889, to which the defendants, in their written statement, do not admit the plaintiffs are entitled. That written statement is not a very candid document, and I do not think the defendants were justified in taking up the position which they did. I shall therefore give the plaintiffs a decree for the costs of this suit up to and including the first day's hearing from the defendants Messrs. Anderson, Wright & Company. I make no order as regards the costs of the remaining days of the hearing, except the costs of the last day, which I shall deal with hereafter.

I have now to consider the case with reference to the claim of Rajah Sew Bux Bogla. He claims to be the owner of the premises, and he makes out his title in this way.

He has produced a certificate of sale, dated the 17th of March 1893, which shows that Rungo Lall Lohea on the 17th of April 1887, purchased at a sale in execution of a decree obtained by him against Sadut Ally and Futteh Hossain (passed in original suit No. 59 of 1880 in the Court of the Subordinate Judge of Hooghly) for a sum of Rs. 850, a 2 annas share in [218] five parcels of land, one of which is stated to be the premises in question.

He has also produced a certificate of sale, dated the 10th of June 1880, which shows that Jogeeram Agurwalla purchased at a sale in execution of

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a decree obtained by Annoda Prosad Chowdhry and others against Sadut Ally and Futteh Hossain (passed on original suit No. 59 of 1880 in the Court of the Subordinate Judge of Hooghly) for a sum of Rs. 31,800, a 14 annas share in three parcels of land, one of which is alleged to be the premises in question. This 14 annas share was afterwards purchased by Nahrmull Bhaniram in 1881.

It is in this way, according to Rajah Sew Bux Bog la, that the premises in question came into the possession of the plaintiff family.

He has also produced a certificate of sale, dated the 20th September 1897, which shows that Rajah Sew Bux Bogla purchased at a sale held by the Registrar of this Court under a decree obtained by Pokur Mull and others against the plaintiffs (passed in suit No. 414 of 1894) for a sum of Rs. 24,000 two parcels of land one of which is alleged to be the premises in question.

He thus claims to be the owner of these premises, and he was made a party defendant in this suit at his own instance in order to see that his interests should not be prejudiced by any collusive proceeding on the part of the original parties to the suit.

He contended, as did the original defendants, that this was a suit for land, and that I had no jurisdiction to entertain it on that ground. But it seems to me that where, in a suit by a landlord against his tenant for rent at a rate agreed upon for one period and for rent on the basis of use and occupation for a subsequent period, it becomes necessary to determine what the nature of the tenancy was, I think that that fact does not make the suit a suit for land. There is no relief claimed in respect of the land, nor is it sought to deal with it in any way whatever, and I think the contention of the defendants involves what appears to me to be an undue extension of the phrase "a suit for land" as used in [219] cl. 12 of the Letters Patent, see *Juggernauth Doss* v. *Brijnath Doss* (1) and *Land Mortgage Bank* v. *Sudurudeen Ahmed* (2).

It was also contended on behalf of Rajah Sew Bux Bogla that the lease was granted for the purpose of building a dock only, and that the evidence shows that the defendants filled up the greater portion of the dock and have been using the unfilled portion merely as a water tank. Under these circumstances he urged that the lease had determined, and he cited in support of this contention the case of the *Secretary of State for India* v. *Luchmeswar Singh* (3). In that case the Maharajah of Durbhanga brought a suit against the Government to recover possession of lands which had been in their possession from the year 1798. The defendants were admittedly tenants of the plaintiff, and it therefore lay upon them to show that their tenancy was still existing at the institution of the suit, or in other words that it was a permanent tenancy. There was no written lease, nor any evidence as to what were the terms which were agreed upon at the beginning of the tenancy, and all that the Government could rely upon to support their claim to a permanent tenancy was the fact that the rent was uniform throughout the whole period of their possession. The Privy Council held that that fact was of no weight under the circumstances of that case and dismissed the appeal. In the course of their judgment their Lordships say this : " But even if the *onus probandi* did not lie so clearly on the defendants, their Lordships think that the reasonable explanation has been given by the Courts below, and that there probably was some understanding, which might have amounted to an agreement, that the

(1) 4 C. 322. (2) 19 C. 358. (3) 16 C. 223 = 16 I.A. 6.

Government should have this land for the purposes of a stud, not that they should have it for ordinary agricultural or commercial purposes, to make what money they could of it. Thus the moment it ceased to be occupied for the purposes of a stud the rights of the landlord would revert, and it was he, and not the Government, who would have the benefit of the increased value of the land."

[220] Now, in the *pottah* of 1847, there is nothing to indicate that the duration of the lease is to be commensurate with the use of the proposed dock. It appears to me the land was given to the lessees for commercial purposes "to make what money they could out of it," to use the words of the Privy Council, and I therefore think the case cited does not govern the present one.

It was stated on behalf of Rajah Sew Bux Bogla that the land belonged to Newaz Bibee's husband; that he died leaving her and one daughter surviving; and that this daughter married Hossain Ali, and by him had two sons, Sadut Ally and Futteh Hossain. Upon this state of facts Mr. Pugh contended that Newaz Bibee could only grant a 2 annas share in the land, and that therefore the *pottah* of the defendants only covered a 2 annas share of the premises in question, and that therefore the defendants were at most only temporary tenants of the other 14 annas share. No proof has been given of the facts stated, but assuming them to be correct, I do not think the conclusions sought to be drawn from them are sound. The *pottah* purports to be a *pottah* of the whole 16 annas interest in the land. The agreement for the reduction of the rent consequent on a loss of a portion of the land was come to on that basis, and the rent suit, which I have before mentioned, was a suit for the rent of the whole land and not of a fractional share of it, and was instituted by the persons entitled to the whole 16 annas of the reversion on the lease. Furthermore the rent receipts given by Sadut Ally and Futteh Hossain are receipts for the rent of the whole of the land and not of a fractional share of it. The rent was paid on this footing for a period of forty-two years, and it seems to me that the only natural conclusion to be drawn from these circumstances is either that Newaz Bibee had full power to deal with the entire interest in this piece of land, or if she had not originally that power, that her action was confirmed by her and her husband's heirs.

It was also stated that the title to the 2 annas share has been kept distinct from the title to the 14 annas share from the year 1864, but that mode of dealing with the reversion of the *pottah* of 1847, even if it were proved, which it has not been, is no evidence whatever as against the holders of this *pottah*, and I therefore think there is nothing in this contention [221] which has been put forward, not by the plaintiffs, but by Rajah Sew Bux Bogla on the plaintiffs' behalf.

I do not propose to decide any questions which arise between Rajah Sew Bux Bogla and the other defendants, save in so far as they are questions which also arise between the plaintiffs and Messrs. Anderson, Wright and Company. Any ground of attack and defence not available both to the plaintiffs and himself, as against the claim of Messrs. Anderson, Wright & Co., to have a permanent lease of these lands, remains untouched by me, and for that reason I decline to enter into the question as to the effect of Rajah Sew Bux Bogla's claim to be a *bona fide* purchaser for value of the premises in question without notice of any claim on the part of Messrs. Anderson, Wright & Co., to a permanent lease.

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The whole of the last day of the hearing and a portion of the previous day were taken up in placing the case of the defendant Rajah Sew Bux Bogla before the Court. The plaintiffs protested against receiving any assistance from Rajah Sew Bux Bogla and against the prolongation of the trial, which would be caused by hearing him. The other defendants also protested against his being heard, but I did not see my way to yield to those objections. He must, however, pay the costs of the last day's hearing to the plaintiffs, and to Messrs. Anderson, Wright & Co., and he must also pay them their costs of the application which he made to become a party to this suit, those costs having been reserved.*

Attorney for the plaintiffs : Mr. *Chick*.

Attorney for the defendants: Messrs. *Orr, Robertson and Burton.*

H. W.

* An appeal was brought in this case but was struck off for default in appearance.

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26 C. 222=3 C.W.N. 228.

[222] APPELLATE CIVIL.

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, and Mr. Justice Banerjee.

SONATUN SHAHA AND OTHERS (*Decree-holders*) *v.* DINO NATH SHAHA (*Objector*).* [22nd August, 1898.]

Civil Procedure Code (*Act XIV of* 1882), *ss.* 108 *and* 253—*Ex parte decree—Surety—Liability of a surety, after a decree passed in the original suit—Surety bond purporting to hypothecate immoveable property—Transfer of Property Act* (*IV of* 1882), *s.* 59—*Evidence Act* (*I of* 1872), *s.* 68.

An *ex parte* decree was set aside on condition that the defendant should find a surety, who would be responsible for any amount that might be found due from the defendant by any decree to be subsequently made in the suit.

Held, that under s. 108 of the Code of Civil Procedure, a Court has jurisdiction to set aside an *ex parte* decree on these terms.

On an application to execute the decree, which was subsequently made against the defendant by the decree-holder, both against the defendant and the surety, objection was taken by the surety to the execution and was allowed by the Court below.

Held, that under s. 253 of the Code of Civil Procedure the decree-holder was entitled to take out execution against the surety.

Held, also, that where a surety bond purported to hypothecate immoveable property, though it was not registered and attested by two witnesses, a personal decree could be passed on it against the surety inasmuch as the document was evidence of a money debt.

Madras Deposit and Benefit Society v. *Oonnamalai Ammal* (1) dissented from.

[R., 32 M. 410 (F.B.)=1 Ind. Cas. 1=19 M.L.J. 584 (588).]

THIS appeal arose out of an application for execution of a decree. The facts were briefly these : One Govind Chundra Shaha and others obtained an *ex parte* decree against one Bhugwan Chunder Shaha. An application to set aside the *ex parte* decree was made by the judgment-debtor under s. 108 of the [223] Code of Civil Procedure, and the said decree was set aside on the petitioner giving security for the satisfaction of any decree that might eventually be passed in the case. One Dino Nath Shaha stood

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* Appeal from order No. 116 of 1898, against the order of Babu Shyam Chand Dhur, Subordinate Judge of Backergunge, dated the 15th of January 1898, reversing the order of Babu Shyama Charan Ukil, Munsif of Barisal, dated the 24th of November 1897.

(1) 18 M. 29.

surety for the said petitioner, and pledged some immoveable property as security. The case was heard *de novo* and a decree was ultimately made against the aforesaid Bhugwan Chunder Shaha. The decree-holder transferred his decree to one Sonatun Shaha, who applied to execute the decree both against the judgment-debtor and the surety. Objection was taken by the surety to the execution, *inter alia*, on the grounds, *first*, that the Court had no jurisdiction to take security under s. 108 of the Code of Civil Procedure, and that proceeding was illegal; *second*, that the Court ought not to have set aside the *ex parte* decree simply on taking security and without enquiring whether there was any good legal ground for setting aside the decree; and, *third*, that the security bond, being for more than Rs. 100, and creating a right to immoveable property and not being registered, was not admissible in evidence, and was invalid. The Court of first instance disallowed the objections, and granted the decree-holder's petition. On appeal to the Subordinate Judge he reversed the decision of the first Court and decreed the appeal. Against that judgment the decree-holder appealed to the High Court.

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Babu *Sri Nath Das* and Babu *Nund Lall Sarkar*, for the appellant.

Dr. *Rash Behary Ghosh* and Babu *Dwarka Nath Chuckerbutty*, for the respondent.

The following judgments were delivered by the High Court (MACLEAN, C. J. and BANERJEE, J.) :—

JUDGMENTS.

MACLEAN, C. J.—In this case the plaintiffs obtained an *ex parte* decree against the defendant. The decree was set aside at the instance of the defendant, and it was set aside on terms, one of the terms being that the defendant should find a surety, who would be responsible for any amount that might be found due from the defendant by any decree to be subsequently made in the suit. The plaintiffs did not object, and the surety gave a bond to be so responsible.

I think the Court had ample jurisdiction under s. 108 [224] of the Code of Civil Procedure to set aside an *ex parte* decree on those terms. A decree was subsequently made against the defendant at the hearing of the suit, and the decree-holders sued out execution both against the defendant and the surety, relying on s. 253 of the Code of Civil Procedure.

The Court below has refused execution against the surety, hence the present appeal by the present decree-holders.

Dr. *Rash Behary Ghosh* for the objector argues that s. 253 does not apply to the case, because the surety here did not become liable before the passing of a decree in the original suit, but became surety only after the *ex parte* decree was pronounced. I think this contention is not well founded, for the words, in my judgment, mean "before the decree in the original suit" which had not been made but which would be made if the litigation proceeded, and for the performance of which the surety became liable. He became liable for a decree in an original suit which had not been passed when he became surety. I think then that the decree-holders were entitled to take out execution against the surety.

A further point is taken that the surety-bond was a mortgage of immoveable property, and that, having regard to the terms of s. 59 of the Transfer of Property Act, such a mortgage could only be enforced if it had been registered and attested by at least two witnesses. I understand this document has not been either registered or attested by two witnesses. The decree-holders answer this argument by saying that they do not rely

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on the document as a mortgage; they are not setting up any right to a charge on the property mentioned in the mortgage, but they say it is evidence of a money debt for which the surety made himself personally liable. The surety then contends that s. 68 of the Evidence Act is a conclusive answer to this argument, and relies on a decision of the Madras High Court in the case of *Madras Deposit and Benefit Society* v. *Oonnamalai Ammal* (1). Section 68 says: "If a document is required by law to be attested it shall not be used as evidence until one attesting witness at least has [225] been called for the purpose of proving its execution," and so forth.

But the document in this case, as far as it creates a mere money or personal liability, does not, so far as I am aware, require to be attested, and, if so, s. 68 does not apply. It is not set up as a mortgage. In this view, speaking with every deference, I am not disposed to agree with the case which has been cited.

Upon these grounds the order of the lower appellate Court must be reversed, and execution must be proceeded with against the surety.

The appellants will get costs in this and in the lower appellate Court.

BANERJEE, J.—I am of the same opinion. The lower appellate Court has set aside the order of the first Court allowing execution to proceed under s. 253 of the Code of Civil Procedure against the person who became liable as surety for the performance of the decree, on the ground that the surety-bond was taken by the Court under circumstances under which it had no authority to take the bond.

It is contended by the learned vakil for the appellants that this view of the lower appellate Court is wrong, and that the Court, which took the surety-bond, had ample authority to do so under s. 108 of the Code.

The only objection to the taking of the bond that the lower appellate Court points out is that the bond was taken by the Court without satisfying itself that the summons was not duly served, or that the defendant was prevented by any sufficient cause to appear, when the case was called on for hearing. It is said that the "terms as to costs, payment into Court or otherwise," can be imposed under s. 108 of the Code, only if the Court is satisfied that the summons was not duly served, or that the defendant was prevented by sufficient cause from appearing. Granting that this is so, there is nothing to show that the Court was not satisfied on these points before the surety-bond was taken. It is true that the *ex parte* decree was set aside by consent, but if [226] the petitioner's adversary consented to the decree being set aside on the ground either that the summons was not duly served or that the defendant was prevented by sufficient cause from appearing when the suit was called on for hearing, that would be the best method of satisfying the Court that the ground alleged was well founded.

I am clearly of opinion, therefore, that the ground upon which the lower appellate Court has held the surety-bond to have been irregularly taken is wholly untenable.

The learned vakil for the respondent does not seek to support the judgment on that ground, but he contends, first, that under s. 253 of the Code there is nothing to warrant the decree being executed in this case against the surety; and, secondly, that the bond is altogether bad being in contravention of s. 59 of the Transfer of Property Act read with s. 68 of the Evidence Act.

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(1) 18 M. 29.

As to the first point, what is urged in support of it is, that the respondent did not become liable as surety "before the passing of a decree" in the original suit within the meaning of s. 253 of the Code, an *ex parte* decree having been made in that suit, and having been in force at the time when he became surety.

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I do not think this contention is sound. Though an *ex parte* decree had been made, it was set aside, and we must take it that it was set aside simultaneously with the order for taking security, so that it could not be said that the respondent became liable as surety after the passing of a decree in the original suit which was then in force, or which has remained in force. The setting aside of that decree must have the same effect as if no such decree had been made at all.

As to the second point urged in support of the order of the lower appellate Court I have nothing to say in addition to what has been said by the learned Chief Justice.

S. C. G. *Appeal allowed.*

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26 C. 227 (P C.) = 26 I.A. 38 = 3 C.W.N. 113 = 7 Sar. P.C.J. 425.

[227] PRIVY COUNCIL.

PRESENT:

Lords Watson, Hobhouse, and Davey, and Sir R. Couch.

[*On appeal from the Court of the Judicial Commissioner of Oudh.*]

RAM NARAIN (*Representative of Plaintiff*) v. MUHAMMAD HADI AND OTHERS (*Defendants*). [28th and 30th June and 26th November, 1898.]

Benami Transaction—Benami purchase—Whether property was held benami for the claimant or was a gift to the holder—Evidence of ownership—Source of purchase-money.

The claimant, having supplied the purchase-money on the sale of the village in suit, took the transfer by sale-deed in the name of the first defendant who remained in possession of it, receiving rents. The claim was for proprietary possession by the purchaser, on the ground that the property was held benami for him. The first Court decreed the claim. The appellate Court reversed this decision.

The first Court had attributed too much to the fact that the plaintiff had supplied the purchase money; an important fact in most of the cases raising the question of benami, or not benami, but not the only test of ownership.

Here the source of that money was consistent with the claimant's having, as the defence alleged, intended to make a gift of the property to the holder of it; and the right inference from the facts was that it was not held benami for the claimant, but belonged to the defendant.

[**Rel. on,** 12 Ind. Cas. 721 (722) = 7 N.L.R. 159; **Appr. & D.,** 29 B. 306 (312) = 6 Bom.L.R. 975 (979); **R.,** 5 Ind. Cas. 85 (87); 158 P.L.R. 1908; 37 P.R. 1909 = 38 P.L.R. 1909 = 50 P.W.R. 1909 = 1 Ind. Cas. 732.]

APPEAL from a decree (14th January 1890) of the Additional Judicial Commissioner, reversing a decree (28th September 1889) of the District Judge of Lucknow.

This suit was brought on the 21st December 1886 for the proprietary possession, valued at Rs. 6,382, with mesne profits Rs. 4,042 of *mauza* Habibpur in the Lucknow District, held by the defendant, and subject to certain interests, either with or under him, of ten other persons, co-defendants with him. The claim arose out of the sale of this *mauza*, which at the time, by registered sale-deed, was transferred from a third

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party, one Haro Nath, into the name of the first defendant, Maulvi Muhammad Hadi; and afterwards *dakhil kharij* to him was effected. The plaintiff, the late Pandit Raj Narain, supplied the purchase-money, Rs. 2,220. He died in 1890, and his brother, the appellant Ram Narain, succeeded him on the record, obtaining leave to appeal.

[228] The plaint alleged that the possession by Muhammad Hadi was benami for Raj Narain, in whose employment Hadi then was. The written answer of the latter was that the transfer, taken in his name, was not benami for Raj Narain, but was really to him, the purchase having been designed for his benefit as a gift from his employer Raj Narain, "in consideration of his, the defendant's, faithful and important service extending over some forty years."

The principal issue questioned this defence, and the Courts having differed upon it, the question was again raised by the present appeal, on which Muhammad Hadi alone appeared as respondent.

The District Judge, on the conflict of testimony, was of opinion that the fact of the plaintiff's having provided the purchase-money was the criterion of ownership; and that the only direct evidence as to the alleged gift having come from the defendant, the Court could not rely upon it; so that the weight of the evidence was in favour of the plaintiff. The judgment referred to Agnew on the Law of Trusts (1882), Tagore Law Lecture 1881, IV, on the subject of how far there was a presumptive character in a benamidar's holding, and to Mayne's Hindu Law and Usage, para. 367.

That decision was reversed by the Judicial Commissioner, whose judgment was that the evidence led him to conclude for the defence.

Although Habibpur had yielded a profit of over Rs. 400 a year, yet for nine years and a half from the date of the purchase to the institution of the suit the plaintiff had without question or objection allowed the retention of the rents without requiring any account. The defendant had been in possession, and held the document of title, the sale deed of 1877, and the receipts for fees paid at the mutation of names. The judgment referred to an expression in *Imambandi Begum* v. *Kamleswari Pershad* (1) that "where there are benami transactions, and the question is who is the real owner, the actual possession, or receipt of the rents, is most important. There were other dicta tending to show that [229] the person impugning the character of a transfer should shew something to establish that it was a benami transaction. Lastly, there was the probability that the defendant would have been reasonably rewarded for his long and arduous services to Raj Narain.

On this appeal,—

Mr. *C. W. Arathoon*, for the appellant, contended that it having been admitted that the plaintiff paid the purchase-money it was for the defendant to show that he had been made the beneficial owner. Due weight should be given to the plaintiff's statement that the purchase had been made *ism farzi* on account of the quarrels of persons who were entitled to maintenance out of the estate, Khalispur, of which this village was part.

Mr. *J. H. A. Branson*, for the respondent Muhammad Hadi, argued that the appellate Court below had rightly held that the plaintiff had failed to prove enough to get rid of the presumption of ownership attending this particular deed. The allegation that it was benami merely grounded

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(1) 21 C. 1005=21 I. A. 118.

on the fact, admitted throughout, that the purchaser had produced the purchase-money, was insufficient to displace the case, which was a reasonable and provable one, that the village had been bought for the purpose of making a gift to reward a servant for valuable services extending over many years.

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Mr. *C. W. Arathoon* replied.

JUDGMENT.

Afterwards, on the 26th November 1898, their Lordships' judgment was delivered by

SIR R. COUCH.—The suit which is the subject of this appeal was brought by Pandit Raj Narain against the respondents for possession of a village called Habibpur in pargana Malihabad, district Lucknow. He having died after the admission of the appeal is now represented in it by his heir and successor the present appellant. The plaint stated that Raj Narain was the absolute owner of the village and had purchased it under a sale deed, dated 27th July 1887, for Rs. 2,225 *ism farzi* (fictitiously) in the name of his agent and steward, the first defendant. This defendant (first respondent) in his written statement denied that the deed of sale was executed fictitiously in his name. The [230] other defendants, except the 7th and 8th, claimed under a deed of gift by him, and the latter two under a mortgage alleged in the plaint to be collusive, which was denied. In the view which their Lordships take of the principal question it is not necessary to go into this matter, and it will be convenient hereafter to call the first defendant the defendant. The District Judge made a decree in the plaintiff's favour, which was reversed by the Additional Judicial Commissioner on appeal.

It was proved that the consideration-money for the sale was paid by Raj Narain. Two of the three witnesses who attested the execution by the seller were examined. One deposed that Raj Narain said he should get the document executed in another man's name, the other said that for five or six days there was discussion. Raj Narain said he was having the deed executed *farzi* in the name of an agent; he did not name him. Also Raj Narain was called by the defendant as his first witness, the plaintiff having previously called the first defendant as his first witness—a proceeding of which there appears to be no explanation. Raj Narain said: "I forget if defendant No. 1 was here when I purchased Habibpur. My papers show that he was. The purchase was *ism farzi.* The reason is clear; it was because of the quarrels of the maintenance holders. I have purchased other Khalispur villages at auctions in my own name. There are the same maintenance holders in them." On this statement there was apparently no reason for this village being bought *ism farzi.* It is difficult to learn from the judgment of the District Judge what is the ground of his decision in the plaintiff's favour. He says: "The true criterion is to ascertain from whose funds the purchase-money proceeded. In the present case it is allowed that the funds for the purchase of Habibpur were supplied by the plaintiff." In many,—it may be said in most,—cases of alleged benami this is a very important fact. But it is not the only criterion. Here it is consistent with the defendant's case, which is that the plaintiff purchased the village for him and intended it to be a gift in return for his services. In such a case a much more important fact is the actual possession or receipt of the rents of the property. The plaintiff himself said that the defendant was "in possession of the [231] collections" and had not accounted for them for nine and a half

1898 Nov. 26. — Privy Council. — 26 C. 227 (P.C.) = 26 I.A. 38 = 3 C.W.N. 113 = 7 Sar. P.C.J. 425.

years. His statement that he said to the defendants five or seven times "give me the accounts of Habibpur," and the defendant said that money was due to him is not, if true, a sufficient reason for not requiring accounts. It is rather the reverse. The defendant in his evidence had said that the plaintiff never asked him for accounts. The plaintiff's father died in 1867. The defendant had been in his service for some years, and after his death continued in the plaintiff's service till 1886, receiving for his pay only 10rupees per month. After making full allowance for exaggeration by the defendant of the value of his services their Lordships do not doubt that he performed some valuable services for the father and for the plaintiff during the ten years previous to the purchase of Habibpur, especially in managing an estate in the Sunderbands which had been bought by the father for between Rs. 4,000 and Rs. 5,000, and was sold by the plaintiff for Rs. 39,000 or Rs. 40,000. The defendant had clearly some claim upon the plaintiff's generosity. It is true that benami transactions are very common in India, but this deed of sale appears to their Lordships not to be of that character, and they will humbly advise Her Majesty to dismiss the appeal and to affirm the decree of the Assistant Judicial Commissioner dismissing the suit. The appellant will pay the costs.

Appeal dismissed.

Solicitors for the appellant : Messrs. *T. L. Wilson & Co.*
Solicitor for the respondent : Mr. *J. F. Watkins.*

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26 C. 232=3 C.W.N. 97.

[232] CRIMINAL REVISION

Before Mr. Justice O'Kinealy and Mr. Justice Banerjee.

KANAI DAS BAIRAGI AND ANOTHER (*Petitioners*) *v.* RADHA SHYAM BASACK (*Opposite Party*).* [5th December, 1898.]

Penal Code (Act XLV of 1860), s. 486—Selling books with counterfeit property mark—Goods—Indian Merchandise Marks Act (IV of 1889).

Books are the subject of trade and are goods within the meaning of s. 2, cl. (4) of the Indian Merchandise Marks Act (IV of 1889) ; therefore when a person sells books with a counterfeit property mark, he commits an offence under s. 486 of the Indian Penal Code.

[F., 17 M.L.J. 490 (492) ; R., 26 B. 289 (292)=3 Bom.L.R. 883.]

THE facts of this rule and the arguments, for the purposes of this report, appear sufficiently from the judgment of the High Court.

Mr. *E. P. Ghose* and Mr. *J. R. Percival*, for the petitioner.

Mr. *C. P. Hill*, Mr. *P. L. Roy*, and Mr. *Grimley*, for the opposite party.

The judgment of the High Court (O'KINEALY and BANERJEE, JJ.) was as follows :—

JUDGMENT.

This is a rule calling upon the District Magistrate to show cause why the convictions and sentences in this case should not be set aside on the ground that the facts found do not amount to the offences of which the petitioners have been convicted, or why the sentences passed should not be reduced or otherwise altered.

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* Criminal Revision No. 724 of 1898, made against the order of S.J. Douglas, Esq., Sessions Judge of Dacca, dated 9th September 1898.

1898 DEC. 5. — CRIMINAL REVISION. — 26 C. 232 = 3 C.W.N. 97.

It appears that there is a well known Bengali Primer by one Ram Sundar Basack, and it has been found that this book has a property mark. The applicants are found to have sold large numbers of this book with a perfect knowledge that the book they sold was not the real book, but a book purporting to be the real one, and they were convicted of offences under ss. 482 and 486 of the Penal Code, and also of abetment of those offences under s. 109.

It has been argued in this Court that books are not goods under Act IV of 1889. "Goods" is defined in that Act to be [233] anything which is the subject of trade or manufacture; and although it was not argued that in ordinary language books are not the subject of trade, yet it was said that they were not the subject of trade within the meaning of that Act. "Trade" is not defined, and we must, therefore, take the ordinary dictionary meaning of that word. That being so, there can hardly be any doubt that books are the subject of trade and of a very large trade in Bengal, therefore books are covered by the word "goods."

The convictions entered up against the accused are of three kinds: One for using a counterfeit property mark, the second for selling the book with a counterfeit property mark, and the third for abetment of those offences. But we think that the conviction in this case ought simply to be a conviction under s. 486, and we accordingly set aside the convictions under ss. 482 and 109.

The result, therefore, is that the applicants will remain convicted under s. 486 and will suffer rigorous imprisonment for three months; and they will have to be taken into custody and serve out the remainder of the sentence.

S. C. G. *Rule discharged.*

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26 C. 233.

APPELLATE CIVIL.

Before Mr. Justice Banerjee and Mr. Justice Rampini.

SATISH CHUNDRA GIRI (*Plaintiff*) v. KABIRADDIN MALLICK AND ANOTHER (*Defendants.*)* [10th January, 1899.]

Bengal Tenancy Act (*VIII of* 1885), s. 29—*Enhancement of rent by registered contract—Increase in the amount of rent by reason of increase of area—Applicability of s.* 29 *in such cases.*

Section 29 of the Bengal Tenancy Act applies only to an increase in the rate of rent, and not to an increase in the amount of rent by reason of an increase of the area.

THIS appeal arose out of an action for arrears of rent due to the plaintiff for the years 1299 to 1302 B.S. The allegation of [234] the plaintiff was that the rent was payable at a certain amount; and in support of his claim he produced evidence to show that the rent was increased once in the year 1288 B.S., and again in the year 1295 B.S., there having been an increase in the area of the holding of the defendants. The defence was that the amount was not what was claimed by the plaintiff

* Appeal from Appellate Decree No. 1146 of 1897, against the decree of Babu Kali Prasanna Mukerjee, Subordinate Judge of Hooghly, dated the 31st of March 1897, affirming the decree of Babu Kali Prasanna Roy, dated the 28th of September, 1896.

1899 JAN. 10. — APPELLATE CIVIL. — 26 C. 233.

but less. The Court of first instance decreed the suit of the plaintiff in part in accordance with the admission of the defendant. An appeal by the plaintiff to the Subordinate Judge was dismissed, the Judge holding that inasmuch as an enhancement could only be made by a contract in writing and registered, and as in this case there was no such contract, the plaintiff was not entitled to any enhancement at all. From this decision the plaintiff appealed to the High Court.

Babu *Saroda Charan Mitter* and Babu *Satis Chandra Ghose* for the appellant.

Babu *Gyanendra Nath Bose*, for the respondents.

Babu *Saroda Charan Mitter*, for the appellant.—Section 29 of the Bengal Tenancy Act does not apply to a case where there has been an increase of rent on account of an increase in the area of the holding. Here, there is not an enhancement of rent, but only an alteration of the rent on account of the alteration in the area; therefore s. 29 has no application. There is a finding of the Court of first instance that upon a measurement there was an alteration in area.

Babu *Gyanendra Nath Bose*, for the respondents.—Section 29 applies to this case. There is no finding by the Court below that there was an alteration of rent on account of any alteration in area.

The judgment of the High Court (BANERJEE and RAMPINI, JJ.) was as follows:—

JUDGMENT.

This appeal arises out of a suit for rent.

The plaintiff's allegation was that the rent was payable at a certain amount. The defence was that the amount was less; and the plaintiff in support of his allegation, that the rent was what was claimed, sought to show that the rent was increased in 1288, and once again in 1295.

[235] The first Court found for the defendants, and gave the plaintiff a decree at the admitted rate. Certain other objections were urged by the defendants, which it is not necessary to consider. On appeal by the plaintiff, the lower appellate Court has held that the alleged increase in the rent in 1288 was not proved, and that the increase in the rent said to have been effected in 1295 could not be given effect to, because it was not by a contract registered as required by s. 29 of the Bengal Tenancy Act.

In second appeal it is contended that the lower appellate Court was wrong in holding that the increase in the rent that is said to have been effected in 1295 came within the scope of s. 29 of the Bengal Tenancy Act. It is argued that s. 29 applies only to an increase in the rate of rent, and not to an increase in the amount of rent by reason of increase of the area, and that the increase of 1295 was an increase of this latter description, as would appear from the judgment of the first Court.

We are of opinion that this contention is correct. Section 29 of the Bengal Tenancy Act applies only to cases of increase in the rate of rent, which is ordinarily designated "enhancement of rent"; whereas increase in the rent by reason of increase in area is not called "enhancement of rent" but is styled "alteration of rent" in the Act; and there is reason to think that the increase in the rent in 1295 was due, partly at any rate, to increase in the area. Whether that is so or not it would be for the lower appellate Court to determine, it being a question of fact which we cannot enter into in second appeal.

The decree of the lower appellate Court is accordingly set aside, and the case sent back to that Court in order that it may dispose of the appeal after determining the question whether there was any increase in the rent in 1295 by reason of increase in the area; and if there was any such increase what was the extent thereof. The costs will abide the final result. 1899 JAN. 10. APPELLATE CIVIL. 26 C. 233.

It is admitted that this judgment will govern second appeals Nos. 1238 and 1239 of 1897.

S. C. G. *Appeal allowed. Case remanded.*

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26 C. 236=3 C.W.N. 88.

[236] APPELLATE CIVIL.

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, and Mr. Justice Banerjee.

CHANDRA NATH ROY (*Defendant*) v. NILMADHAB BHUTTACHARJEE AND OTHERS (*Plaintiffs*).* [1st December, 1898.]

Evidence Act (I of 1872), s. 32, cl. (5)—Statement relating to the existence of any relationship contained in a document signed by several persons, some only of whom are dead.

A statement relating to the existence of any relationship contained in a document signed by several persons, some only of whom are dead, is admissible in evidence under cl. 5 of s. 32 of the Evidence Act.

THIS appeal arose out of an action brought by the plaintiffs to recover possession of certain immoveable property by establishment of their title by inheritance. The plaintiffs' allegation was that they were the great grandsons of the maternal grandfather of one Raj Narayan Roy, and therefore they were the preferential heirs. The defendant denied the relationship of the plaintiffs to Raj Narayan Roy, and he claimed the property in dispute as being the heir. The plaintiffs, in support of their claim, put in a copy of a *potta* containing certain statements of the daughters of Raj Narayan to prove the existence of their relationship with Raj Narayan. Some only of the several executants of the *potta* were dead. The Munsif, having admitted this document in evidence, and considering other evidence in the case, decreed the plaintiffs' suit. On appeal to the Subordinate Judge, he affirmed the decision of the first Court. Against this judgment the defendant appealed to the High Court, on the ground that the statement made in the *potta* was not admissible in evidence.

Babu *Promotha Nath Sen*, for the appellant.

Dr. *Rash Behary Ghosh* and Babu *Sarat Chandra Roy Chowdhry*, for the respondents.

Babu *Promotha Nath Sen*, for the appellant.—The recitals in the *potta* are not admissible in evidence, as they are not statements of a person who is dead. In this case all the executants are not dead, [237] and as "person" includes "persons," s. 32 of the Evidence Act does not apply.

The respondents were not called upon.

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* Appeal from Appellate Decree No. 1383 of 1897, against the decree of Babu Mohim Chandra Ghose, Subordinate Judge of Faridpur, dated the 8th of March 1897, confirming the decree of Babu Aghore Chandra Hazrah, Munsif of Goalundo, dated the 27th of January, 1896.

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APPELLATE CIVIL.

26 C. 236 = 3 C.W.N. 88.

The judgments of the High Court (MACLEAN, C.J., and BANERJEE, J.) were as follow :—

JUDGMENTS.

MACLEAN, C. J.— In this case the statements in the *potta*—statements by way of recital—were properly admitted, in my opinion, as relevant facts under s. 32, sub-s. 5 of the Indian Evidence Act. The statements were recitals as to pedigree, and they supported the plaintiffs' case. The *potta* was executed by three sisters, two of whom are dead, and one of whom is still living. It was urged for the appellant that these recitals were not admissible, because they were not statements made by a person who was dead, but the joint statements of three persons, two of whom only were dead, and consequently that s. 32 did not apply. This argument was based entirely upon that provision of the General Clauses Act which says that "person" shall include "persons," and it was contended that "person" in s. 32 must be read "persons." I do not think this ingenious argument is entitled to succeed. Each of the sisters executed the *potta*, and each of the sisters made the statement in that *potta*, and that statement was as much the statement of each sister who is dead as the statement of the sister who is now living. I do not see why, because there is one sister still living, and who might be called as a witness, the recitals become, on that account, any the less a statement, in the case of the other sisters, made by a person who is dead. It may be matter for legitimate comment in arguing the case that those statements must be received with caution, as the plaintiffs had not called the surviving sister to depose to their accuracy, but I do not think the matter could be placed higher than that. My view is consistent with the ordinary meaning of the language used in the section: and it would, in my opinion, be narrowing seriously the useful operation of that section if we were to place upon it the construction urged by the appellant.

The appeal must be dismissed with costs.

BANERJEE, J.—I am of the same opinion. The question raised in this case is whether a statement relating to the existence [238] of any relationship contained in a document signed by several persons, some only of whom are dead, is admissible in evidence under cl. 5 of s. 32 of the Evidence Act. The contention of the learned vakil for the appellant is, that it is not admissible, because all the persons who joined in making that statement are not dead, and therefore the preliminary condition required by the section to be fulfilled is not satisfied. I am of opinion that this contention is not sound. The contention proceeds upon the assumption that the statement is but one statement, whereas the correct view is, that each of the executants must be taken to have made the statement for himself or herself, and if any of the executants of the document is dead, the statement made by that person would be admissible under s. 32, if it comes under one or other of its clauses, as being the statement of a person who is dead.

S. C. G. *Appeal dismissed.*

26 C. 238.

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26 C. 238.

APPELLATE CIVIL.

Before Mr. Justice Ghose and Mr. Justice Rampini.

SHAMA CHARAN MISSER AND OTHERS (*Defendants*) *v.* CHUNI LAL MARWARI (*Plaintiff*).* [2nd December, 1898.]

Interest—Compound Interest—The Santhal Parganas Settlement Regulation (*III of* 1872), *s.* 6—*The Santhal Parganas Justice Regulation* (*V of* 1893), *s.* 24—*Contract Act* (*IX of* 1872), *ss.* 23 *and* 24—"*Unlawful*" *consideration, Meaning of.*

There is no law or regulation laying down that an agreement between any two persons living in the Santhal Parganas to pay compound interest upon the amount borrowed is "unlawful" within the meaning of s. 23 of the Contract Act. All that the law provides is that compound interest will not be *decreed* by any Court.

Referring to the Santhal Regulations, s. 6 of Reg. III of 1872 and s. 24 of Reg. V of 1893, it was *held* in respect of an agreement to pay interest on an amount composed partly of the principal and interest due on a former debt, that such agreement is not void under s. 24 of the Contract Act, and that the obligee may recover such sums of money as he is entitled in law to recover, notwithstanding that part of the consideration is compound interest.

[R., 1 C.L.J. 182 (190); 23 T.L.R. 17.]

[239] THIS was an action on two mortgage bonds executed in favour of the plaintiff by the defendant Shama Charan Misser against him and his sons on the ground that they belonged to a Hindu family governed by the Mitakshara law, of which Shama Charan, the father, was the *karta* or master. As regards one of the bonds (dated 17th Asar 1302 F. S., corresponding to 24th June 1895), one of the pleas taken in defence was that the amount of the bond having been made up partly of principal and interest due on account of a previous debt, the stipulation for payment of interest was really for payment of compound interest, which was not allowed by law in the Santhal Parganas, and that therefore under the general law (Contract Act, ss. 23 and 24) the stipulation was unlawful and the contract void. The Deputy Commissioner held :—

"I do not, however, consider that compound interest is forbidden as illegal in s. 6 of Reg. III of 1872. It may be taken and given without the breaking of any law, but it cannot be *decreed* by the Court, an entirely different matter."

The defendants appealed to the High Court.

Babu *Sris Chandra Chaudhuri* and Babu *Joygopal Ghosh*, for the appellants.

Babu *Karuna Sindhu Mukerjee* and Babu *Akhoy Kumar Banerjee*, for the respondent.

The judgment of the High Court (GHOSE and RAMPINI, JJ.) was as follows :—

JUDGMENT.

The suit out of which this appeal has arisen was based upon two bonds; but there is no question raised before us as regards the first of them. The learned vakil for the appellant has confined his remarks to the second bond. It appears that this bond was for a certain sum of money,

* Appeal from Appellate Decree No. 599 of 1897, against the decree of R. Carstairs, Esq., Deputy Commissioner of Dumka in the Santhal Parganas, dated the 12th of January 1897, modifying the decree of H. Heard, Esq., Subordinate Judge of Deoghur, dated the 5th of October 1896.

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a part of which was interest upon the amount covered by the first bond, and it was agreed between the parties that the whole amount of the consideration as mentioned in the bond should bear interest, the result being that the obligor promised to pay interest upon the interest which was due upon the first bond. The Courts below have given a modified decree to the plaintiff.

[240] It has been contended on behalf of the defendant-appellant that, inasmuch as a part of the consideration for this bond was unlawful according to s. 23 of the Contract Act, the plaintiff obligee is not entitled to recover, having regard to the provisions of s. 24 of that Act, any portion of the money covered thereby.

Reference has been made to s. 6 of the Santhal Reg. III of 1872, as also to s. 24 of Reg. V of 1893, which modified to some extent the former Regulation. Section 6 provided that "all Courts having jurisdiction in the Santhal Parganas shall observe the following rules relating to usury, namely, interest on any debt or liability for a period exceeding one year shall not be decreed at a higher rate than two per cent. per mensem, notwithstanding any agreement to the contrary, and no compound interest arising from any intermediate adjustment of account shall be decreed," and so forth. Section 24 of the other Regulation provides that to "s. 6 of the Santhal Parganas Settlement Regulation the following shall be added, namely: *Explanation.*—The expression 'intermediate adjustment' of account in cl. (*a*) of this section means any adjustment of account which is not final, and includes the renewal of an existing claim by bond, decree or otherwise when without the passing of fresh consideration the original claim is increased by such renewal. *Illustration.*—A bond is given for Rs. 75, of which Rs. 25 are interest. Unless the obligee can prove to the satisfaction of the Court that he gave such consideration for the bond as rendered the transaction fair and equitable, of the Rs. 75, Rs. 50 only will bear interest, and the limit of the claim on the bond will be Rs. 100." There is no law or regulation laying down that an agreement between any two persons living in the Santhal Parganas to pay compound interest upon the amount borrowed is unlawful within the meaning of s. 23 of the Contract Act. All that the law provides is that compound interest will not be decreed by any Court. And it appears to us that the illustration to s. 24 of Reg. V of 1893, which we have just adverted to, shows clearly that a contract of this character may be so treated as to allow the obligee such sums of money as in law he is entitled to recover, notwithstanding that part of the consideration is [241] compound interest. We are of opinion that the argument of the learned vakil for the appellant on this head cannot be sustained, and that the plaintiff is entitled to recover the sums of money for which the Court below has given him a decree, barring compound interest.

Another point has been raised before us, and it is this: No decree ought to have been given in this case binding the minor son of the obligor at any rate charging the mortgaged property. It appears to us that the Judicial Commissioner has found that the bond was given by the father of the family in his representative capacity, and in that view of the matter the plaintiff is entitled to the relief which he asks for, it not being shown by the defendant that the debt was contracted for any immoral purpose.

For these reasons we think that the appeal fails and must be dismissed with costs.

S. C. C. *Appeal dismissed.*

26 C. 241.

1898 JULY 6.

APPELLATE CIVIL.

26 C. 241.

APPELLATE CIVIL.

Before Mr. Justice Ameer Ali and Mr. Justice Pratt.

KUMAR NATH BHUTTACHARJEE AND OTHERS (*Defendants*) *v.* NOBO KUMAR BHUTTACHARJEE AND OTHERS (*Plaintiffs*).*
[6th July, 1898.]

Limitation Act (*XV of* 1877), *sch. II, art.* 120—*Contribution, Suit for—Liability created by* ekrarnama—*Suit upon a covenant in the* ekrarnama *for money paid—Cause of action.*

A suit upon a covenant in an *ekrarnama* (executed by some of the defendants who were adults, and by the guardian of the others who were minors at the time when the *ekrarnama* was executed) was brought by the plaintiffs for the purpose of obtaining from the defendants contribution in respect of a debt which had been realized by the sale of the property mortgaged by the father of the plaintiffs. The defence mainly was that the suit was barred by limitation, inasmuch as it was not brought within six years from the date when the *ekrarnama* was executed, or from the date when the mortgage-debt became repayable upon the mortgage bond,

Held, that the cause of action in the case arose when the plaintiffs were damnified, *i.e.*, when they paid the mortgage debt, and as the suit was brought within six years from that date it was not barred by limitation.

[R., 34 A. 429 (432) = 9 A.L.J. 534 = 14 Ind. Cas. 244; 10 Ind. Cas. 320 (328) = 22 M. L.J. 207 = 10 M.L.T. 496; 36 M. 348 = 10 M.L.T. 300 (303) = (1911) 2 M.W.N. 227 = 21 M.L.J. 983 = 12 Ind. Cas. 353.]

[242] THE material facts of this case, as stated in the plaint, were as follows: The plaintiffs' father and the defendants were members of a joint Hindu family. A dispute having arisen between the members of the family it was amicably settled by two agreements, one executed by the father of the plaintiffs in favour of the defendants and the other by the defendants in favour of the plaintiffs. By one of these agreements, the plaintiffs' father relinquished a certain share of the joint family property in favour of the defendants, and by the other the defendants agreed to pay one-half of the amount which the plaintiffs' father borrowed by a mortgage-deed from one Raja Srinath Roy, for the necessity of the joint family. At the time of the execution of the agreement by the defendants some of them were adults and some were minors, and the mother of the minors signed the agreement on their behalf. Raja Srinath Roy, after the death of the father of the plaintiffs, instituted a suit against them, obtained a decree, and in execution thereof caused the mortgaged property to be sold on the 2nd September 1893, and appropriated the money realized by the sale in liquidation of the debt due to him. The plaintiffs, thereupon, brought this suit upon the terms of the agreement executed by the defendants for recovery of half the money so realized, and also claimed compensation at the rate of 12 per cent. from the date of the sale till the institution of the suit. The defendants, *inter alia*, pleaded that the suit was barred by limitation, and that the plaintiffs were not entitled to compensation. The Court below holding that the suit was not barred by limitation, and that the plaintiffs were entitled to interest as claimed by them, decreed the suit. From this decision the defendants appealed to the High Court.

Babu *Saroda Churn Mitter* and Babu *Hara Kumar Mitter*, for the appellants.

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* Appeal from Original Decree No. 146 of 1897, against the decree of Babu Kali Prosunno Mukerjee, Subordinate Judge of Hooghly, dated 12th of March 1897.

1898 JULY 6. — APPELLATE CIVIL. — 26 C. 241.

Babu *Boidya Nath Dutt*, for the respondents.

The judgment of the High Court (AMEER ALI and PRATT, JJ.) (so far as it was material for the purpose of this report) was as follows:—

JUDGMENT.

This appeal arises out of a suit brought by the plaintiffs in the Court of the Subordinate Judge of Hooghly under the following circumstances.

[243] The plaintiffs' father Upendra Nath Bhuttacharjee formed at one time with the defendants a joint Hindu family, but he appears to have separated from them in or about the year 1291, for we find that on the 31st of Assar of that year, corresponding with the 14th of July 1884, an *ekrarnama* was executed in his favour by some of the defendants, who were adults at the time, and by the guardian of the others who were minors, by which practically a partition was made of the joint estate and liabilities. It would appear from that document that, whilst the family was joint, Upendra Nath had the management of the entire property. It also appears that he had borrowed upon a mortgage executed by him in his own name from one Srinath Roy a sum of over Rs. 11,000. After the division in 1884 Upendra died, leaving the plaintiffs as his heirs. The exact date of his death is not disclosed upon the evidence; but it is said that it took place about six or seven years before the present action. After his death Srinath brought a suit against the plaintiffs, the heirs and representatives of Upendra, upon the mortgage executed by him, which ended in a decree; and in execution of that decree the mortgagee, decree-holder, sold a Calcutta property belonging to him. The plaintiffs bring this suit upon a covenant in the *ekrarnama* for the purpose of obtaining from the defendants contribution in respect of the debt paid off by them as aforesaid. The covenant upon which they base their action is contained in cl. 4 of the *ekrarnama*. It runs thus: "We shall be liable for one-half of the debts due by the joint estate and you shall be liable for the other half; and we shall respectively pay off the debts in proportion to our half shares. Let it be further declared that we shall pay off one-half of the amount borrowed in your own name under a mortgage from Srinath Roy and of the interest due thereon up to date, and you shall pay off the other half." They allege that the defendants are liable to pay them a half share of the amount paid by them to Srinath Roy, together with interest up to the date of payment. The defendants Probhu Gopal and Dwarkanath did not appear in the suit. The other defendants filed written statements, and among other objections contended that Upendra Nath had realized various sums of money from different parties indebted to the joint family, [244] and that they were entitled to have those sums credited against the amounts now claimed by the plaintiffs. They also allege that he was also liable to them under the *ekrarnama* for a share of the consideration paid by the joint family for the purchase of *mouzah* Soudra, and that in any event the plaintiffs were not entitled to interest as claimed by them. They also pleaded limitation.

The Subordinate Judge has held that the plaintiffs' suit was not barred by limitation; that the defendants had failed to establish that Upendra had realized the sums of money alleged by them; and that the plaintiffs were entitled to interest as claimed. He accordingly made a decree for Rs. 11,374, with interest at the rate of 12 per cent. per annum from the 2nd of September 1893 to the date of suit, with costs in proportion and interest at 6 per cent. per annum until realization.

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26 C. 241.

The defendants have appealed to this Court, and a number of objections have been taken to the decree of the Subordinate Judge: First, that the suit is not maintainable on the ground that the cause of action accrued either on the date when the *ekrarnama* was executed, that is some time in the year 1884, or when the debt became repayable upon the mortgage bond; and the suit not having been brought within six years from those dates, assuming that art. 120 was applicable to such an action, the suit was barred. It was also contended that the defendants, who were minors at the time of the *ekrarnama*, were not bound by the acts of their guardian. Besides these legal questions it was urged that the Subordinate Judge was wrong in disallowing the different items in respect of which credit was claimed by the defendants, and that in any event the plaintiffs were not entitled to interest allowed by the Subordinate Judge.

As regards the question whether the suit was maintainable or not, reference was made to Mayne on Damages, p. 405; *Loosemore* v. *Radford*(1), *Lethbridge* v. *Mytton* (2) and *Rutnessur Biswas* v. *Hurrish Chunder Bose*(3). All these cases point substantially to **[245]** the conclusion that when a person contracts to indemnify another in respect of any liability which the latter may have undertaken on his behalf such other person may compel the contracting party, before actual damage is done, to place him in a position to meet the liability that may hereafter be cast upon him. For instance, in *Loosemore* v. *Radford* (1) the plaintiff and defendant were joint makers of a promissory note, the plaintiff being surety and the defendant as principal; the latter had covenanted with the former to pay the money to the holder of the note on a given day, but made default. Upon an action brought upon the covenant by the plaintiff who was the surety, it was held that the defendant was liable by way of damages for the full amount of the money that he ought to have paid according to the covenant. *Lethbridge* v. *Mytton* (2) is to the same effect, and the same principle has been enunciated in the case of *Rutnessur Biswas* v. *Hurrish Chunder Bose* (3). In that case *B* had obtained from *A* a lease of lands, agreeing thereunder to pay a certain rental and a further sum of Rs. 183 odd yearly to *A's* superior landlord and to obtain a receipt therefor. *A* sued *B* for the rent due to himself and for the sum due to his superior landlord; it was held that *A* was entitled to recover the sum due to his superior landlord as damages for breach of the contract, and that the amount of such damages ought not to be taken as nominal, but should be assessed on the footing of the sum for which *A* might become liable to the landlord. These cases, therefore, show that in a certain class of cases, even before an injury is done or damage takes place, the plaintiff may bring an action in order that the person making the covenant may place him in a position to meet the liability he has undertaken on the latter's behalf. No authority has been shown to the effect that such a suit may not be brought for damages subsequent to injury sustained. The causes of action in the two classes of cases are different. In the one there is a right to bring an action to have the plaintiff put in a position to meet the liability cast upon him; in the latter to be indemnified after the plaintiff has met the liability. We think, therefore, that the **[246]** plaintiffs were not bound to bring their action within six years from the date of the mortgage; that their cause of action arose when they were damnified, that is, when they paid the mortgage-debt to Srinath Roy in

(1) (1842) 9 M. & W. 657. (2) (1831) 2 B. & Ad. 772. (3) 11 C. 221.

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1893, and calculating from that time the Subordinate Judge was right in holding that the suit was within time.

[The remainder of the judgment was on the merits of the case, and is unnecessary for this report. The case was eventually remanded.]

S. C. G.

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26 C. 246=3 C.W.N. 84.

APPELLATE CIVIL.

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, and Mr. Justice Banerjee.

GIRINDRA NATH MUKERJEE (*Judgment-Debtor*) *v.* BEJOY GOPAL MUKERJEE AND OTHERS (*Decree-Holders*).* [8th September, 1898.]

Transfer of Property Act (IV of 1882), *ss.* 58, 59—*Security bond whether attested by only one witness—Signatures of the Sub-Registrar and the identifier on the back of the bond whether sufficient to render mortgage valid—Security for the costs of the respondent to Her Majesty in Council—Code of Civil Procedure (Act XIV of* 1882), *ss.* 603 *and* 610.

A security bond, by which an interest in specific immoveable property has been transferred to another person for the purpose of securing a future debt, is a mortgage bond within the meaning of s. 58 of the Transfer of Property Act; and in order to create a valid mortgage it must be signed by the executant, and attested by at least two witnesses. Therefore, in a case where the mortgage bond by which the liability of a surety was created was signed by the mortgagor only on the front page, and not attested by two witnesses, but on the back of the bond it contained the signatures of the Sub-Registrar and of the identifier, a suit is not maintainable inasmuch as the bond is not a valid one under s. 59 of the Transfer of Property Act.

Nitye Gopal Sircar v. *Nagendra Nath Mitter*(1), distinguished.

Notwithstanding the admission of an appeal to Her Majesty in Council under s. 603 of the Code of Civil Procedure, a surety is not precluded from questioning the validity of the security bond in execution proceedings, inasmuch as he was not a party to the order of the High Court.

[**N.F.**, 6 A.L.J. 737; **Diss.**, 26 A. 69 (70); 33 C. 861=4 C.L.J. 41; **F.**, 27 C. 190 (193); 33 C. 985=4 C.L.J. 219; 31 M. 215 (216)=18 M.L.J. 219=3 M.L.T. 300; 9 C.W.N. 1001; 14 C.P.L.R. 42 (45); **Appr.**, 32 C. 494=1 C.L.J. 118=9 C.W.N. 372; **R.**, 32 C. 729=9 C.W.N. 697; 37 C. 526=11 C.L.J. 563=14 C.W.N. 974 (977)=5 Ind. Cas. 539; A.W.N. (1903) 201; 17 C.L.J. 267=18 Ind. Cas. 900 (902); **D.**, 27 B. 91 (94).]

THIS appeal arose out of an application to execute the order of Her Majesty in Council which awarded costs to the respondents [247] against the surety. The facts were shortly these: An appeal to Her Majesty in Council having been admitted, one Girindra Nath Mukerjee furnished security to the extent of Rs. 4,000 for the costs of the respondents in the Privy Council appeal, and he executed a bond in favour of the Registrar of the High Court, by which he gave certain immoveable properties as security. The security bond was signed by the executant on the front page, and at the foot it was signed by the scribe. But on the back of the deed, under the recorded admission of the execution by the executant and his signature, there were the signatures of the scribe and of the Sub-Registrar. After the disposal of the appeal to Her Majesty in Council, the decree-holders applied for execution of the decree for costs against the

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* Appeal from Order No. 285 of 1897, against the order of Babu Ananta Ram Ghose, Subordinate Judge of Nuddea, dated the 31st of July 1897.

(1) 11 C. 429.

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26 C. 246 = 3 C.W.N. 84.

surety judgment-debtors, who, *inter alia*, objected to the execution on the grounds that, inasmuch as the security bond was not properly attested, it was invalid under s. 59 of the Transfer of Property Act; that the security bond was not admissible in evidence; and that the application for execution should have been made by the Registrar of the High Court. The Subordinate Judge of 24-Pergunnahs, relying upon the case of *Nitye Gopal Sircar* v. *Nagendra Nath Mitter* (1), held that the provisions of s. 59 of the Transfer of Property Act were complied with, and that the security bond was properly attested by two witnesses, inasmuch as the identifier and the Sub-Registrar signed under the signature of the executant admitting execution, and allowed execution to proceed. Against this decision the judgment-debtor appealed to the High Court.

Babu *Lal Mohun Das* and Babu *Horendra Nath Mookerjee*, for the appellant.

Babu *Srinath Das* and Babu *Hem Chunder Mitter*, for the respondents.

The judgment of the High Court (MACLEAN, C.J., and BANERJEE, J.) was as follows:—

JUDGMENT.

The question raised in this appeal, which arises out of a proceeding in execution of a decree, is whether the order of Her Majesty in Council, which awards costs to the respondents, can be [248] executed against the surety, the appellant before us, notwithstanding that the mortgage bond which creates the liability of the surety is not attested by witnesses as required by s. 59 of the Transfer of Property Act. The Court below, applying the principle laid down in *Nitye Gopal Sircar* v. *Nagendra Nath Mitter* (1), has held that the requirement of the law as to the attestation of mortgages above a certain value is satisfied by the signatures of the Sub-Registrar and the identifiers of the executant below the registration endorsement recording the admission of execution, and it has accordingly allowed execution of the order for costs to proceed against the surety.

Against this decision the surety has appealed; and it is contended on his behalf that the Court below is wrong in holding that the signatures below the registration endorsement supply the place of attestation by witnesses.

We are of opinion that this contention is valid. The attestation required by s. 59 of the Transfer of Property Act is attestation by witnesses of the execution of the document, and not of the admission of execution. That is the ordinary sense of the expression "attestation by witnesses"—see *Sharpe* v. *Birch* (2). If we look at the document itself the signature of the mortgagor does not purport to be attested. The signatures of the Sub-Registrar and of the identifier are on the back of the mortgage bond, not on the same side as the signature of the mortgagor on the face of the bond. Having regard then to the provisions of s. 59, in the absence of attestation, no mortgage has been effected. As regards the case of *Nitye Gopal Sircar* v. *Nagendra Nath Mitter* (1), that was the case of a will as to which the third clause of s. 50 of the Indian Succession Act provides that it "shall be attested by two or more witnesses, each of whom must have seen the testator sign or affix his mark to the will or have seen some other person sign the will in the presence and by the direction of the testator, or have received from the testator a personal acknowledgment of

(1) 11 C. 429. (2) (1881) L. R. 8 Q. B. D. 111.

1898 SEP. 8. — APPELLATE CIVIL. — 26 C. 246 = 3 C.W.N. 84.

his signature or mark, or of the signature of such other person." So that attestation, either of [249] the execution or of the admission of execution by the testator, is expressly made sufficient for the purpose. That, however, does not hold good in the case of a mortgage deed—see *Kumari Bibi* v. *Srinath Roy* (1) and *Tofaluddi Peada* v. *Mahar Ali Shaha* (2).

It was argued for the respondents that even if that was so it did not render the security bond invalid, as it is not a mortgage within the meaning of s. 58 of the Transfer of Property Act. This argument is not sound. The document was clearly intended to transfer to the Registrar of this Court for the benefit of the respondents an interest in the properties specified in the document for the purpose of securing to the extent of Rs. 4,000 a future debt, namely, a judgment-debt that might be created by the order of Her Majesty in Council; and thus the document became a mortgage as defined by s. 58 of the Act.

It was next contended for the respondents that even if the bond was a mortgage bond, as the Court by admitting the appeal to Her Majesty in Council under s. 603 of the Code of Civil Procedure must be taken to have held that the security given was valid, it was not open to the appellant to question the validity of the mortgage bond in these proceedings. We do not consider this contention to be well founded. The surety was not a party to the appeal nor to the proceeding by which the appeal was admitted. It was the appellant to Her Majesty in Council and not the surety, who put forward the security bond, and the surety cannot be held to be bound by the order admitting the appeal so as to be precluded from showing that the mortgage bond is invalid in law. In other words, as he was not a party to the order of this Court, he ought not to be taken to be bound by it.

It was lastly contended by the learned vakil for the respondents that, as by s. 610 of the Code of Civil Procedure the order of Her Majesty in Council regarding the respondents' costs can be executed against the surety to the extent to which he has rendered himself liable, in the same manner as it may be executed against the appellant to the Privy Council, the execution can proceed against the surety even if the mortgage bond be [250] invalid. We are unable to accept this contention as correct. The section provides that execution of the order for costs may proceed against a surety to the extent to which he has made himself liable. Now what is the exent to which the surety in this case has made himself liable? He has not made himself personally liable at all; for the mortgage deed contains no covenant to pay. The only extent to which he intended to make himself liable was by way of a mortgage on certain property which turns out not to have been effected owing to the mortgage deed not being attested as required by s. 59 of the Transfer of Property Act. He undertook no other liability. We feel constrained, therefore, to hold that the security bond was invalid and did not create any liability in the surety which can be enforced. The order of the Court below allowing execution to proceed against the surety must consequently be discharged. We give no costs of the appeal.

S. C. G. *Appeal allowed.*

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(1) 1 C.W.N. 81. (2) 26 C. 78.

26 C. 250=3 C.W.N. 222.

1898 DEC. 9.

APPEL-LATE CIVIL.

26 C. 250=3 C.W.N. 222.

APPELLATE CIVIL.

Before Mr. Justice Macpherson and Mr. Justice Stanley.

DWAR BUKSH SIRKAR (*Third Party*) *v.* FATIK JALI (*Judgment-debtor*) AND ANOTHER (*Decree-holder*).* [9th December, 1898.]

Civil Procedure Code (Act XIV of 1882), *s.* 244—*Parties to suit—"Representative" of party—Purchaser of the decree from the Decree-holder—Civil Procedure Code (Act XIV of* 1882), *ss.* 2, 232—*Decree-holder—Application by transferee of decree—Civil Procedure Code Amendment Act (VII of* 1888)—*Second Appeal.*

The word "representative," as used in s. 244 of the Code of Civil Procedure, when used with reference to a decree-holder, includes the purchaser of the decree from the decree-holder by an assignment in writing.

Ishan Chunder Sircar v. *Beni Madhub Sircar* (1) and *Badri Narain* v. *Jai Kishen Das* (2) referred to.

The Court executing a decree which has been so transferred can go into the disputed question of the transfer of the decree under the provisions of s. 244 of the Civil Procedure Code as amended by Act VII of 1888.

[251] Where there has been an assignment pending proceedings in execution taken by the decree-holder, there is nothing in the Code which debars the Court from recognising the transferee as the person to go on with the execution even if he has omitted to make a formal application for execution, such omission being merely an error of procedure, and not an error affecting the merits of the case.

[F., 27 C. 670 (672); 25 M. 529 (532); 28 M. 87 (89)=14 M.L.J. 475; R., 31 A. 82 (94)=6 A.L.J. 71=5 M.L.T. 185; 12 C.L.J. 312 (318)=7 Ind. Cas. 55; 15 C. P.L.R. 69 (71); 3 O.C. 32 (34, 35); 22 T.L.R. 172 (F.B.); D., 14 Ind. Cas. 40 =64 P.R. 1912=113 P.W.R. 1912.]

THE facts are set out sufficiently in the judgment of the High Court.

Babu *Prio Sunker Mozumdar*, for the appellant.

Babu *Promotho Nath Sen*, for the respondents.

The judgment of the High Court (MACPHERSON and STANLEY, JJ.) was as follows:—

JUDGMENT.

In this case the property of the judgment-debtor was attached and proclaimed for sale. Two days before the date fixed for the sale the decree-holder represented to the Court that the judgment-debtor had satisfied the decree by payment, and asked that the execution case might be disposed of accordingly. No order was passed on this application. On the 1st November, the day fixed for sale, Dewar Bux Sirkar, the appellant in this Court, intervened, and objected to satisfaction being recorded on the ground that he had purchased the decree from the decree-holder by means of a *kobala* some time before the payment in satisfaction was alleged, to have been made by the judgment-debtor, and that the decree-holder could not under such circumstances certify satisfaction. He also said that no payment had, in fact, been made, and that the decree-holder and judgment-debtor were colluding to defeat his right. The Subordinate Judge after taking evidence found that there had been a valid transfer of the decree previous to the alleged payment, and he allowed the objection and rejected the decree-holder's application to have the execution case

* Appeal from order No. 146 of 1898, against the order of R. R. Pope, Esq., District Judge of Dinagepur, dated the 21st of February 1898, reversing the order of Babu Sarbeswar Mozamdar, Subordinate Judge of that district, dated the 13th of January 1898.

(1) 24 C. 62. (2) 16 A. 483.

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disposed of as settled. He did not, however, find whether the judgment-debtor had or had not notice of the transfer, or whether he had or had not made the payment alleged by the decree-holder.

The judgment-debtor appealed, and the District Judge, without coming to any decision on the disputed question of transfer, reversed the order of the first Court on the ground that he had no jurisdiction to make any such order under s. 244 of the Procedure Code at the instance of the objector. He entertained the [252] appeal merely because he considered that the Judge had acted, although erroneously, under s. 244. It is clear, however, that the appeal did lie, as the Subordinate Judge had in substance held against the judgment-debtor that the decree had not been satisfied.

The contention before us is that the Subordinate Judge had full power under s. 244 to make the order which he did make. It appears that the appellant's pleader in the lower Court conceded that the case did not come under s. 244, apparently with a view to defeat the judgment-debtor's right of appeal; but an erroneous admission of the pleader on a point of law cannot bind the appellant. The respondent's pleader, moreover, appears to have made the same admission, and the Judge said that it was obviously a correct admission.

A Full Bench of this Court held in *Ishan Chunder Sirkar* v. *Beni Madhub Sirkar* (1) that a purchaser of the mortgaged property after a decree for sale was the "representative" of the judgment-debtor within the meaning of s. 244, and that the word "representative" used with reference to a judgment-debtor was not confined to his legal representative, but included also his representative in interest, when the representative was, as regards that interest, bound by the decree. I think the word, when used with reference to a decree-holder, must in the same way include the purchaser of the decree from the decree-holder by an assignment in writing; and it has been expressly held by the Allahabad High Court in *Badri Narain* v. *Jai Kishen Das* (2), that the purchaser of the decree is the "representative" of the decree-holder within the meaning of s. 244. A decree-holder as defined in the Procedure Code includes any person to whom the decree is transferred. As pointed out in the Allahabad case the expression "decree-holder" is not used in s. 244. That section speaks of "the parties to the suit in which the decree was passed or their representatives." The decree-holder who sold the decree was a party to the suit, and the person who purchased the decree from [253] him must, it seems, if he is anything at all, be his representative *qua* the decree within the meaning of the section.

The District Judge was also, I think, wrong in holding that the Subordinate Judge could not under the provisions of s. 244 go into the disputed question of the transfer of the decree. That section, as amended by Act VII of 1888, provides that, if a question arises as to who is the representative of a party for the purpose of the section, the Court may either stay execution of the decree until the question has been determined by a separate suit, or itself determine the question by an order under the section. The only provision in the Code referring expressly to the assignment of a decree is contained in s. 232, and that no doubt contemplates a case in which the assignee applies for execution. In such a case the Court may, if it thinks fit, after notice to the decree-holder and the judgment-debtor, allow the decree to be executed by

(1) 24 C. 62. (2) 16 A. 483.

1898 DEC. 9. — APPELLATE CIVIL. — 26 C. 250 = 3 C.W.N. 222.

the assignee. If, however, there is an assignment pending proceedings in execution taken by the decree-holder, I see nothing in the Code which debars the Court from recognising the transferee as the person to go on with the execution. The recognition of the Court is no doubt necessary before he can execute the decree, but it is the written assignment and not the recognition which makes him the transferee in law. The omission of the transferee, if it was an omission, to make a formal application for execution, was merely an error of procedure and does not affect the merits of the case. The Subordinate Judge had, I consider, power to determine, if he chose to do so, whether there had been a valid transfer of the decree. He did determine that the decree had been transferred by the *kobala*, and he decided also a question relating to the satisfaction of the decree as between the judgment-debtor and the person whom he found to be the representative of the decree-holder. The appeal of the judgment-debtor was properly before the District Judge, and he was bound to determine all the questions raised in it including the question of representation, if raised. A second appeal lies to this Court as the appellant is the person who was found by the first Court to be the representative of the decree-holder, and the District Judge has not found that he is not the representative.

[254] It is argued for the respondent that the transferee's title was not complete as express notice of the transfer had not been given to the judgment-debtor. As already observed, the transfer, as between the transferor and the transferee, is effected by the written assignment. If the judgment-debtor had no notice of the transfer and being otherwise unaware of it paid the money to the decree-holder, the payment was, of course, a good payment, and he cannot again be held liable to the transferor. Those are matters, however, which must be determined, and the order of the Subordinate Judge was defective inasmuch as it did not determine them.

The order of the District Judge is set aside, and the case remanded to him in order that he may determine all questions arising on the appeal. The costs of this appeal will abide the result.

N. C. *Case remanded.*

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26 C. 254 = 3 C.W.N. 299.

APPELLATE CIVIL.

Before Mr. Justice Ameer Ali and Mr. Justice Pratt.

DURGA PROSONNO BOSE (*Plaintiff*) v. RAGHU NATH DASS AND OTHERS (*Defendants*).* [29th June, 1898.]

Contribution, Suit for—Partnership business—Money borrowed by agreement by one partner and paid into partnership business—Decree against one partner—Suit for contribution by him against other partners—Adjustment of account whether necessary.

In a partnership business entered into between the plaintiff and the defendants, it was agreed that each member, together with the *gomastas* of the business, should be at liberty to borrow money upon his individual credit and to pay into the firm the money so borrowed to carry on the business. The plaintiff conjointly with defendants 4 and 6, in accordance with that agreement, borrowed several sums of money upon promissory notes, and paid the amounts so borrowed into

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* Appeal from Appellate Decree No. 38 of 1897, against the decree of S J. Douglas, Esq., District Judge of Dacca, dated the 30th of September 1896, modifying the decree of Babu Jogesh Chunder Mitter, Subordinate Judge of that District, dated the 18th of February 1895.

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26 C. 254 = 3 C.W.N. 299.

the business. After the loan the partnership business came to an end, but no account was settled. Afterwards decrees were obtained upon those promissory notes, and the plaintiff was obliged to pay up the decretal amounts. To a suit for contribution by the plaintiff, for money so paid, against the members of the firm, the defence, *inter alia*, was that the suit was not maintainable, in the absence of adjustment of the accounts relating to the firm.

[255] *Held*, that the suit was maintainable, inasmuch as the money secured by the promissory notes did not become an item of the partnership account.

[R., 32 M. 76 = 19 M.L.J. 10 (15) = 4 M.L.T. 456 = 1 Ind. Cas. 384; 16 C.W.N. 897 (901) = 16 Ind. Cas. 459.]

THE facts of the case, so far as they are necessary for the purposes of this report, were as follows :—

The plaintiff in his plaint stated that he and the defendants carried on in partnership the business of commission agents in respect of country produce such as jute, &c., as also a money-lending business, and after giving the shares of the different persons interested he stated that by an agreement between the parties each member, together with the *gomastas* of the business, was authorised to borrow money upon his individual credit and to pay into the firm the money so borrowed to carry on the business. In accordance with this agreement the plaintiff stated he borrowed on his own credit, by two separate bills, two sums of money, aggregating Rs. 2,000, from the defendant No. 1 and a person of the name of Rup Lal Dass. Apparently the defendant No. 1 carried on a separate money-lending business in conjunction with Rup Lal Dass. The plaintiff paid the money so raised into the business. One of the notes was paid but the other did not appear to have been paid. The plaintiff went on to state that on the 28th of Bysack 1293, conjointly with the defendants 4 and 6, he borrowed from one Trilochan Nag, who was really acting on behalf of defendant No. 5, upon a bond executed by the three, a further sum of Rs. 3,000, which also was brought into the business. The plaintiff further stated that the *karbar* came to an end some time in 1294; that thereafter there was some talk between the parties about the taking of the accounts which went so far that the parties executed an *achalnamah* appointing certain arbitrators, but in consequence of the laches of the defendants, the attempt to take the accounts proved infructuous; that whilst these negotiations were going on he was induced by the defendants to renew the outstanding promissory note in favour of the defendant No. 1 and Rup Lal Dass; that subsequently the defendant No. 1 and Rup Lall Dass brought a suit against him upon that promissory note and obtained a decree which he paid up, and that similarly Trilochan Nag brought a suit upon his bond against the three executants, obtained a decree and got it satisfied from the plaintiff alone. He therefore brought this suit to recover the [256] amounts so over-paid by him in respect of the said promissory note and bond.

In paragraph 12 of the plaint he says as follows : "That because the amounts of money mentioned in paragraphs 3 and 4 were borrowed and spent on account of business of the joint firm and for the interest of the joint firm, and as at the request and desire and with the consent of the partners, defendants, the promissory note mentioned in para. 3 was renewed in the manner stated in para. 8, the amounts of money mentioned in paras. 10 and 11 are the just debts of the plaintiff, and all the partners, defendants, &c. ;" and the prayer of the plaint was that the Court might be pleased to (*ka*) "confirm that the money paid off by the plaintiff, as stated in paras. 10 and 11 of the plaint, was payable by all the partners of the joint firm and to declare that the same was

paid off by the plaintiff (*kha*), pass a decree against the partners, defendants, either jointly or severally, for Rs. 2,800 left after deduction of the 2-13th share of the total amount, including costs and damages due by the plaintiff as stated in schedule (*ka*), below, and of Rs. 23-9 whereof remission has been given from the amount in claim together with interest during the pendency of the suit, as well as future interest, damages and the costs in Court according to the respective shares of the business, as stated in the schedule (*kha*) &c." 1898 JUNE 29. APPELLATE CIVIL. 26 C. 254 = 3 C.W.N. 299.

A number of pleas were raised by the defendants which practically reduced themselves into two. They denied in the first place the agreement, in other words, the authority which the plaintiff alleged he had from the members of the partnership business to borrow upon his own individual credit; and, *secondly*, they denied that the money so borrowed was in fact applied for the benefit of the partnership business; and by way of demurrer they alleged that, inasmuch as a suit for the adjustment of the partnership accounts was barred, the plaintiff was not entitled to any relief in the present action.

The Subordinate Judge did not frame any issue in the case; but he considered that the defendants were entitled to succeed upon their demurrer, in other words that the plaintiff was not [257] entitled to maintain the action. He proceeded upon the case of *Knox* v. *Gye* (1) in holding that as the suit for the partnership account was barred any relief which the plaintiff might have been entitled to in this action was barred also, as according to the plaintiff's statement the money had been applied to the partnership business. The Subordinate Judge accordingly dismissed the suit, and on appeal to the District Judge his decree was upheld. The plaintiff appealed to the High Court.

Dr. *Rash Behary Ghose* and Babu *Basant Kumar Bose*, for the appellant.

Babu *Lal Mohun Das*, Babu *Boidya Nath Dutt*, and Babu *Horendra Narayan Mitter*, for the respondents.

Dr. *Rash Behary Ghose*, for the appellant.—A suit for contribution by one partner against another does lie: see Lindley on Partnership, pp. 382 and 566. The case of *Knox* v. *Gye* (1) does not apply to the facts of the present case. The present suit is one for contribution and not for adjustment of accounts. The cases of *Dayal Jairaj* v. *Khatav Ladha* (2) and *Merwanji Hormusji* v. *Rustomji Burjorji* (3) were referred to.

Babu *Lal Mohun Das*, for the respondents.—The suit is not maintainable, inasmuch as there cannot be any suit for contribution without going into the accounts. The case of *Knox* v. *Gye* applies. Let an account be taken. Lindley on Partnership, 6th Edn., p. 551; Byle's Bills of Exchange, p. 43 (12th Edn.), and also the decision in appeal from order No. 7 of 1896 (4) were referred to.

Babu *Basant Kumar Bose* in reply.

JUDGMENT.

The judgment of the High Court (AMEER ALI and PRATT, JJ.), after stating the facts as mentioned above, continued as follows :—

The plaintiff appealed to the District Judge, who has, in his judgment, set forth at some length the arguments on both sides. He holds, and we think properly, that art. 99, sch. II of the [258] Limitation Act of 1877 was applicable to this suit, the period running from the time when

(1) (1872) L.R., 5 E. & Ir. App. 656.
(2) 12 B. H. C. 97.
(3) 6 B. 628 (635).
(4) *Post* 26 C. 262 *note*.

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the plaintiff was compelled to make the payments; and applying strictly the decision in the case of *Dayal Jairaj* v. *Khatav Ladha* (1) he was of opinion that the two defendants who joined with the plaintiff in executing the bond in favor of Trilochan Nag were liable for contribution to the plaintiff, but again reading strictly the case to which we have just referred, he thought that the plaintiff was not entitled to maintain his action as against the defendant No. 1.

Now, it is necessary to bear in mind the frame of the suit. Strictly speaking, this is a suit for contribution, an action in equity well known to any one at all familiar with the practice and procedure which prevailed on the Equity Side of the old Supreme Court, and unless there is anything which would justify a demurrer on the part of the defendants, there can be no question that the plaintiff would be entitled to recover in this suit; provided, of course, that his allegations of fact are well founded. The Subordinate Judge thinks that, because the money which the plaintiff borrowed upon his own credit was applied for the purposes of the partnership business, it therefore became an item in the partnership account; and that consequently, in view of the remarks made by Lord Westbury in *Knox* v. *Gye* (2), the plaintiff could not maintain the action for contribution apart from the account. It seems to us that the Subordinate Judge has taken a somewhat narrow view of the object and scope of the action even upon the rules which were prevalent in the English Courts prior to the passing of the Judicature Act in 1873. *Knox* v. *Gye* (2) was a case in which the accounts of the business of which the parties were members were actually asked for; and the subject-matter of the action and the relief that was prayed for in that suit were intimately connected with the taking of the accounts. One of the noble and learned Lords held that, although the action was brought to recover a portion of the assets that had been realized by one of the partners after the dissolution of the partnership, it could not be recovered because the accounts could not be taken. The [259] three other Judges were of opinion that an action for the recovery of a portion of the assets realized by one of the partners might be maintained. That view has been adopted by Mr. Justice Green in the case to which we have already referred, and by Latham, J., in the case of *Merwanji Hormusji* v. *Rustomji Burjorji* (3). The case of *Knox* v. *Gye* (2) occurred long before the Judicature Act came into force. Mr. Justice Lindley in his work on Partnership summarises the effect of the new rules in words, which to our minds are absolutely expressive of the way in which Courts of Equity, so far as we are aware, now deal with such matters. In Lindley on Partnership, 5th Edition, p. 560, will be found the following passage: "The Judicature Acts and rules have materially altered the law relating to actions between partners. Formerly no action at law could be maintained by one partner against another if it in any way involved taking a partnership account: for, although the right to an account was a legal right, the old action of account, at least between partners, had long become obsolete, and Courts of law had no machinery enabling them to do justice in matters of account. Hence it became settled that actions involving accounts between partners could not be sustained. The Judicature Acts and rules have, however, abolished this rule; and the present state of the law on this subject appears to be as follows: First as regards real property; *Secondly*, as regards personal property; *thirdly*, as regards actions for

(1) 12 B.H.C. 97 (106). (2) (1872) L.R. 5 E. & Ir. App. 656. (3) 6 B. 628.

money demands or damages. The three following rules may be taken as guides: (1) An action for damages may be maintained by one partner against another in all those cases in which such an action might have been maintained before the Judicature Acts, provided the action would not have been restrained by a Court of Equity. (2) Any action which would have been so restrained cannot be supported. (3) An action may be maintained by one partner against another for any money demand which before the Judicature Acts could have been made the subject of a suit for an account." And with reference to this he says: "Practically the important questions which will arise under the new procedure are deduced to the [260] following: 1. When can an action be maintained between partners without taking a general account of all the partnership dealings and transactions? 2. When will such an account be ordered without a dissolution of the firm? The second of those questions has been already considered. The first, which has also been alluded to, can only be answered generally by saying that each case must depend upon its own circumstances and upon whether justice can really be done without taking such an account." Even under the old rules there were numerous exceptions in the practice generally followed in the common law Courts, and Mr. Justice Lindley in p. 562 gives for purposes of reference a summary of the circumstances under which an action could have been maintained, as also the circumstances under which it could not. In p. 564 will be found an abstract of a case where "*A* and *B* agreed to become partners and each agreed to furnish a certain amount of capital, and *A* lent *B* the amount *B* was to contribute. This loan constituted a debt for which an action by *A* against *B* would lie, although they may have actually become partners. And it also followed that if partners agreed to contribute capital from time to time to meet expenses as occasion might require, and one of them was compelled to pay the whole of the expenses for which all were liable, he could sue his co-partners for what they ought to have contributed according to their agreement." Another case of a similar character is given in p. 566, and in p. 567 some instances are given in which an action was held not to be maintainable. The case of *Dayal Jairaj* v. *Khatav Ladha* (1) arose out of a suit brought in 1873; whilst that of *Sedgwick* v. *Daniell* (2) was undoubtedly under the old rules. There four persons, shareholders in a certain company, borrowed on their own credit a certain sum of money which was applied for the business of the company. The plaintiff in that action had to pay in the entire amount, and brought a suit for contribution against his co-partners. The learned Judges held that the action was maintainable. They said that, inasmuch as some of the [261] shareholders had entered into a separate obligation, the suit was maintainable by the plaintiff as against the persons who joined in incurring the obligation with him. We think the learned District Judge in this case has regarded as a principle what was stated, as we understand it, merely as a test. To our minds the learned Judges in *Sedgwick* v. *Daniell* (2) considered the fact that four persons out of the company had entered into a transaction as an indication that that transaction had nothing to do with the partnership business. In our opinion they simply used that circumstance as a test for determining whether the transaction in respect of which the action was brought was so intimately connected with the partnership business as to make it an item in the partnership account. We are inclined to think that if the

(1) 12 B. H. C. 97.

(2) (1857) 2 H. & N. 319.

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District Judge had not taken that limited view of *Sedgwick* v. *Daniell* (1) his conclusion would have been different. In the case of *Dayal Jairaj* v. *Khatav Ladha* (2) Mr. Justice Green, on appeal from the decision of Mr. Justice Sargent, pointed out what he thought was the principle properly deducible from the enunciations contained in *Knox* v. *Gye* (3), and applying the test pointed out in *Sedgwick* v. *Daniell* (1) which was strictly applicable to the facts of the case before him, he upheld the decision of the Court below. The facts of the Bombay case were shortly these, and they indicate exactly how matters stood before Mr. Justice Green: Six persons were members of a partnership business. Two retired before dissolution, two became insolvents, and the plaintiff had to pay all the amounts recoverable from the different parties. He then brought a suit against the only defendant who could be sued. Upon objections raised by the defendant he subsequently added the other persons who had joined with him in contracting the debt for which he had been sued and held liable. There is nothing in the facts of the present case which would, in our opinion, bar a suit for contribution, unless of course the money secured by the promissory note became an item of the partnership account. The most important allegation which affords an indication to the question **[262]** whether the money was borrowed upon an understanding totally apart from the partnership business, or whether it became an item of the partnership business, is contained in paragraph 2 of the plaint. The plaintiff states that there was an agreement between the parties that one or more of them might upon his individual credit borrow money from outsiders which money he might pay into the business; and he alleges further that not only were the members so authorised, but also the *gomastas* were placed on the same footing, *i. e.*, that under and by virtue of that agreement the *gomastas* had equal authority to pledge their credit. Apart from that agreement it cannot be said that the position of the *gomastas* was the same as that of the partners in the firm. To our mind this is a clear indication of the fact that the contract was wholly distinct from the partnership business. In considering also the question whether this suit is maintainable or not, we must bear in mind the allegations contained in paragraph 12 of the plaint relating to the renewal of one of the notes at the request of the defendants.

We have reserved for this stage this last case relied upon by the respondents in support of their contention. It is an unreported judgment delivered by two learned Judges of this Court on the 5th of January 1897 in appeal from order No. 7 of 1896 (4). The facts out of which that

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(1) (1857) 2 H. & N. 319. (2) 12 B.H.C.R. 97.
(3) (1872) L. R., 5 E. & Ir. App. 656.

26 C. 262-N.

(4) *Before Mr. Justice Banerjee and Mr. Justice Rampini.*

GUDA KULITA AND ANOTHER (*Defendants*) *v.* JOYRAM DAS (*Plaintiff*).*
[5th January, 1897.]

Contribution, Suit for—Partnership business—Whether a suit for contribution by a partner against a co-partner would lie and in what cases—Adjustment of account whether necessary.

A suit for contribution by a partner against some of his co-partners, on account of money paid by him for the satisfaction of a debt contracted by him jointly

* Appeal from Order No. 7 of 1896, against the order of G. Godfrey, Esq., District Judge of Assam Valley Districts, dated the 8th of November 1895, reversing the order of Abdul Majid, Esq., Extra Assistant Commissioner and Munsif of Gauhati, dated the 25th of July 1895.

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appeal arose are not [263] sufficiently stated in the judgment, nor do we understand the learned Judges in the sense in which the judgment was attempted to be construed. If the facts had been identical with the facts of this case, and if the learned Judges had gone so far as the learned pleader for the respondents attempted to make out, we would have felt it our duty to make a reference to a Full Bench. Having regard to the opinion expressed by the learned Judges, almost in the language of Mr. Justice Lindley as given at [264] p. 566 of his book, namely, that "if it was a liability of the partnership, then the mere fact of one partner having been compelled to pay the whole of the partnership debt would not entitle him to sue his co-partners, or any of them, for contribution in the absence of any special circumstances," we think they had distinctly in view the fact that even under the old rules there might be special circumstances

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with the said co-partners, is maintainable in cases where the liability satisfied by the plaintiff is not a joint liability of the entire partnership, or [263] where the said partners were some only of several persons comprising the partnership, and the bond was executed not in the usual course of business of partnership; it is also maintainable in a case where the co-partners expressly promised to contribute their share of a debt after a decree has been passed upon the bond.

[Cons., 26 C.254 (262).]

THE facts of the case as stated in the plaint were shortly these: The plaintiff and the two defendants executed a joint bond in favour of one Deb Hari Gossami, and borrowed from him a certain sum of money. Deb Hari brought a suit upon that bond, obtained a decree, and in execution of that decree realized the whole amount due under it from the plaintiff. It was admitted that the money that was borrowed by the plaintiff and the defendants was applied to the partnership business carried on by the plaintiff, the defendants and a third party, who was no party to the bond in favour of Deb Hari or a defendant in the suit brought by him. Plaintiff further stated that the decree-holder Deb Hari, after having taken out execution of his decree, threatened to put him in jail, and the defendants at this time when asked to contribute their share of the debt promised to do so, but avoided payment under some excuse or other. Thereupon the plaintiff brought this suit for contribution. The defence, *inter alia*, was that the suit was not maintainable, unless a suit for settlement of account of the partnership business was brought. The Court of first instance dismissed the suit, holding that it was not maintainable. On appeal to the Judge of the Assam Valley District, he, holding that the suit was maintainable, remanded the case under s. 562 of the Civil Procedure Code to the Court below, to be tried on the merits. Against this decision the defendants appealed to the High Court.

Babu *Jasoda Nundun Poramanick*, for the appellants.

Babu *Hem Chundra Mitter*, for the respondent.

The judgment of the High Court (BANERJEE and RAMPINI, JJ.) was as follows:—

JUDGMENT.

This is an appeal from an order of the Judge of the Assam Valley District remanding, under s. 562 of the Code of Civil Procedure, to the [264] first Court for trial on the merits the plaintiff respondent's suit which had been dismissed by that Court on the ground that the suit was not maintainable; and the question for determination in this appeal is whether the view taken by the lower appellate Court that the suit is maintainable is right.

The learned Vakil for the defendants-appellants contends that the question should be answered in the negative, and the ground of his contention is that the suit in this case is one that is brought by one partner against some of his co-partners for contribution on account of money paid by him for the satisfaction of a debt of the firm.

Now the facts of the case as stated in the plaint are shortly these: The plaintiff and the two defendants executed a joint bond in favour of one Deb Hari Gossami and borrowed from him Rs. 500. Deb Hari Gossami brought a suit against the plaintiff and the defendants upon that bond, obtained a decree, and in execution of that decree realized the whole amount due under it from the plaintiff. It was not disputed in the course of the argument that the money that was borrowed by the plaintiff and the defendants was applied to the partnership business carried on by the plaintiff, the defendants and the third party, a person named Sandhyaram, who was no party to the bond in favour of Deb Hari Gossami, nor a defendant in the suit brought by him.

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which would make the action maintainable. [265] The case of *Sadler* v. *Nixon* (1) referred to in that judgment, as Mr. Justice Green points out, has been doubted in the English Courts; and a reference to it will show that that case can hardly be regarded as an authority for the contention now advanced. *Sadler* v. *Nixon* was disposed of without any reasons being given. In this view of the law, and having regard to the case made by the plaintiff in this action, it appears to us that if there was a contract, either express or implied, between the plaintiff and the defendants that he should, like the *gomastas* as he alleges, pledge his [266] individual credit and borrow money from outsiders, and apply the same to the benefit of the business, the mere fact that the money was applied to the partnership business does not render it an item in the partnership account so as to preclude the plaintiff from maintaining the present action. The plaintiff did not actually seek for an adjustment of

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And the question is whether, upon this state of facts, the liability that was satisfied by the plaintiff was a liability of the partnership, or whether it should be treated as a separate liability. If it was a liability of the partnership, then the mere fact of the one partner having been compelled to pay the whole of the partnership debt would not entitle him to sue his co-partners or any of them for contribution in the absence of any special circumstances, though, of course, he would be entitled to charge the sum paid in the partnership account. In support of this view we need only refer to the case of *Sadler* v. *Nixon* (1) and other cases referred to in Lindley on Partnership, 5th Edition, p. 566. On the other hand, if it be treated as a separate liability distinct from the partnership business, that is, in other words, if the liability which was satisfied by the [265] plaintiff alone was not a joint liability of the whole partnership but a joint liability only of himself and the two defendants, in that case a separate suit would clearly lie; see the cases of *Sedgwick* v. *Daniell* (2) and *Dayal Jairaj* v. *Khatav Ladha* (3). The determination of the preliminary objection raised to the tenability of the suit will, therefore, depend upon the determination of the question whether the liability satisfied by the plaintiff alone was a joint liability of the entire partnership or a liability of the plaintiff and defendants only. It was on the one hand argued for the appellants that the liability should be treated as a liability of the entire firm because the money borrowed from Deb Hari Gossami constituted the entire capital of the firm, and it had been borrowed in the usual course of business of the partnership and with the consent of the remaining partner Sandhyaram, and s. 249 of the Contract Act was relied upon in support of this view. It was further contended that, upon the statements made by the plaintiff in his deposition, the firm should be treated as having consisted on the date of the loan only of the plaintiff and the defendants. On the other hand, it was contended by the learned Vakil for the plaintiff respondent that the very fact of the bond having been executed by the plaintiff and the two defendants should be taken as sufficient for the present purpose to show that the liability created thereby was not the liability of the whole firm. Upon the material placed before us, we are not in a position to accept either of these two extreme contentions as correct. We think the question ought to be determined upon the evidence. Of course if it is found that at the date when the bond in favour of Deb Hari Gossami was executed, the plaintiff and the defendants were the only members that constituted the partnership, then the plaintiff's case should fail. So also should the suit fail if it is found that the money was borrowed in the usual course of business of the partnership on [266] behalf of all the members, though the bond was executed only by three of them. But if it is found that the plaintiff and defendants were some only of several persons composing the partnership, and that the bond was executed not in the usual course of business of the partnership, in that case the suit will lie and should be tried on the merits. We should further add that if the express promise to pay that is referred to in the fourth paragraph of the plaint is made out, in that case, quite apart from all other circumstances, the suit will lie, and the Court should, therefore, in the first instance, determine whether this allegation in the plaint is true. The remand order of the lower appellate Court will, therefore, stand, but the questions for determination by the first Court in the first instance will be those indicated above. The costs of this appeal will abide the result.

S.C.G. *Appeal dismissed.*

(1) (1834) 5 B. & Ad. 936. (2) (1857) 2 H. & N. 319.
(3) 12 H.C. R. 97.

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account, although he stated in one of his prayers that if it was necessary that accounts should be taken he was not unwilling to that course being adopted. The test in all these actions, as pointed out in *Sedgwick* v. *Daniell* (1), is whether the money which was borrowed and sued for became by the mere fact of borrowing an item in the partnership account; but we think that is clearly not so here. We are of opinion therefore that with respect to defendants 4 and 5 the District Judge's decision proceeding on a strict and somewhat literal interpretation of the case of *Dayal Jairaj* v. *Khatav Ladha* (2) is correct so far as it goes; and we accordingly affirm his decree as against defendants 4 and 5; but we think that the dismissal of the suit against the other defendants is erroneous. We accordingly set aside the order of dismissal and remand the case to the District Judge either to try it himself, or in the event of the parties desiring that evidence should be gone into regarding the [267] allegations in the plaint to which we have referred, to remit it to the Court of first instance. In that case proper issues should be framed and the evidence directed to the points requiring determination. The plaintiff has throughout expressed his willingness to have the accounts adjusted; and as between him and the defendants 4 and 5, as also the other defendants, if his allegations are established, it will be a mere question whether he has been overpaid or not.

We think that under the circumstances of the case the plaintiff is entitled to his costs in all the Courts.

S. C. G. *Appeal allowed. Case remanded.*

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26 C. 267 = 3 C.W.N. 261.

APPELLATE CIVIL.

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, and Mr. Justice Banerjee.

JATINDRA MOHAN PODDAR (*Petitioners*) v. SRINATH ROY AND OTHERS (*Opposite Parties*).* [8th September, 1898.]

Parties—Civil Procedure Code (Act XIV of 1882), ss. 108, 109—Whether an auction-purchaser is a necessary party to an application to set asede an ex-parte decree—Partnership business—Service of summons upon minors whether good, by affixing summonses on the house in which the business is carried on—Civil Procedure Code (Act XIV of 1882), ss. 74, 76 and 443.

An auction-purchaser of property sold in execution of an *ex parte*-decree, is not a necessary party to an application made by the judgment-debtor to set aside the said decree, inasmuch as the auction-purchaser does not come under the description of "opposite party" in s. 109 of the Code of Civil Procedure.

In a suit for the enforcement of an equitable mortgage of certain property belonging to a partnership business, brought against certain minors and other persons who constituted a firm carrying on business within the jurisdiction of the Court in which the suit was brought, but the minors resided outside its jurisdiction, the summonses were neither served upon the minors, nor upon their guardian personally, but were affixed on the house in which the business was carried on.

Held, that there was no service of summons either personal or substituted upon the minors either under s. 74 or under s. 76 of the Code of Civil [268] Procedure, even assuming that those sections can apply to a case in which some of the defendants who were interested in the partnership business are minors.

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* Appeal from Order No. 430 of 1897, against the order of Babu Rajendra Kumar Bose, Subordinate Judge of 24-Pergunnahs, dated the 7th of September 1897.

(1) (1857) 2 H. & N. 319. (2) 12 B.H.C. 97.

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Held, also, that ss. 74 and 76 of the Code of Civil Procedure are controlled by s. 443 of the said Code.

THE facts of this case, so far as they are necessary for the purposes of this report, were shortly as follows :—

Raja Srinath Roy and others instituted a suit upon an equitable mortgage against a number of persons, including the present appellants, represented by their mother as their certificated guardian; the defendants were all members of a partnership firm carrying on business under the name and style of Bungshi Badan and Giridhar Poddar. The plaint was filed on the 12th February 1895 and an *ex-parte* decree was made in favor of the plaintiffs on the 13th February 1896. The present appellant made an application on the 2nd August 1897 to set aside the decree under s. 108 of the Code of Civil Procedure on the ground that no summons had been served upon the minors or their certificated guardian. The Court below found that, although the firm was alleged to have stopped payment in August 1894, it continued as a matter of fact till April 1895, and was not formally dissolved by an order of the Court till the 11th May 1896. The Court further found that in the present suit, summons was served on the 9th March 1895 upon the defendants 3 to 8 at the office of the firm at Baliaghata, and held that such service was good service upon the minor defendants according to s. 76 of the Code of Civil Procedure, although they were then residing in the District of Faridpore. The Court, also holding that as one of the partners, Srinath Poddar, appeared and defended the suit, there was sufficient appearance on behalf of the minors under s. 36 of the Civil Procedure Code read with s. 251 of the Indian Contract Act, dismissed the application under s. 108 of the Civil Procedure Code. The petitioners appealed to the High Court.

The Advocate General (Sir *Charles Paul*), Dr. *Ashutosh Mookerjee*, and Babu *Sarat Chandra Ghosh*, for the appellants.

Mr. *Pugh*, Dr. *Rash Behary Ghose*, Babu *Busunt Kumar Bose* and Babu *Jogendra Chunder Ghose*, for the respondents.

[269] Mr. *Pugh*, for the respondents, took a preliminary objection to the hearing of the appeal on the ground that the auction-purchasers at the sale in execution of the original decree, which was sought to be set aside, had not been made parties to the appeal.

The *Advocate General*, for the appellant.—The objection comes too late, as it was not taken in the Court below; moreover the auction-purchasers are not necessary parties. As to the merits, no summons was served upon the infants, and at the time when the summons had been served upon the other defendant the business had ceased to exist. The case of *Gocul Das Dwarkadas* v. *Ganeshlal* (1) referred to by the Subordinate Judge has no application to this case.

Mr. *Pugh*, for the respondents.—The auction-purchasers are necessary parties, as the decree under which the sale took place is sought to be set aside. As to the merits, there was a valid service under s. 74 or s. 76 of the Code of Civil Procedure. Moreover appearance by the managing partner was a good appearance on behalf of the minors. See Indian Contract Act, s. 251, Lindley on Partnership, 6th Edition, p. 280, and the case of *Tomlinson* v. *Broadsmith* (2).

Dr. *Ashutosh Mookerjee*, in reply.—The auction-purchasers are not "opposite parties" within the meaning of ss. 108 and 109 of the Code of Civil Procedure, as they would not be affected by the decree being set

(1) 4 B. 416.

(2) L.R. (1896) 1 Q. B. 386,

aside. See *Jan Ali* v. *Jan Ali Chowdhry* (1), and *Zainulabdin Khan* v. *Muhammad Asghar Ali Khan* (2). There was no valid service under s. 74 or 76 of the Civil Procedure Code, as, in the case of infant defendants, these sections must be taken to be controlled by s. 443; moreover, the firm was not sued as such and no attempt was made to serve the managing member as representing the firm. See Daniell's Chancery Practice, pp. 334, 335; and *Lovell* v. *Beauchamp* (3).

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[270] The judgment of the High Court (MACLEAN, C.J., and BANERJEE, J.) was as follows :—

JUDGMENT.

This appeal arises out of an application by the appellants, under s. 108 of the Code of Civil Procedure, to set aside the *ex-parte* decree obtained by the respondents against the appellants, and certain other persons. The Court below has rejected the application, holding that summonses had been duly served on the petitioners under s. 76 of the Code of Civil Procedure; that the appearance entered by the defendant Srinath Poddar was an appearance entered by all the defendants; that the petitioners were aware of the institution of this suit; and that the application was not a *bona fide* one.

Against this order of the Court below the petitioners have preferred this appeal, and it is contended, on their behalf—*first* that the Court below is wrong in holding that summonses had been duly served on the petitioners under s. 76 of the Code of Civil Procedure, and that it ought to have held that no effective service of the summonses had been made on them; and, *secondly*, that the Court below is wrong in holding that the appearance entered by the defendant, Srinath Poddar, was an appearance entered on behalf of all the defendants as their recognised agent, and that it ought to have held that, so far as the petitioners being minors are concerned, appearance on their behalf could only have been entered by their guardian *ad litem*, duly constituted.

The respondents raised a preliminary objection that the present application could not be entertained in the absence of the auction-purchasers of the property sold in execution of the *ex parte* decree.

We are of opinion that the preliminary objection cannot prevail.

The parties entitled to notice of an application under s. 108 of the Code of Civil Procedure are those that come under the description of "opposite party" in s. 109, and they are in our opinion such of the parties to the suit as are interested in opposing the application. An auction-purchaser does not come within this description. It was urged that the auction-purchasers [271] are interested in opposing an application of this nature, as their position may be affected by the *ex parte* decree being set aside. The answer, however, to this argument is that, as the sale has been confirmed, their rights, whatever they may be, cannot be affected in any way by the present proceeding, to which they are not parties and which is instituted with the object of setting aside the *ex parte* decree, and not of setting aside the sale held in execution of it. The preliminary objection must be overruled.

The following are the facts material to be stated. The two petitioners who are minors represented by their mother and guardian appointed by the Civil Court were, as such, represented by her as their guardian; and no order appointing her as guardian *ad litem* for the purposes of the suit

(1) 1 B.L.R.A.C. 56. (2) 10 A. 166=15 I.A. 12.
(3) L.R. (1894) A. C. 607.

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was made under s. 443 of the Code of Civil Procedure. This fact is undisputed. The suit was brought in 1895 against the minors, and certain other persons, who constituted a firm carrying on business at Baliaghata within the jurisdiction of the Court in which the suit was brought, but the minors resided outside its jurisdiction ; and the suit was for the enforcement of an equitable mortgage of certain property belonging to the partnership. The firm fell into financial difficulties about the year 1894, but the partnership was not dissolved until May 1896 ; and though it was contended by the present appellants that the partnership had ceased to exist since July 1894, we consider, though in the view we take the point is not very material, that the balance of evidence supports the contention that the firm continued to carry on business down to the 20th of March 1895. It is not disputed that the summonses in suit were neither served upon the minors nor upon their mother personally. The summonses on the defendants were taken to their place of business at Baliaghata, and sought to be served personally on some of them who were at that place, and on their refusal to sign the acknowledgment of service, they were affixed, on the 9th of March 1895, on the house in which the business of the firm was carried on.

These being the facts of the case, the first question is whether the summonses were duly served on the petitioners. If that question is answered in the negative the mere fact of the certificated [272] guardian of the petitioners being aware of the institution of the suit is a matter of no importance, and cannot affect the rights of the minors. It must be borne in mind that s. 108 of the Civil Procedure Code is imperative, and enacts that, if the applicant for setting aside an *ex-parte* decree " satisfies the Court that the summons was not duly served or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall pass an order to set aside the decree, etc."

As we have pointed out, there was no personal service of the summons on the minors or upon their guardian, nor was the summons affixed to the house in which the minors or their guardian actually resided, but the Court below has held that the summons was duly served on the petitioners under s. 76 of the Code. It is contended for the appellants that this view is wrong, because there could be no service of summons, actual or constructive, on the petitioners before any guardian was appointed for them under s. 443, and the suit was not properly instituted against them, and further because the partnership business at Baliaghata had stopped payment before the institution of this suit. As in point of fact there was no service on the certificated guardian, the mother, this point is not very material, but as the person by whom the minors were said to be represented was their guardian appointed by the Civil Court, and there is no suggestion that she was not the proper person to represent them, the Court was under s. 443 bound to appiont her as the guardian for the suit, and under such circumstances, it may well be, having regard to the view expressed in the Full Bench case of *Suresh Chunder Wum Chowdhory* v. *Jugut Chunder Deb* (1) that the absence of a formal order would not vitiate the proceedings.

As for the second branch of the contention, the evidence, as we have said above, indicates that the business of the firm was being carried on when the summonses were served.

(1) 14 C. 204.

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The question then is whether there was due service of the summons under either s. 76, or s. 74 of the Code, **[273]** and whether either of those sections applies to a case in which a minor is sued along with other persons, or whether ss. 74 and 76 are not controlled by s. 443.

It is, we think, abundantly clear from the evidence that the service of the summons in this case was not made, and was not intended to be made, on any of the defendants for himself and for the other defendants as their partner, or as manager of their joint business, or as agent under s. 74 or s. 76. There having been no personal service on any guardian *ad litem* of the minors, the suggestion that the service such as it was, was one under s. 74 or 76, savours somewhat of an after-thought. The service sought to be effected, and the judgment of the Court below supports this view, was personal service on certain of the defendants (other than the petitioners) in their personal and not in any representative character, and upon their refusal to sign the acknowledgment of service, the summonses were, apparently under s. 80 of the Code, affixed to the place of business at Baliaghata.

In our opinion there was no service of the summons under either s. 74 or s. 76, even assuming that those sections can apply to a case in which some of the defendants who were interested in the partnership or business are minors. Though it is unnecessary for us to decide the point, it is by no means clear that those sections apply to a case like the present. Section 443 of the Code requires that a minor defendant shall be represented by a guardian appointed for the suit, in other words, by a guardian *ad litem*, and although that section does not expressly say anything about the service of summonses, it speaks of the person so appointed as being appointed to "put in the defence for such minor and generally to act on his behalf in the conduct of the case;" and it would be anomalous to hold that though the case requires the appointment of a proper person as guardian to act for a minor generally in the conduct of the case, service of the summons on a person other than such person may be sufficient service on the minor. In our opinion there has been neither personal nor substituted service of the summons upon the minor defendants, and, if so, they are entitled to have the decree set aside under s. 108. It follows from the above that the **[274]** appearance which Srinath Poddar purported to enter on behalf of the minors is quite ineffectual. He had no power or authority to enter any appearance on their behalf.

The result is that the appeal must be allowed, the order of the Court below must be reversed, and the *ex parte* decree made in this case must be set aside, and the Court below directed to proceed with the hearing of the suit. We cannot, however, part with the case without impressing upon plaintiff litigants the absolute necessity of proceeding with strictness in accordance with the Code in cases where minors are defendants. The inconvenience, difficulties, loss of time and money by not so proceeding are aptly illustrated by the present case, but all this difficulty might have been avoided if the plaintiff had complied with the Code and had seen that a proper guardian *ad litem* had been appointed in the first instance. His present position is attributable to his lack of due diligence and care at the outset of the suit. The Court ought to be jealous in seeing that in the case of minor defendants the provisions made for their protection are strictly complied with.

We should have been better satisfied if we could have taken a different view of the law applicable to this case, as there is ground at least for suspecting the sincerity of the application in the true interests of the

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minors, and we may add that it will be for the advisers of the minors to consider, and most carefully, whether any real benefit is likely to accrue from a rehearing of the suit, especially having regard to the question of subsequent costs. The respondents must pay the appellants their costs of this appeal.

S. C. G. *Appeal allowed.*

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26 C. 275 = 3 C.W.N. 243.

[275] APPELLATE CIVIL.

Before Mr. Justice Ghose and Mr. Justice Stevens.

GOOR BUX SAHOO (*Plaintiff*) *v.* BIRJ LAL BENKA AND OTHERS (*Defendants*).* [13th January, 1899.]

Appeal—Appeal from order—Civil Procedure Code (*Act XIV of* 1882), *ss.* 57, 582, 588, 589—*Returning plaint to be presented to the proper Court—Order under Civil Procedure Code, s.* 582.

Where an order is made by the lower Court of appeal, returning a plaint under s. 57 of the Civil Procedure Code, by virtue of the powers conferred on it by s. 582, an appeal lies to the High Court under s. 589. Section 588 does not prohibit such appeal.

Bindeshri Chaubey v. *Nandu* (1), distinguished.

[F., 25 A. 174 = 22 A.W.N, 222; 30 C. 453 (456); 59 P.R. 1899 = (1900) P.L.R. 137; R., 31 C. 344 (347).]

THE facts and arguments on this appeal, so far as they are material to this report, appear from the judgment of the High Court.

Mr. *C. Gregory* and Babu *Karuna Sindhu Mukerjee*, for the appellant.

Dr. *Rash Behary Ghose* and Babu *Jogesh Chandra Roy*, for the respondents.

The judgment of the High Court (GHOSE and STEVENS, JJ.) was as follows :—

JUDGMENT.

This is an appeal against an order of the District Judge of Patna under s. 57 of the Code of Civil Procedure, directing that a plaint which had been filed in the Court of the Subordinate Judge of that district, be returned to the plaintiff for the purpose of being presented to the proper Court.

The suit was one for the recovery of damages by reason of breach of a contract on the part of the defendant in the matter of the sale of certain goods which had been consigned by the plaintiff, and despatched by him from his place of business in the [276] district of Patna to the defendant at Calcutta. The plaint mentioned in the first place what the nature of the contract was, and that the defendant had committed a breach of such contract in connection with the sale of the goods that had been consigned to him; and it then stated that the cause of action had accrued at Sadikpore, Nawada, and Mokama, the places from which the goods were

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* Appeal from Order No. 32 of 1898, against the order of J. Knox-Wight, Esq., District Judge of Patna, dated the 4th of February 1898, directing the return to the plaintiff for the purpose of being presented to the proper Court, the plaint which had been filed in the Court of Babu Hamengoo Chundra Bose, Subordinate Judge of that district.

(1) 3 A. 456.

despatched to the defendant. The plaint, however, omitted to state where the contract was entered into between the parties, and also where it was to be fulfilled.

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The defendant entered appearance on the 22nd December 1896, and presented a petition stating that the suit should have been instituted in Calcutta, and praying at the same time, under s. 20 of the Code of Civil Procedure, for stay of proceedings. The Subordinate Judge fixed, in the first instance, the 6th of January 1897, and ultimately the 22nd of January of the same year, for the purpose of determining the question raised by the defendant. On that date, the plaintiff was examined, and also cross-examined by the defendant, and he put in a petition for the amendment of his plaint. In that petition the plaintiff alleged that the contract between the parties was entered into at Mokama in the district of Patna; and that the stipulation was that the price of the grains to be sold by the defendant should be paid at Barh in the same district; and that, therefore, the cause of action arose within the jurisdiction of the Court of the Subordinate Judge of Patna. The Subordinate Judge allowed this amendment. Subsequently the defendant put in his written statement; issues were fixed for trial upon the merits of the case, and ultimately the Subordinate Judge found upon the evidence adduced on both sides that the agreement was entered into within the jurisdiction of his Court; that the proceeds of the sale of the goods transmitted by the plaintiff were payable in the district of Patna; and that, therefore, the cause of action arose within his jurisdiction. He further found that the plaintiff had suffered damage by reason of the conduct of the defendant in connection with the sale of the goods in question, and accordingly gave the plaintiff a decree as claimed by him.

Against this decree an appeal was preferred by the defendant. [277] In dealing with this appeal, the District Judge has not gone into the merits of the case, but he is of opinion that the amendment of the plaint that was prayed for by the petition presented by the plaintiff on the 22nd January 1897 should not have been allowed by the Subordinate Judge, because the cause of action, as alleged in that petition, was totally different from that stated in the plaint, and that it created a "different jurisdiction;" and he has accordingly directed that the plaint be returned to the plaintiff with a view to its being presented to the proper Court. Certain other minor points are dealt with by the District Judge in his judgment; but we do not think it necessary to notice them.

We observe that the learned Judge, though asked to do so, did not enter into the question whether the contract upon which the plaintiff sued was effected in the district of Patna or not.

The present appeal is by the plaintiff; and upon its being called on for hearing, a preliminary objection has been taken by the learned vakil for the respondent upon the ground that no appeal lies to this Court under s. 588 of the Code of Civil Procedure from the order of the District Judge directing that the plaint be returned for the purpose of its being presented to the proper Court. In support of his argument the learned vakil has called our attention to the case of *Bindeshri Chaubey* v. *Nandu* (1). In that case, which was instituted in the Court of the Munsif, the defendant raised the objection that the value of the subject-matter of the suit exceeded the pecuniary jurisdiction of the Court, and that, therefore, the suit was not cognizable by the Munsif.

(1) 3 A. 456.

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The Munsif, however, found that the value of the property was within his pecuniary jurisdiction, and on the merits gave the plaintiff a decree. On appeal by the defendant, the lower appellate Court, upon investigation, held that the value of the subject-matter of dispute did exceed one thousand rupees, and that, therefore, the suit was not cognizable in the Court of the Munsif, and accordingly directed that the appeal be decreed, and the record of the case sent back to the Munsif for the purpose of the plaint being returned to the plaintiff for being presented to the proper Court. On second appeal, the learned Judges [278] of the High Court at Allahabad held that art. 6 of s. 588 of the Code of Civil Procedure referred to an order passed by the Court of first instance, and not to a decision of an appellate Court on general grounds; that the proper course for the plaintiff-appellant was to file a second appeal on proper Court-fees against the decision of the appellate Court; and that the special appeal to the High Court could not be entertained. In the present case, it will be observed, that the learned District Judge of Patna did not go into the merits of the question, whether the cause of action to the plaintiff really arose within the jurisdiction of the Court of the Subordinate Judge of Patna; but, as already stated, being of opinion that the amendment as prayed for by the plaintiff ought not to have been allowed by the Subordinate Judge, and confining, as we understand it, his attention to the plaint, has held that the plaint should be returned to the plaintiff for the purpose of being presented to the proper Court, being apparently of opinion that, upon the recitals in the plaint, the suit was not cognizable in the Court of the Subordinate Judge of Patna, but in some other Court.

Section 588 of the Code of Civil Procedure lays down that an appeal shall lie from certain orders mentioned therein, one of those orders being an order returning a plaint for the purpose of being presented to the proper Court as mentioned in art. 6 of that section; and it is provided that the orders passed in appeals under that section shall be final; that is to say, that there should be only one appeal against an order of the kinds mentioned in s. 588. No doubt, the order contemplated in art. 6 of the section is one which it is ordinarily within the province of the Court of first instance, where the plaint is presented, to make; but the like order may also be made by the appellate Court under the powers conferred upon it by s. 582. That section provides that "the appellate Court shall have, in appeals under this chapter, the same powers, and shall perform as nearly as may be the same duties, as are conferred and imposed by this Code on Courts of original jurisdiction in respect of suits instituted under chap. V; and in chap. XXI, so far as may be, the word 'plaintiff' shall be held to include a plaintiff-appellant or defendant-appellant," and so on. Then we find that [279] in s. 589 of the Code it is provided that, "when an appeal from an order is allowed by this chapter, it shall lie to the Court to which an appeal would lie from the decree in the suit in relation to which such order was made or, when such order is made by a Court (not being a High Court) in the exercise of Appellate Jurisdiction, then to the High Court;" so that, when an order is made by an appellate Court under s. 57 of the Code, by virtue of the powers conferred on it by s. 582, and where an appeal has to be preferred against such an order, it must be preferred to the High Court, as provided by s. 589.

We think, upon a consideration of the sections to which we have referred, that it was in no way the intention of the Legislature to prohibit an appeal such as has been preferred in this case against an

order of the appellate Court under s. 57 of the Code of Civil Procedure. It seems to us to be clear that what s. 588 prohibits is a second appeal against any of the orders mentioned therein ; but when a Court of appeal makes the order by virtue of the powers conferred upon it by s. 582, there is no reason to hold, having regard to the provisions of s. 589, that an appeal does not lie against it.

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Turning now to the merits of the matter before us, we are of opinion that the learned District Judge has not taken a right view of the question raised before him. As already pointed out, he has not investigated the question, whether or not the cause of action arose within the local limits of the jurisdiction of the Subordinate Judge of Patna ; but he is of opinion that the amendment allowed by the Subordinate Judge ought not to have been allowed, because the petition for amendment introduced a cause of action very different from that which was alleged in the original plaint, and a different jurisdiction. We have already mentioned what the plaint was, and also indicated the defect in it. It seems to us that the cause of action stated in the petition of amendment is in no way inconsistent with that alleged in the plaint. The plaintiff in his plaint omitted to mention, as we take it, the place where the contract was entered into, or where it was agreed that it should be fulfilled ; and the circumstances under which the cause of action arose in Patna were not accurately [280] stated ; and all that was supplied and put right by the petition of the 22nd January 1897. It did not, as we understand, introduce a new cause of action, nor a different jurisdiction. No doubt, as pointed out by the learned District Judge, there was considerable delay in the presentation of the petition. But if the cause of action as mentioned in that petition did not raise, before the Court of the Subordinate Judge, a case altogether different from that set up in the plaint, there is no reason why the Subordinate Judge should not have allowed the amendment prayed for. It was discretionary with him to allow it ; and we do not think that the discretion was badly exercised. At any rate, he allowed the amendment, and tried out the case on the merits. That being so, we think that it was the duty of the Judge to investigate whether the contract between the parties was entered into in the district of Patna, and whether it was agreed that it should be fulfilled there.

We accordingly direct that the order of the District Judge be set aside, and the case sent back to him with a direction that he do determine the question whether the contract was entered into in the district of Patna, and whether the parties agreed that it should be fulfilled there. If he finds this question against the plaintiff, it will be his duty to return the plaint for the purpose of being presented to the proper Court, or make such other order as he may be advised in that behalf. If, on the other hand, he finds that the cause of action really arose within the local limits of the jurisdiction of the Subordinate Judge, he should try the appeal on the merits, and determine whether the decree made by the Subordinate Judge in favour of the plaintiff should be affirmed or not.

The costs will abide the result.

S. C. C. *Appeal allowed. Case remanded.*

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ORIGINAL CIVIL.

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[281] ORIGINAL CIVIL.

Before Mr. Justice Jenkins.

JADOBRAM DEY *v.* BULLORAM DEY. [9th February, 1899.]

Partnership—Alleged agreement—Burden of proof—Contract Act (IX of 1872), *s.* 253—*Evidence—Income Tax—Income Tax Act II of* 1886), *Rule* 16—*Production and admissibility in evidence of Income-Tax papers.*

In a partnership suit where one party does, but the other party does not, allege a specific agreement that the shares in the said partnership were unequal, the existing presumption as to the equality of partner's shares casts the burden of proof on those alleging the agreement who must therefore begin.

Rule 16 of the rules made by the Local Government under s. 38 of the Income Tax Act (II of 1886) does not apply to the production of Income-Tax papers in a Court of Law in a suit between two partners.

Lee v. *Birrell* (1), and Mayne's Commentary on the Criminal Law, pp. 86, 87, cited.

[R., 32 M. 62 = 19 M.L.J. 263 (268) = 4 M.L.T. 317 (319) = 1 Ind. Cas. 705 ; 40 P.R. 1908 = 186 P.L.R. 1908 = 89 P.W.R. 1908.]

THIS was a partnership suit. The plaintiff and defendant had carried on business together for many years as dealers in stationery under the style of Day and Cousin. The plaint alleged that the parties in 1865 commenced to carry on business together upon the terms amongst others that each should be entitled to an eight annas share in the said partnership business ; that the business was first carried on at the dwelling house of the parties, but that in 1870 a shop was opened at 9, Hastings Street, in Calcutta, and thenceforward the business was carried on at that shop, upon the same terms as before. The plaint also alleged that there was an equal contribution of capital. The defendant by his written statement denied that the shares were equal, and alleged that the business had all along been carried on upon the terms that the share of the defendant in the profit and losses should be 10 annas, and that of the plaintiff 6 annas, and that the capital had been contributed by the parties in proportion to their respective shares.

The plaint further alleged that the defendant had in fraud of the partnership opened another shop competing with the latter, [282] and had wrongfully closed the partnership business and excluded the plaintiff therefrom, and in the prayer asked for distribution of the partnership business, and that the usual accounts should be taken, and that the defendant should be ordered to account for the profits made in his other and rival shop, and should pay Rs. 2,000 as damages. At the trial the claim for damages and account of the alleged rival shop was abandoned, and the issue was limited to the question whether the shares were equal or unequal and as to their amount. During the hearing of suit the following points were raised :—

(1) As to whether the onus was on the defendants, who alleged inequality of shares in the partnership business, to prove it.

Mr. *Sinha*, for the plaintiff.—The ouns is on the defendant. In the absence of any evidence the presumption is that the shares of the partners are equal. It lies on the defendant who alleges inequality to prove it. Lindley on Partnership, s. 348.

Mr. *J.G. Woodroffe* (Mr. *Dunne* with him), for the defendant.—Where no agreement is alleged or proved it is true that the presumption contended

(1) (1813) 3 Camp. 337.

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for does arise—Contract Act (Act IX of 1872), s. 253 : but in the present case the plaint in effect alleges a specific agreement that the shares were to be equal. The plaintiff therefore rests his case, not on presumption, but on the agreement, which he must prove.

JENKINS, J.—As the plaintiff does not allege any specific agreement, but contends that the business had been carried on without any thing being said as to the amount of the shares, and as the defendant on the other hand alleged a specific agreement that the shares were to be unequal, the presumption which exists as to the equality of partner's shares casts the burden of proof upon the defendant, who must therefore begin.

(2) A further question then arose as to the production of certain Income Tax returns made by the firm of Day and Cousin. It was alleged that it would appear from these returns that the firm had stated the shares of the partners to be as alleged by the defendant. Application had been made to the Registrar for the issue of a subpœna upon the Income-Tax Collector to produce all returns made by the firm from the year 1886. The Registrar refused to [283] issue the subpœna without the order of the Court by reason of Rule 16 issued under s. 38 of the Income Tax Act (II of 1886) (1) which rule was as follows:—

"16. All public servants are forbidden to make public or disclose, except for the purpose of the working of Act II of 1886, any information contained in documents delivered or produced with respect to assessments under Part IV of the said Act, and any public servant committing a breach of this rule shall be deemed to have committed an offence under s. 166 of the Indian Penal Code."

On application being made to the Court by the defendant, the subpœna was ordered to issue to the Income-Tax Collector for the production in Court of returns without prejudice to any objection raised hereafter by the parties as to the production in evidence of these documents. At the hearing a clerk from the Income Tax Office attended with two Income Tax returns (the preceding returns having been destroyed), but objected on behalf of the Collector to their production in evidence on the ground of their being confidential communications and on the ground of the rule above mentioned.

Mr. *J. G. Woodroffe*, for the defendant.—These documents are not privileged from production. It is for the Court, not the Registrar, to decide as to the production of the document in evidence. The rule was published with the object of regulating the conduct of the officers of the Income Tax Office, not with the object of depriving litigants of evidence which they would otherwise be entitled to use. The rule has no application where disclosure is sought under the process of Court. Even if the rule has such application production can in this case be enforced because there is in fact no *disclosure*. The rule is for the protection of persons making returns. There can be no disclosure where the person applying for the return is the partner in the firm which made it. This is not the case of a stranger applying for returns made by a firm with which he is not connected. In the case of *Ali Khan Bahadur* v. *Indar Parshad* (2) the Judicial Commissioners held the returns to be inadmissible, but the Privy Council, [284] while deciding nothing upon this finding, appear to have inspected the returns in question. [JENKINS, J.—There are the cases of *Lee* v. *Birrell* (3) and *R.* v. *Yakataz Khan* (4) cited in Mayne's Criminal Law, pp. 86, 87.] Those cases are in the defendant's favour. No doubt it does not there

(1) *Calcutta Gazette*, March 10th, 1886. (2) 23 C. 950 = 23 I.A. 92.
(3) (1813) 3 Camp 337. (4) (1863) 2nd Madras Sessions.

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appear that there was any such rule then in force as that which is now published : See Act XVII of 1870 ; and 46 Geo. III, c. 65, sch. F., but there is no substantial difference between the oath of secrecy there referred to and the rule in question.

Mr. Pugh, for the plaintiff.—The grounds on which the plaintiff objects to these documents being produced are because he knows nothing about them. In England there was no statutory provision, but the Income Tax Officer was appointed on taking an oath not to disclose secrets which came to his knowledge. The question before Lord Ellenborough was whether, notwithstanding the oath, he could be made to disclose the particulars. Here there is a statutory provision, and the facts in that case differ materially from those in the present case.

Mr. *Woodroffe.*—In reply.

JENKINS, J.—The point for my decision is whether certain Income Tax papers, which are desired in evidence, are privileged from production by virtue of a rule made by the Local Government in pursuance of the power contained in s. 38 of Act II of 1886. This section and the rule framed under it appear to me to have been framed for the purpose of regulating the conduct of officers coming under its operation and from preventing any disclosures by them in the course of their duties, and its object was to secure the interests of those making the returns under the Act. I think, however, that the rule was not directed against their production in a Court of Law such as is sought in this case. I therefore think the objection fails. A somewhat analogous point was decided by Lord Ellenborough in the case of *Lee* v. *Birrell* (1) and also apparently by Scotland, C. J., in the Madras Court. The reference to this decision appears in Mr. Mayne's Commentaries on [285] the Criminal Law (2). In both cases it was decided, notwithstanding the oath of secrecy taken on assumption of office, that the documents were not privileged from production.

[The returns were admitted upon its being proved that they had been compiled by the defendant in consultation with the plaintiff who had approved of their being made in the form in which they then appeared, and upon its appearing from the returns that the shares of the partners had been stated therein to be as contended for by the defendant.]

Attorneys for the plaintiff: Messrs. *Pugh & Co.*

Attorneys for the defendant: Messrs. *Gonesh Chunder Chunder & Co.*

(1) (1813) 3 Camp. 337. (2) Mayne's Criminal Law, pp. 86, 87.

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APPELLATE CIVIL.

Before Sir Francis William Maclean, K.C.I.E., Chief Justice, and Mr. Justice Banerjee.

BRAJA LAL SEN (*Plaintiff*) v. JIBAN KRISHNA ROY (*Defendant*).*
[8th September, 1898.]

Hindu Law—Bengal School—Father's brother's daughter's son whether preferential heir to mother's brother's son—Limitation Act (IX of 1871)—Suit by reversioner for possession of immoveable property—Revival of right extinguished—Limitation Act (XV of 1877), s. 2—Effect of sale for arrears of rent accrued due after the death of the full owner, from the female heir—Res judicata.

Under the Bengal School of Hindu Law, the father's brother's daughter's son as heir is preferential to the mother's brother's son.

A and *I*, daughters of one *R*, on his death succeeded in equal shares to the properties left by him. Subsequently *A* died, leaving behind her a minor son *U*, who after his mother's death held possession of half of the said properties as heir to his mother's father for more than twelve years. The period of twelve years expired before the Limitation Act (IX of 1871) came into operation. In a suit for recovery of possession of the share of the immoveable properties, which was originally in the possession of *U*, but [286] afterwards passed into the hands of a third party, by the reversioner within twelve years from the death of *I*, the female heir, the defence was that the suit was barred by limitation.

Held, that inasmuch as the possession of *U* was adverse to the female heir, and as her right to the disputed property was barred before the Limitation Act (IX of 1871) came into operation, the right of the reversioner was also barred. *Srinath Kur* v. *Prosunno Kumar Ghose* (1), followed. *Tikaram* v. *Shama Charan* (2), dissented from.

A claim for arrears of rent, against a female heir, accrued due after the death of the last full owner, is a personal claim against her; therefore by a sale held under the provisions of Bengal Act VIII of 1869, in execution of a decree for arrears of such rent obtained against her by some of the co-sharer landlords, only the limited estate of the female heir passed, unless the said landlords proceeded to bring the tenure itself to sale.

Baijun Doobey v. *Brij Bhookun Lall* (3) and *Mohima Chunder Roy Chowdhry* v. *Ram Kishore Acharjee Chowdhry* (4), followed.

A previous suit brought by the said female heir for setting aside the aforesaid sale was dismissed. In a subsequent suit by the reversioner for recovery of possession of the immoveable property so sold, the defence was that the suit was barred as *res judicata*.

Held, that the dismissal of the previous suit, which was for recovery only of the limited estate of female heir, would not be a bar to the subsequent suit, which was for the recovery of the absolute estate, which vested in the reversioner.

[F., 16 C.W.N. 1070=15 Ind.Cas. 351 (352); 17 C W.N. 337=16 Ind. Cas. 437; R., 34 M. 183 (201)=9 Ind. Cas. 1072=21 M L.J. 320=9 M.L.T. 235=(1910) M.W.N. 799; 20 C.L.J. 23 (27)=25 Ind. Cas. 84; 19 Ind.Cas. 677 (678)=18 C.W.N. 477; Cited, 18 C.W.N. 778=19 C.L.J. 72 (74)=21 Ind. Cas. 207 (208); D., 36 C. 753 =2 Ind.Cas. 252.]

THE facts of the case, so far as they are necessary for the purposes of this report and the arguments, appear sufficiently from the judgment of the High Court.

Dr. *Rash Behary Ghose* and Babu *Bhawani Churn Dutt*, for the appellant.

Babu *Saroda Churn Mitter* and Babu *Haro Kumar Mitter*, for the respondent.

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* Appeal from Original Decree No. 26 of 1897, against the decree of Babu Bulloram Mullick, Subordinate Judge of 24-Pergunnahs, dated the 3rd of October 1896.

(1) 9 C. 934.
(2) 20 A. 42.
(3) 1 C. 133=2 I.A. 275.
(4) 15 B.L.R. 142=23 W.R. 174.

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The judgment of the High Court (MACLEAN, C.J. and BANERJEE, J.) was as follows:—

JUDGMENT.

This appeal arises out of a suit brought by the plaintiff appellant for possession and mesne profits of certain immoveable [287] property known as *chak* Bele Durgabagun, on the allegation that the *chak* appertained to the estate of one Ramsagur Mitter; that on the death of Ramsagur Mitter in 1240, corresponding to 1833, his two daughters Anandmoyi and Ishaneswari, who were his heiresses, held and owned the said *chak* in equal shares; that on the death of Anandmoyi in 1241 (or 1834), her share passed by survivorship to her sister Ishaneswari, who, however, out of affection, gave Anandmoyi's son Uma Charan an eight anna share of the *chak* for his maintenance, and Uma Charan accordingly held possession of the same; that on the death of Ishaneswari in Falgoon 1300 (or March 1894), the plaintiff as Ramsagur Mitter's father's brother's daughter's son became entitled to the said *chak* by inheritance, and that he has been wrongfully kept out of possession of it by the defendant; and that even if the defendant had acquired any right to the *chak* it became extinguished on the death of Ishaneswari.

The defendant sets up various defences. He says that the plaintiff is not the heir of Ramsagur, pleads the statute of limitation, sets up the plea of *res judicata*, and alleges that the property in dispute never belonged to Ramsagur Mitter, but was acquired by Uma Charan's father Harish and Ishaneswari in equal shares; and that even if it did belong to Ramsagur, the plaintiff's right, if any, as reversioner, has become extinguished. He then alleges, and there is not, we think, any dispute as to the truth of these allegations, whatever the result in law flowing from them may be, that Uma Charan, Ishaneswari, and her son Prosonno Coomar Bose jointly mortgaged the *chak* in dispute to Kristo Mohun Mitter in May 1861, to pay off certain arrears of rent due in respect thereof; that Uma Charan's heirs subsequently mortgaged their eight anna share, that is, a moiety of the *chak*, to Brojo Nath Kundoo to satisfy the mortgage debt due to Kristo Mohun Mitter; that subsequently the eight anna share of Uma Charan's heirs in the *chak* was sold in execution of the decree obtained on Brojo Nath Kundoo's mortgage, and that the remaining eight anna share of the *chak*, which belonged to Ishaneswari, that is, the other moiety, was sold in execution of certain decrees for arrears of rent, and that the entire sixteen annas interest in the *chak*, that is, the entirety of the property, was purchased by one Mathura Nath [288] Chuckravarti, whose interest subsequently passed by a sale in execution of a decree to Thakomoni Dasi. It is further alleged by the defendant, and we think proved, that the execution sale of Ishaneswari's eight anna share was set aside in a regular suit, and the said share was again sold on the 5th of January 1885 in execution of a fresh decree for arrears of rent, and purchased by one Chandra Coomar Bandopadhya, from whom it passed through an intervening transfer to Thakomoni Dasi; that Thakomoni Dasi subsequently mortgaged the disputed *chak* and other properties to the defendant; and that the defendant purchased the entirety of the property at a sale held in execution of the decree obtained by him on his mortgage. He thus claims to be entitled to the entire sixteen anna share, in other words, the entirety of the property in dispute, and, in assertion of that claim, opposes the plaintiff's contention.

The Court below held that the plaintiff was the reversionary heir of Ramsagur Mitter; that the property in dispute appertained to the estate of Ramsagur, and that the plaintiff's claim was not barred by limitation, but he dismissed the suit on the ground that the sale of Ishaneswari's eight anna share, in execution of the decrees for rent, passed not merely her limited interest as her father's daughter, but also the reversionary interest in the said share; that the present suit, so far as it relates to that share, was successfully met by the defendant's plea of *res judicata* by reason of the dismissal of Ishaneswari's suit for reversal of the execution sale; and that the reversionary right claimed by the plaintiff in respect of the eight anna share held by Uma Charan had been extinguished, and an absolute title created in favour of Uma Charan by virtue of a family arrangement made by Ishaneswari, and acquiesced in by Prosanno Kumar Bose, the then next reversioner.

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Against this decision the plaintiff appeals, urging that the Court below was wrong in holding that the sale in execution of the rent decrees could pass any thing beyond Ishaneswari's limited interest; that it was wrong in holding that the suit as regards Ishaneswari's eight anna share was barred as *res judicata*; and that it was also wrong in holding that, in regard to the remaining eight anna share, an absolute title had been created in favour of Uma Charan. The respondent not only supports the judgment [289] of the lower Court on the points decided in his favour, but also seeks to support the decree of dismissal of the suit on three additional grounds, namely, that the plaintiff has failed to establish his heirship to the estate of Ramsagur Mitter; that he has also failed to show that the property in dispute appertained to that estate; and that the suit, as regards the eight anna share of the *chak* held by Uma Charan, was barred by limitation. In this position of matters the points which arise for our determination are:

First.—Whether the plaintiff has made out that he is the reversionary heir to the estate of Ramsagur Mitter.

Second.—Whether the *chak* in dispute appertains to that estate.

Third.—Whether the plaintiff's claim to the eight anna share of the *chak* held by Uma Charan is barred by limitation.

Fourth.—Whether the reversionary right claimed by the plaintiff in the eight anna share held by Uma Charan became extinguished under the family arrangement set up by the defendant.

Fifth.—Whether the defendant's plea of *res judicata* in respect of the other eight anna share is a bar to the suit.

Sixth.—Whether the reversionary interest in the eight anna share passed under or was bound by the sale in execution of the rent decrees against Ishaneswari or her limited interest only.

Dealing with these various points in the order indicated above, on the first point the case of the plaintiff is that he is Ramsagur Mitter's father's brother's daughter's son and as such, he is, in the absence of any nearer heirs, the reversionary heir to Ramsagur. The defendant contends that one Panchanan Bose, who is Ramsagur Mitter's mother's brother's son, but who has made no claim to the property in dispute, is his heir in preference to the plaintiff. The Court below has found the plaintiff's relationship with Ramsagur Mitter established by evidence. The correctness of this finding has not been questioned on this appeal, and we see no reason to dissent from it. But the learned Subordinate Judge has held that the alleged relationship of Panchanan Bose with Ramsagur Mitter is not established, and that, even if it had been established, still the

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plaintiff would be the preferential heir of [290] Ramsagur, and his finding of fact and his conclusion of law are both impugned on behalf of the respondent as incorrect. Three witnesses have been examined on behalf of the defendant to prove the alleged relationship between Panchanan Bose and Ramsagur Mitter; they are Harinath Mitter, a relation of Ramsagur, Sham Charan Mitter, a neighbour, and Panchanan Bose himself. There is no evidence to contradict them. The Court below has given no good reason for disbelieving their evidence; and we hesitate to affirm the finding of the Court below that the evidence is insufficient to prove that Panchanan Bose is the son of Ramsagur's maternal uncle. But in the view we take upon the question of law, it becomes unnecessary to determine this question of fact. We agree with the Court below in holding that even if Panchanan Bose be Ramsagur's maternal uncle's son, still the plaintiff would be the preferential heir of Ramsagur.

Whatever doubts might at one time have existed as to the heritable rights of the father's brother's daughter's son under the Bengal School of Hindu law [see *Gobindo Hareekar* v. *Woomesh Chunder Roy* (1)] it must now be taken as settled by the decision of the Full Bench in the case of *Guru Gobind Shaha* v. *Anund Lal Ghose* (2) that he is in the line of heirs as a *sapinda* relation within the meaning of the *Dayabhaga*, and the only ground upon which the learned Vakil for the respondent rests his contention on his point is that the plaintiff, though in the line of heirs of Ramsagur, is excluded by Panchanan, the maternal uncle's son being entitled to succeed in preference to the father's brother's daughter's son. No authority is cited in support of this contention; and the only reason given in its favour is that, while the maternal uncle's son is mentioned in the *Dayabhaga*, the father's brother's daughter's son is not. This is not, however, strictly correct. For if the maternal uncle's son is mentioned, by necessary implication (and not expressly, as the argument assumes) in the *Dayabhaga*, chap. XI, s. VI, paragraphs 13 and 20, so is the father's brother's daughter's son, as has been shown in the case of *Guru Gobind Shaha* v. *Anund Lal Ghose* (2). And as for the [291] exact position of the father's brother's daughter's son in the line of heirs, though that may be after the agnatic *sapinda* descendants of the great grandfather, a point upon which conflicting considerations may arise (see *Huri Das Bundopadhya* v. *Bama Churn Chattopadhya* (3) there can be no doubt that he comes before the *sapinda* relations in the maternal line. This will be seen from the *Dayabhaga*, chap. XI, s. VI, paragraphs 13 and 20, in the former of which the author indicates the reason for the succession of maternal kinsmen and for the preference of *sapindas* in the paternal over those in the maternal line, according to the doctrine of spiritual benefit. The reason is shortly this: The wealth of a deceased person, who can no longer have temporal enjoyment, should devolve on those who can confer spiritual benefit on him. Now the *sapindas* on the paternal line offer oblations to the paternal ancestors which the deceased was bound to offer, and in which he participates, and the *sapindas* in the maternal line offer oblations to the maternal ancestors, which the deceased was bound to offer, but in which he does not participate; so that, while they both confer spiritual benefit on the deceased, the former benefit him doubly by enabling him to participate in the oblations offered by them and by discharging a duty that was incumbent on him of offering

(1) (1864) W. R. F.B. 176.
(2) 5 B.L.R. 15=13 W. R. F.B. 49.
(3) 15 C. 780.

oblations to certain ancestors, and the latter benefit him only in one way, namely, by offering certain oblations which he was bound to offer; and therefore while both are entitled to inherit his estate, the latter succeed only on failure of the former. After showing that his doctrine is in conformity with the texts of Manu, the author of the *Dayabhaga* states his conclusion in paragraph 20. We should add that there is a slight inaccuracy in Colebrooke's translation of this paragraph in the passage "which the deceased shares, or which he was bound to offer," where the word "or" has been erroneously used for "and." The view we take that the father's brother's daughter's son comes in the order of succession before the maternal line is in accordance with the opinion of Jagannath (see Colebrooke's Digest, Book V, chap. VIII, s. I, v. 434 commentary, Madras Edition, Vol. II, page 567).

[292] Upon the second point all that is urged on behalf of the respondent, who impugns the correctness of the lower Court's finding, that the *chak* in dispute belonged to Ramsagur Mitter, is that the *pottah* of 1246 or 1839 (Ex. H. 2, p. 94 of the Paper Book), under which the *chak* is held, was granted to Uma Charan and Ishaneswari, and that the terms are very different from those of the *pottah* in favour of Ramsagur granted by Rani Sankari in 1227 or 1820. That may be so, but it is clear from the *pottah* of 1246 or 1839 (Ex. H. 2) that it was granted to Uma Charan and Ishaneswari as the heirs of Ramsagur, and that the tenure created by it was only a modified form of the tenure created in favour of Ramsagur by the *pottah* of Rani Sankari. We see no reason to disturb the finding arrived at by the Court below that the property in dispute appertained to the estate of Ramsagur Mitter.

Upon the third point, namely, that relating to the statute of limitation, which has been decided by the lower Court in favour of the appellant, and which is raised before us by the respondent, the contention of the respondent is that the possession of Uma Charan Dutta and his heirs and successors was adverse to Ishaneswari, and that the claim of the plaintiff in respect of the eight anna share, over which such possession extended, was barred by limitation. In answer it is urged for the appellant that the possession of Uma Charan was not adverse to Ishaneswari, and that even if the possession of Uma Charan's heirs and successors was adverse, such adverse possession did not extend over a period of time sufficiently long to bar Ishaneswari's claim, before the present law, which gives the reversioner a fresh starting point, *viz.*, from the date of the death of the person having the limited interest, first came into force. In other words, the appellant urges that when Uma Charan died in 1872, the claim of Ishaneswari had not become barred by the adverse possession, if adverse, of Uma Charan and Uma Charan's heirs, and consequently that under the new law the period of limitation only begins to run against him as from the date of her death. In approaching this part of the case we have to deal with a condition of affairs which originated more than sixty years ago, and so far as the [293] evidence goes, there are matters which are left in some obscurity. But the evidence appears to us to establish these facts.

The property in dispute appertained, as has been found above, to the estate of Ramsagur Mitter, and on his death in 1240 or 1833 descended to his two daughters, Anandmoyi and Ishaneswari, as his heiresses. On Anandmoyi's death in 1241 or 1834 one moiety of the property would appear to have been held by her son Uma Charan Dutta, who was then a minor, and the other moiety by Ishaneswari. Things continued in this

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state down to Joisto 1279 or May 1872, when Uma Charan died and disputes arose between his sons and Ishaneswari. The possession of one moiety by Uma Charan is admitted in the plaint; but the plaintiff says that Uma Charan held possession by virtue of a gift from his aunt Ishaneswari, who, out of affection, gave him that moiety of the property for his maintenance. There is, however, no evidence, leastways no reliable evidence, of this supposed gift, and the first mention of it is to be found in the *pottah* (Ex. III, p. 32 of the Paper Book), executed by Ishaneswari in favour of one Mathura Nath Chakravarti in 1873, which is after the death of Uma Charan, and after the dispute had commenced with his sons. The learned Vakil for the appellant asks us to infer such a gift from the fact deposed to by several of the witnesses for the plaintiff, and by one of the witnesses (Kedar Nath Mitter) for the defendant, that Ishaneswari loved Uma Charan as if he were her son, and lived in joint mess with him, and he contends that but for a gift express or implied from Ishaneswari, Uma Charan could not have obtained the half share he held; as, on Anandmoyi's death Ishaneswari became, as the survivor, entitled by law to the whole of her father's estate. There might have been considerable force in this contention if there had been nothing to show how and under what circumstances the possession of Uma Charan commenced. But that is not the case. It appears from the plaintiff's Exs. I and V (attested copies of a decree of the Sudder Dewani Adalat, dated the 1st February 1837 and a *solenamah* or deed of compromise, dated the 29th January 1840) and the defendant's Ex. H 2 (the *pottah* of 1246 already referred to) that Ramsagur Mitter brought a suit to recover possession of the *chak* in dispute; that on his death during the pendency [294] of that suit his daughter's son Uma Charan, then a minor, represented by his father Hara Chunder Dutta, and Ishaneswari, daughter of Ramsagur, were substituted as his legal representatives; that the suit resulted in a compromise pursuant to which a *pottah* was obtained from the proprietors of the land; and both in the deed of compromise and in the *pottah* Uma Charan and Ishaneswari are described and treated as the heirs of Ramsagur. Uma Charan's claim to one moiety of the property as a co-heir with his aunt Ishaneswari was thus asserted (erroneously no doubt), and this claim was not opposed by Ishaneswari who apparently was under a mistake as to the extent of her own right. Under the circumstances the fair inference appear to us to be that the admitted possession of Uma Charan from about 1838 to the date of his death in 1872, a period of nearly thirty-five years, ought to be attributed to the independent right which he asserted, and which was not disputed, as a co-heir of his grandfather, rather than to a gift which we are invited to infer from the circumstance of the affection which Ishaneswari felt for her nephew, Uma Charan, and of their living in joint mess.

In our opinion the possession of Uma Charan from 1838 to 1872 was under this claim of right, and was adverse to his aunt Ishaneswari. After the death of Uma Charan, disputes undoubtedly arose between his sons and Ishaneswari as is admitted in the plaint, and the possession (so far as it extended) of Uma Charan's sons and of persons deriving title from them must, on the plaintiff's own admission, have been that of trespassers as against Ishaneswari. It is not by any means clear from the evidence that after Uma Charan's death, Ishaneswari had possession of the entire property. Debendra Kumar Dutta, one of the sons of Uma Charan, who is examined for the plaintiff, and who admits that he manages the case on behalf of the plaintiff, in his examination-in-chief cannot say more than

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this: after his father's death, "Ishaneswari was in possession of the sixteen annas of many portions of the disputed *chak*, and realized the sixteen annas of the rents;" but in his cross-examination he says: "A year after the death of my father, my eldest brother Upendra died. Mohendra then may have been twelve or thirteen years old. [295] On the death of my eldest brother, the second brother used to look after the estate. We had then a half share of the *chak* and the other half appertained to the estate of Ramsagur." And a little further on he adds: "We became dispossessed of the disputed *chak* from the time of the auction sale." The evidence tends to the conclusion that after Uma Charan's death, though there was some dispute about possession, the moiety of the property held by him remained in the possession of his sons until it was sold at auction at the instance of their creditors, and thereafter it remained in the possession of the auction-purchaser and of the persons deriving title from him.

It is in this manner, as appears to us, that possession has been held of the moiety of the property now under consideration, and the question is what is the effect in point of law of such possession as regards the plea of limitation.

It is contended for the defendant that, as the possession of Uma Charan's sons, and of persons deriving title from them must, in any view of the case, be held to be that of trespassers as against Ishaneswari, and as such possession had continued for more than twelve years before her death, the reversioner's claim must be held to be barred by limitation, notwithstanding that she died within twelve years before the institution of this suit, inasmuch as art. 141 of sch. II of the Limitation Act only gives a fresh starting point to the reversioner from the date of the female heir's death, when the reversioner is entitled to the estate at such date, that is to say, when the interest of the female heir has not itself been barred at the date of her death. In our opinion the question is concluded by the Full Bench decision in the case of *Srinath Kur* v. *Prosunno Kumar Ghose* (1), and we cannot agree with the view of the Allahabad High Court expressed in the case of *Tikaram* v. *Shama Charan* (2) that the case of *Srinath Kur* v. *Proshunno Kumar Ghose*(1) has been virtually overruled by the decisions of the Privy Council in the case of *Lachhan Kunwar* v. *Anant Singh* (3).

[296] It appears to us, therefore, not material to discuss this question any further, more especially as we entertain the view that the admitted possession of Uma Charan from 1838 to 1872 must be taken to have been a possession adverse to Ishaneswari. Such adverse possession, which had continued for upwards of twelve years, and had barred Ishaneswari's claim before the new law (first enacted by Act IX of 1871) came into operation, must be held to bar the reversioner also. This view gains support from the decision of a Full Bench of this Court in *Nobin Chunder Chuckerbutty* v. *Gurupersad Doss* (4) which has been approved by the Privy Council in *Amirto Lal Bose* v. *Rajonee Kant Mitter* (5). And if the reversioner's right was barred before the new law of limitation came into force, as under the circumstances of this case in our judgment it was, that law (see s. 2 of Act XV of 1877) does not revive such right.

It was further contended by the learned vakil for the appellant that Ishaneswari by allowing the *pottah* of 1246 (Ex. H 2) to be taken by Uma Charan jointly with herself, precluded herself from suing Uma Charan as

(1) 9 C. 934. (2) 20 A. 42. (3) 22 C. 445 = 22 I.A. 25.
(4) B.L.R. Sup. Vol. 1008 = 9 W.R. 505. (5) 15 B.L.R. 10 = 23 W.R. 214.

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a trespasser, and as this happened before Uma Charan's possession had continued for twelve years, Uma Charan's possession could not upon the authority of the case of *Nobin Chunder Chuckerbutty* v. *Gurupersad Doss* (1) bar the reversion. We do not think this argument is well-founded, *viz.*, that the taking of the *pottah* jointly with Uma Charan can have any such effect. It seems to us that the *pottah* has one of two effects: either as an admission of Uma Charan's title to one moiety, to which his long possession of that moiety of the property is to be attributed, or as indicating an alienation by way of gift by Ishaneswari in favour of her nephew Uma Charan of that moiety, in which view the alternative contention put forward in the fourth point urged would prevail. The alienation to be implied from the transaction was made by Ishaneswari in favour of Uma Charan, who was one of the then next reversioners, and such alienation was subsequently ratified by her son Prosonno Kumar Bose, the only other next reversioner for the time being as [297] appears from the mortgage deeds of 1861 and 1869 (Exs. B and A).

In this view, the interest acquired by Uma Charan would, upon the authority of *Nobokishore Sarma Roy* v. *Hari Nath Sarma Roy* (2) be an absolute interest.

For the reasons given above we think that the suit, as regards the moiety of the *chak* which was held by Uma Charan, fails.

It remains now to consider the last two points, which relate to the remaining eight-anna share or the other moiety of the *chak* property.

Upon the fifth point the contention of the defendant, which has been accepted by the Court below, is that, as the suit brought by Ishaneswari in 1886 for setting aside the sale of an eight-anna share of the *chak* in dispute for arrears of rent was dismissed on the 19th of March 1887, that decision is binding on the reversioner, and the present suit, so far as it relates to that share, is barred as *res judicata*. On the other hand it is urged for the plaintiff-appellant, that, if what passed by the sale in execution of the decrees for arrears of rent, was only the limited estate of Ishaneswari, the suit could only have been for reversal of the sale of that estate, and the dismissal of such a suit cannot be a bar to the present suit, which is brought for recovery of the absolute estate now vested in the reversioner. And it is further urged that, having regard to the main ground of dismissal of the former suit, namely, that the sale had been confirmed with the consent of Ishaneswari, given upon receipt of Rs. 2,040 by her, the decree in that suit cannot bind the reversioner. We are of opinion that the appellant's contention is sound. It is quite true that Ishaneswari, though owning only the limited estate of a Hindu female, represented the absolute estate for certain purposes, and that a decree in a suit concerning the absolute estate if obtained against her without fraud or collusion would be binding on the reversioner [see *Kattama Nauchear* v. *The Rajah of Shivagunga* (3)]; but if a suit, though concerning the absolute estate, is determined [298] upon a ground personal to the female heir, for instance, if a suit brought by a Hindu widow to recover possession of immoveable property appertaining to her husband's estate is dismissed on the ground of its having been alienated by her in favour of the defendant, in the absence of legal necessity being shown, the decree in such a case ought not to bind the reversioner. Now having regard to the ground upon which Ishaneswari's suit for reversal of sale was dismissed (see Ex. IX, p. 44 of the Paper Book) we do not think it would be right to hold that the dismissal of that

(1) B.L.R. Sup. Vol. 1008 = 9 W.R. 505. (2) 10 C. 1102.
(3) 9 M.I.A. 539 (604).

suit is a bar to the reversioner's claim. If what passed by that sale so sought to be set aside was only the limited estate of Ishaneswari, the dismissal of the suit for setting that sale aside cannot bind the reversioner, whilst if what passed under that sale included also the interest of the reversionary heir, the question of *res judicata* becomes a superfluous one.

It remains, therefore, to determine what passed by the sale, which is the sixth and the last point. The sale, though for arrears of rent, was admittedly in execution of decrees for rent obtained by certain sharers, not the entire body of co-sharers, in the undivided estate under which the *chak* in dispute was held, and according to the law then in force (s. 64 of Bengal Act VIII of 1869) it had "the same effect as the sale of any immoveable property sold in execution of a decree, not being for arrears of rent payable in respect thereof," that is to say, it would pass not the whole tenure, but only the right, title and interest of the judgment-debtor. The judgment-debtor in this case was Ishaneswari, who held the qualified estate of a Hindu daughter under the law of the Bengal School, but the Court below has held that as she represented the absolute estate for certain purposes, and, as the suits for rent were brought against her as representing the absolute estate, the whole inheritance and not merely her limited interest passed by the sale in execution of the rent decrees; and the decision of the Privy Council in *Jugul Kishore* v. *Jotendro Mohun Tagore* (1) is relied upon in support of this view. The rule laid down in that case is this: "If the suit is simply for a personal claim against the widow then merely [299] the widow's qualified interest is sold and the reversionary interest is not bound by it. If, on the other hand, the suit is against the widow in respect of the estate, or for a cause which is not a mere personal cause of action against the widow, then the whole estate passes." The suit against Ishaneswari was admittedly one for arrears of rent, and the question is whether a claim for arrears of rent is a personal claim against the widow, or is one against the inheritance which, for certain purposes, she represents. The point is not free from difficulty, and there is some conflict of authority in this Court upon it, the case of *Tiluck Chunder Chuckerbutty* v. *Muddun Mohun Joogee* (2) and *Anund Moyee Dossee* v. *Mohendro Narain Dass* (3) being in favour of the respondent, while *Mohima Chunder Roy Chowdhry* v. *Ram Kishore Acharjee Chowdhry* (4) (in which *Tiluck Chunder Chuckerbutty* v. *Muddun Mohun Joogee* (2) was cited and considered) and *Kristo Gobind Majumdar* v. *Hem Chunder Chowdhry* (5) support the opposite view. As for the case of *Jugul Kishore* v. *Jotendro Mohun Tagore* (1) relied upon by the Court below, though it lays down the general principle quoted above, the facts of that case were different from those in the case we are now considering. There the sale was in execution of a decree for mesne profits and costs against a Hindu widow, who was sued, along with certain reversionary heirs, for possession of immoveable property, and for mesne profits. Here the suit for rent was brought against Ishaneswari alone, and in respect of arrears which accrued due after her father's death, and as she was in enjoyment of the rents and profits of the *chak*, the liability for rent ought to be regarded as her personal liability and ought not to be held as attaching to the reversion, unless the landlord proceeded to bring the tenure itself to sale under the special provisions of the rent law. In *Tiluck Chunder Chuckerbutty* v. *Muddun Mohun Joogee* (2) the landlord had, as had been pointed out by the Privy Council in *Baijun*

(1) 10 C 985=11 I.A. 66.
(2) 12 B.L.R. 143 note=12 W.R. 504.
(3) 15 W.R. 264.
(4) 15 B.L.R. 142=23 W.R. 174.
(5) 16 C. 511.

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Doobey v. *Brij Bhookun Lall* (1), proceeded against the tenure under the [300] rent law, and the same remark also applies to the case of *Anundmoyee Dossee* v. *Mohendro Narain Dass* (2).

The present case in our opinion is rather analogous in principle to the case of *Baijun Doobey* v. *Brij Bhookun Lall* (1) in which the Privy Council held that a sale in execution of a decree against a Hindu widow for arrears of her mother-in-law's maintenance, which was a charge on the inheritance, passed only the widow's estate ; and following that case and the case of *Mohima Chunder Roy Chowdhry* v. *Ram Kishore Acharjee Chowdhry* (3) we hold that the sale in question passed only the limited estate of Ishaneswari.

The result is that the decree of the Court below, so far as it relates to the eight-anna share of the *chak* in dispute that was sold on the 5th of January 1885, must be set aside, and the plaintiff's suit in respect of that share decreed with mesne profits and costs in proportion. The decree dismissing the suit as regards the remaining eight annas will stand. As each party has partially succeeded and partially failed in this appeal there will be no costs.

S. C. G. *Decree varied.*

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26 C. 300=3 C.W.N. 175.

APPELLATE CIVIL.

Before Mr. Justice Ghose and Mr. Justice Rampini.

PARDHAN BHUKHAN LAL AND ANOTHER (*Defendants*) *v.* NARSING DYAL (*Plaintiff*).* [14th December, 1898.]

Interest—Penalty—Enhanced rate of Interest—Interest Act (*XXVIII of* 1855), s. 2—*Contract Act* (*IX of* 1872), s. 74—*Equitable relief.*

In a mortgage bond the interest payable was 2 per cent. per mensem, and there was a stipulation that on default of payment on the due date, interest should run " from the date of default of promise " at 6 per cent. per mensem. In a suit upon the bond, interest was claimed at the higher rate from the date of default to the date of realization,

[301] *Held*, that it is open to the Court to decide, notwithstanding the provisions of s. 2, Act XXVIII of 1855, whether the stipulation as to the enhanced interest was agreed upon as interest properly so called, or as a penalty, and whether in the circumstances of the case the debtor was entitled to equitable relief. *Ramendra Roy Chowdhry* v. *Serajuddin Ahmed Chowdhry* (4), and *Umar Khan* v. *Sale Khan* (5) referred to.

Per GHOSE, J.—The cases of *Mackintosh* v. *Crow* (6) and *Kala Chand Kyal* v. *Shib Chunder Roy* (7) do not lay down any rule of law precluding the Court from affording relief to a debtor, independently of s. 74 of the Contract Act (IX of 1872), even when the bond provides for increased rate of interest prospectively and not retrospectively, where a proper ground for such equitable relief is made out.

Per RAMPINI, J.—The stipulation for increased rate of interest *may* be a penalty, but is not necessarily so merely because the increased rate is an exorbitant-one ; whether it is a penalty or not is rather a question of fact than

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* Appeal from Appellate Decree No. 77 of 1897, against the decree of F. Cowley, Esq., Judicial Commissioner of Chota Nagpur, dated the 16th of September 1896. modifying the decree of Colonel C. H. Garbett, Esq., Deputy Commissioner and Subordinate Judge of Hazaribagh, dated the 27th of July 1894.

(1) 1 C. 133=2 I.A. 275. (2) 15 W.R. 264.
(3) 15 B.L.R. 143 note=23 W.R. 174. (4) 2 C.W.N. 234.
(5) 17 B. 106. (6) 9 C. 689. (7) 19 C. 392.

one of law, and the Court must consider whether in the circumstances of the case the defendants had made out their claim to equitable relief. *Ramendra Roy Chowdhry* v. *Serajuddin Ahamed Chowdhry* (1) distinguished. 1898 DEC. 14.

Pava Nagaji v. *Govind Ramji* (2); *Umar Khan* v. *Sale Khan* (3); *Bichook Nath Panday* v. *Ram Lochun Singh* (4); *Magniram Marwari* v. *Rajpati Koeri*(5); and *Surya Narain Singh* v. *Jogendra Narain Roy Chowdhury* (6) explained. APPELLATE CIVIL.

[F., 10 C.W.N. 1020 (1023); R., 27 C. 421=4 C.W.N. 122; 30 C. 15 (19); 9 Ind. Cas. 406 (410); 36 M. 229=18 Ind. Cas. 417 (434)=24 M.L.J. 135 (165)=13 M.L.T. 20; 1 N.L.R. 9 (12); D., 31 C. 138 (140).] 26 C. 300= 3 C.W.N. 175.

THIS was a suit on a mortgage bond, dated the 16th August 1886, for recovery of Rs. 1,183 of which the principal was Rs. 185, and the rest interest. The facts of the case, so far as they are necessary for this report and the arguments urged and the cases cited, appear from the judgments of the High Court.

The defendants (debtors) appealed to the High Court.

Babu *Joges Chandra Dey* and Babu *Raghunandan Prasad*, for the appellants.

Dr. *Rash Behary Ghose* and Babu *Akkhoy Kumar Banerjee*, for the respondents.

[302] The judgments of the High Court (GHOSE and RAMPINI, JJ.) were as follows:—

JUDGMENTS.

GHOSE, J.—This appeal arises out of a suit for the recovery of money due upon a bond. The document stipulates for the payment of interest at the rate of Rs. 2 per cent. per mensem, but provides at the same time that if the money borrowed be not repaid on the due date, interest at the rate of Rs. 6 per cent. per mensem should be paid from that date. And the main question that has been discussed before us is whether the Courts below were right in decreeing to the plaintiffs interest at the rate of Rs. 6 instead of Rs. 2 per cent. per mensem from the date of default, it being contended on behalf of the defendant appellant that the stipulation to pay such increased rate of interest was but a penalty against which a Court of Equity should give relief.

Both the Courts below have decreed the claim in full. And the learned Judicial Commissioner has affirmed the decree of the Court of first instance allowing the plaintiff interest at the increased rate upon the ground that the stipulation to pay such increased rate of interest from a "definite date" is "not illegal."

No doubt, according to s. 2, Act XXVIII of 1855, a man is free to contract to pay any rate of interest that he chooses on the money borrowed, and he may do so from any time, either prospective or retrospective. Such a contract may not be "illegal," but the question that may arise, and which does arise in this case, is whether the stipulation to pay the increased rate of interest was, in the circumstance, not really a penalty against which a Court of Equity ought to grant relief. The Courts below have not apparently considered the case from this point of view, but have proceeded upon the idea that whenever the increased rate of interest is agreed to be paid from the date of default, and not from the date of the bond, the Court is bound to enforce such stipulation. The learned Judicial

(1) 2 C.W.N. 234. (2) 10 B.H.C.R.A.C. 382. (3) 17 B. 106.
(4) 11 B.L.R. 135. (5) 20 C. 366 note. (6) 20 C. 360.

1898 DEC. 14. — APPELLATE CIVIL. — 26 C. 300 = 3 C.W.N. 175.

Commissioner does not quote any case in support of his view, but the Deputy Commissioner has referred to the case *Mackintosh* v. *Crow* (1).

[303] In the case of *Mackintosh* v. *Crow* (1) it was held that where money is borrowed under a contract for repayment with interest on a certain day, and the contract stipulates that if the money is not paid on the due date it shall thenceforth carry interest at an enhanced rate, such a stipulation is not a penalty, and the enhanced rate can be recovered in its entirety. This case was approved of in *Kala Chand Kyal* v. *Shib Chunder Roy* (2). The stipulation in the bond in the latter case was that, on failure of payment on the due date, the interest should be paid at an increased rate from the date of bond, and it was held by a Full Bench of this Court that this provision was a penalty, and that s. 74 of the Contract Act applied to the money claimed at the enhanced rate of interest.

But these cases, and other cases which are to the same effect, do not, I think, lay down any rule of law precluding the Court from affording relief to a debtor, independently of s. 74 of the Contract Act, even when the bond provides for increased rate of interest prospectively and not retrospectively, where a proper ground for such equitable relief is made out. As explained in the case of *Ramendra Roy Chowdhry* v. *Serajuddin Ahamed Chowdhry* (3) it is open to the Court to decide, notwithstanding the provisions of s. 2 of Act XXVIII of 1855, whether the stipulation as to the enhanced interest was agreed upon between the parties as interest, properly so called, or as a penalty. And as stated by Sargent, C. J., in the case of *Umar Khan* v. *Sale Khan* (4) "that a proviso for enhanced interest in the future cannot be considered as a penalty unless the enhanced rate be such as to lead to the conclusion that it could not have been intended to be part of the primary contract between the parties."

I do not propose to go into all the authorities on the subject, and as to the circumstances under which a Court may or may not afford equitable relief; for the learned Judicial Commissioner has not dealt with the case from the point of view which I have expressed.

[304] In this view of the matter, the case should, I think, be sent back for consideration of the question whether, in the circumstances of the case, the defendant is entitled to equitable relief.

Another point has been raised before us, which is to the effect that the Courts below have allowed the plaintiff compound interest. The matter is not very clear upon the decree itself; but I think it would be as well to declare that the plaintiff is not entitled to such compound interest.

RAMPINI, J.—This is an appeal against a judgment of the Judicial Commissioner of Chota Nagpur.

The suit is one based on a mortgage bond in which the amount of the principal lent was Rs. 185. The interest payable on the loan was 24 per cent. per annum, and there was a further stipulation that, if default in payment was made on the due date, interest should run "from the date of default of promise" at the rate of 72 per cent. per annum.

The lower Courts have held that the stipulation for payment of interest at the higher rate is enforceable under the law, and have decreed the plaintiff's claim.

The defendants appeal, and on their behalf it has been urged;

(1) 9 C. 689. (2) 19 C. 392. (3) 2 C.W.N. 234. (4) 17 B. 106.

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(1) That the higher rate should not have been decreed up to the date of realization; (2) that compound interest should not have been allowed; and (3) that the stipulation for the payment of the higher rate of interest of 72 per cent. is, in the circumstances of this case, a penalty, and one from which this Court as a Court of Equity should give relief.

The first ground of appeal is apparently founded on a misapprehension. The Subordinate Judge, whose order has been affirmed by the Judicial Commissioner, has allowed the higher rate of interest not up to the date of realization, but only up to three months from the 24th July 1894.

From the decree it is not clear whether compound interest has been decreed or not. If it has, I agree, that, looking at the terms of the bond, it should not be allowed.

The principal ground of appeal in the case is, however, the third; and in support of his contention that the higher rate of 72 per [305] cent. is a penalty, from the burden of which we should relieve his client, the learned pleader for the appellant relies on the two cases of *Ramendra Roy Chowdhry* v. *Serajuddin Ahamed Chowdhry* (1) and *Manoo Bepari* v. *Durga Churn Saha* (2) recently decided by two Benches of this Court.

In the first of these cases it was held on a consideration of the terms of the bond sued on that the higher rate of interest stipulated for in case of default of payment was meant to apply *from the date of the loan*, and that in that view of the matter it was a penalty, which could not be enforced. So far then the ruling in the case of *Ramendra Roy Chowdhry* v. *Serajuddin Ahamed Chowdry* (1) is no authority for the argument of the learned pleader for the appellant in the present case, for in the present case it is clear beyond all doubt that the higher rate of 72 per cent. per annum was to run only "from the date of default of promise," and not from the date of loan.

But the learned Judges who decided the case of *Ramendra Roy Chowdhry* v. *Serajuddin Ahamed Chowdhry* (1) went on to say that even if the stipulation for the higher rate of interest in that case were to be construed as running only from the date when default had been committed, they were not "prepared to hold that it was a stipulation which, according to the principles of equity, ought to be enforced." "No doubt," it was said, "according to s. 2 of Act XXVIII of 1855 a man is free to contract to pay any rate of interest that he chooses on the money borrowed, and there is nothing to hinder him from agreeing to pay it from any time either prospective or retrospective. But the question that would arise in a case like the present is whether a Court of Equity is precluded from affording relief independently of s. 74 of the Contract Act. This question seems to have been discussed in the Bombay High Court in two cases, *viz.*, *Pava Nagaji* v. *Govind Ramji* (3), and *Umar Khan* v. *Sale Khan* (4), and also by this Court in *Bichook Nath Panday* v. *Ram Lochun Singh* (5), [306] and it has been held in these cases that, notwithstanding s. 2 of the said Act, it is still open to the Court to decide whether the provision as to the enhanced rate of interest was agreed upon by the parties as interest, or whether it was intended to be a penalty. We are inclined to adopt this view, and we may in this connection also refer to the case of *Magniram Marwari* v. *Rajpati Koeri* (6), where this Court, upon a similar question being raised, did not hold that the matter was precluded by the Act of 1855, but rather went into the facts with a view to see whether any

(1) 2 C.W.N. 234. (2) 2 C.W.N. 333. (3) 10 B.H.C. 382.
(4) 17 B. 106. (5) 11 B.L.R. 135. (6) 20 C. 366 note.

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case for equitable relief had been established. In the present case there can be little or no doubt, looking at the instrument as a whole, that the provision to pay interest at 75 per cent. per annum in case of breach was not meant to be interest properly so called, but a penalty to ensure due payment in accordance with the instalments mentioned in it. It will be observed that interest upon the sum borrowed was calculated upon the date of the bond at more than 12 per cent. per annum, and added on to the principal, and the whole amount was agreed to be paid in eight years, and the further provision was that in default of payment of the instalments, interest should be paid at the rate of 75 per cent. per annum. We think that this provision was intended to be a penalty, and that the debtor is entitled to be relieved from it in accordance with the principles of equity and good conscience."

The facts of the second case relied on, that of *Manoo Bepari* v. *Durga Churn Saha* (1), are similar. In that case the higher rate of interest was also 75 per cent. per annum, but Ghose, J., who delivered the judgment of the Bench, held that on the terms of the bond it was not clear whether the higher rate was to run from the date of the bond, or from the date of default, but considered that it was safer to hold that the former was the case, and consequently that the stipulation to pay this higher rate of interest was a penalty. Ghose, J., went on to say: "We think we are not precluded from relieving the defendant from the penalty of paying that interest, if we are convinced that the stipulation was intended to be really a penalty for ensuring the payment of the instalments, [307] on the dates agreed upon, and not for the payment of a higher interest. He then referred to the cases of *Ramendra Roy Chowdhry* v. *Serajuddin Ahamed Chowdhry* (2) and of *Umarkan* v. *Sale Khan* (3), and observed that the Bench was prepared to adhere to the view expressed in these cases. Ameer Ali, J., concurred.

Now, with regard to those cases, I would say, *firstly*, that seeing that in both of them it was held on a consideration of the bonds sued on that the higher rate of interest was to run from the date of the bond, they are not on all fours with the present case in which no such contention has been or could be raised; *secondly*, the learned Judges who decided those cases, merely laid down that the Courts of this country are not restricted by the terms of s. 2 of Act XXVIII of 1855, from giving equitable relief against stipulations to pay increased rates of interest, which appear to be penalties and not interest, but they did not lay down any hard and fast rule as to when such stipulations are to be regarded as penalties which should be relieved against.

The leading case on the subject of when such stipulations are penalties is the case of *Mackintosh* v. *Crow* (4). In that case it was ruled, that "where money is borrowed under a contract for repayment with interest on a certain day, and the contract stipulates that, if the money is not paid at the due date, it shall *thenceforth* carry interest at an enhanced rate, such a stipulation is not a penalty, and the enhanced rate may be recovered in its entirety." In that case, Wilson, J., who delivered the judgment of the Court, laid down that it was a rule of law established by the Legislature of this country that a man is free to contract to pay any rate of interest that he chooses upon money borrowed; and the Courts *must* enforce it against him (Act XXVIII of 1855, s. 2), and there is

(1) 2 C.W.N. 333. (2) 2 C.W.N. 234.
(3) 17 B. 106. (4) 9 C. 689.

nothing to hinder his agreeing with regard to the future as well as the present. He may contract to pay no interest at present, but interest hereafter: or to pay one rate of interest now, and a higher or lower rate hereafter.

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[308] Other cases to the same effect are *Mackintosh* v. *Hunt* (1); *Bhola Nath* v. *Fateh Singh* (2); *Kunj Behari Lal* v. *Ilahi Baksh* (3); *Jaganadham* v. *Raghunadha* (4); and *Dullabh Das Dev Chand Shet* v. *Lakshman Das Swarupchand* (5). In the Full Bench case of *Kala Chand Kyal* v. *Shib Chunder Roy* (6) it was unanimously held that when it was stipulated in the bond that the increased rate of interest should in the case of default run from the date of the bond, this is a penalty, and the provisions of s. 74 of the Contract Act become applicable, but no dissent from or doubt of the correctness of the rule laid down in *Mackintosh* v. *Crow* (7) and other cases, that where the higher rate of interest is to run only from the date of default this is not a penalty, was expressed.

There are numerous other cases to the same effect. Reference to them in detail appears to be unnecessary.

I would now advert to the cases referred to by the learned Judges who decided the cases of *Ramendra Roy Chowdhry* v. *Serajuddin Ahamed Chowdhry* (8), and *Manoo Bepari* v. *Durga Churn Shaha* (9). These are the cases of *Bichook Nath Panday* v. *Ram Lochun Singh*(10), and *Magniram Marwari* v. *Rajpati Koeri* (11) decided by this Court, and those of *Pava Nagaji* v. *Govind Ramji* (12), and *Umar Khan* v. *Sale Khan* (13) decided by the Bombay High Court.

The case of *Bichook Nath Panday* v. *Ram Lochun Singh* (10) is an old case, in which the increased rate of interest was to run [309] from the date of the bond. This is undoubtedly a penalty. The learned Judges who decided the case of *Ramendra Roy Chowdhry* (8), no doubt only referred to *Bichook Nath Panday's* case as an authority for the proposition that the provisions of s. 2 of Act XXVIII of 1855 do not preclude a Court from giving equitable relief, where there is reason to believe that the stipulation for the increased rate of interest is a penalty. It would, however, seem to me to be no authority for holding that a stipulation for the payment of increased interest from the date of default is necessarily and in all cases a penalty.

The case of *Magniram Marwari* v. *Rajpati Koeri* (11) similarly appears to me to afford no authority for the proposition that the enhanced rate of interest in this case is necessarily of the nature of a penalty. On the contrary, it appears to me to be an authority for the proposition that equitable relief against a stipulated rate of interest can only be given in exceptional circumstances, such as will be adverted to later on.

The case of *Pava Nagaji* v. *Govind Ramji* (14) would only seem to lay down that the provisions of Act XXVIII of 1855 do not destroy the equitable jurisdiction of the Courts to relieve against a penalty.

There remains the case of *Umar Khan* v. *Sale Khan* (13). In this case it was said by Sargent, C.J., and Jardine, J., that "upon a review of the authorities we think the safer conclusion is that a proviso for retrospective enhancement of interest in default of payment of interest at the due date

(1) 2 C. 202. (2) 6 A. 63. (3) 6 A. 64.
(4) 9 M. 276. (5) 14 B. 200. (6) 19 C. 392.
(7) 9 C. 689. (8) 2 C.W.N. 234. (9) 2 C.W.N. 333.
(10) 11 B.L.R. 135. (11) 20 C. 366, note. (12) 10 B.H.C.A.C. 362.
(13) 17 B. 106. (14) 10 B. H.C.A.C. 135.

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is generally a penalty which should be relieved against, but that a proviso for enhanced interest in the *future* cannot be considered as a penalty, unless the enhanced rate be such as to lead to the conclusion that it could not have been intended to be part of the primary contract between the parties, as may well be deemed to have been the case in *Bichook Nath Panday* v. *Ram Lochun Singh* (1) and *Pava Nagaji* v. *Govind Ramji* (2).

[310] It appears then that a stipulation for an enhanced rate of interest running from the date of default is not to be considered as a penalty except in exceptional circumstances.

The law on this subject has been summed up in Cunningham and Shephard's Contract Act (8 Ed., p. 229) as follows: "The equitable jurisdiction which the Courts possessed to relieve against penalties is not restricted by Act XXVIII of 1855 or by this Act. The tendency, however, of Courts of Equity as well as of Courts of Law at the present day is to interfere as little as possible with the expressed intention of the contracting parties, and the *mere fact that the terms* are exorbitant is by itself no *reason for not enforcing an agreement.* It is only when to this fact is added the circumstances that the parties were not on an equal footing, or that the party seeking relief did not fully understand the transaction that the Court will give relief."

The judgment of Pigot, J., in *Surya Narain Singh* v. *Jogendra Narain Roy Chowdhry* (3) may also be cited. In this judgment it is said: "Such a contract as to interest must, we think, be held valid, where there is no question of fraud or oppression, improper dealing, exorbitant amount, dealing with an ignorant person, or the like considerations, but there is nothing of the sort in this case."

Now, applying these principles to the present case it would seem to me that the stipulation for increased rate of interest contained in the bond now sued on *may* be a penalty, but is not necessarily so merely because the increased rate is an exorbitant one. Whether it is a penalty or not is rather a question of fact than one of law, and as the lower Courts seem to have been under the impression, when deciding the case, that they must decree the increased rate in favour of the plaintiff, and could, in no circumstances, grant the defendants equitable relief, I think it advisable to remand this case to the lower appellate Court to re-consider the case, and to enable the defendants to show, if they can, that in the circumstances they are entitled to equitable relief. [311] If they do not make out such a case, the plaintiff will be entitled to a decree for the full amount of the interest claimed by him.

I would accordingly remand the suit and would order costs to abide the result.

S. C. C. *Appeal allowed; case remanded.*

(1) 11 B.L.R. 135. (2) 10 B.H.C.A.C. 382. (3) 20 C. 360.

26 C. 311.

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26 C. 311.

APPELLATE CIVIL.

Before Mr. Justice Banerjee and Mr. Justice Rampini.

RAM NARAIN SHAHA (*Plaintiff*) *v.* KAMALA KANTA SHAHA AND OTHERS (*Defendants*).* [3rd January, 1899.]

Easement—Implied grant—Easement upon the severance of a heritage by its owner into two or more parts—Continuous and apparent easement—Right of way—Limitation Act (*XV of* 1877), *s.* 26.

Implication of a grant of easement upon the severance of a tenement may extend to a "way," but that is so only where there has been some permanence in the adaptation of the tenement from which continuity could be inferred.

Charu Surnokar v. *Dokouri Chunder Thakoor* (1), distinguished.

[R., 8 C.L.J. 289 (291); 16 C.P.L.R. 156 (159).]

THIS appeal arose out of a suit for the declaration of a right of way and for the removal of certain obstructions alleged to have been made by the defendants. The plaintiff's allegation was, that on the north of a tank known as Sen's tank was his homestead, as well as that of the defendants, his house being just on the northern bank of the tank, and that of the defendants on the east of it; that there was a space between the defendants' house and the tank, over which he had a right of way, and which was interfered with by the defendants. Originally the homestead of the plaintiff and that of the defendants and the tenement over which the right of way was claimed belonged to one and the same person. The western portion, now plaintiff's house, was the inner apartment, and the eastern portion, now defendants' house and the land over which right of way was claimed, was the outer apartment. In course of time the entire house passed to two sets [312] of owners; the western portion passed to one Ram Coomar Sen and others and afterwards to the plaintiff, and the eastern portion including the disputed land passed to one Bhairab Das and others and afterwards to the defendants, who were occupying it since ten years before this suit. The Munsif upon the evidence held that the plaintiff had been living on the western portion for about thirty years, and that he had proved his right of way over the disputed land which had all along remained waste and unoccupied, although it formed part of the defendants' homestead, and decreed the plaintiff's suit. On appeal to the Subordinate Judge by the defendants he reversed the decision of the Court of first instance. From this decision the plaintiff appealed to the High Court.

Babu *Saroda Churn Mitter* and Babu *Karuna Sindhu Mookerjee*, for the appellant.

Dr. *Rash Behari Ghose* and Babu *Benod Behary Mookerjee*, for the respondents.

The judgment of the High Court (BANERJEE and RAMPINI, JJ.) was as follows:—

JUDGMENT.

This appeal arises out of a suit for the declaration of a right of way, and for the removal of certain obstructions alleged to have been made by the defendants.

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* Appeal from Appellate Decree No. 1220 of 1897, against the decree of Babu Amrita Lal Pal, Subordinate Judge of Dacca, dated the 30th of April 1897, reversing the decree of Babu Shoshi Bhushan Chowdhry, Munsif of Munshigunge, dated the 30th of March 1896.

(1) 8 C. 956.

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Three points have been raised by the learned vakil for the plaintiff appellant. *First*, that upon the findings arrived at by the lower appellate Court, the plaintiff was entitled to a decree quite irrespective of s. 26 of the Limitation Act, on the ground that the claim was one that the plaintiff was entitled to make under an implied grant presumable from what is known as: "Disposition of the owner of two tenements;" *secondly*, that the lower appellate Court is in error in throwing upon the plaintiff the burden of proof upon the question whether the user was "as of right;" and, *thirdly*, that upon the findings arrived at by the lower appellate Court, even if the plaintiff was not entitled to a right of way for marriage and funeral processions, he was at least entitled to an ordinary right of way.

In support of the *first* contention raised, it is argued that as the tenement belonging to the plaintiff, and, the tenement over **[313]** which the right of way is claimed, belonged originally to one and the same person, and as it has been found that the original owner of the land over which the way is now claimed used it as a way for purposes of ingress to and egress from the other tenement now belonging to the plaintiff, the plaintiff must be held to be entitled to the way in question, and the case of *Charu Surnokar* v. *Dokouri Chunder Thakoor* (1) is relied upon as supporting the appellant's view. We are, however, of opinion that the contention is not sound, and that the case cited is distinguishable from the present. The presumption in favour of the grant of an easement upon the severance of a heritage by its owner into two or more parts arises primarily with reference only to continuous and apparent easements ; and a "way" is evidently neither a "continuous" nor always an "apparent" easement.

It is true that in certain cases referred to in text books on the subject—See Gale on the Easements, 6th ed., pp. 108 to 123 and Goddard on Easements, 5th ed., pp. 174 to 186, implication of a grant of an easement, upon the severance of a tenement, has been held to extend, under certain circumstances, to a "way," but that is so only where there has been some permanence in the adaptation of the tenement, from which continuity could be inferred. In other words the extension of the rule can hold good, if at all, only in the case of " a formed road," to use the language of Lord Justice Fry in *Thomas* v. *Owen* (2), " made over an alleged servient tenement, to and for the apparent use of the dominant tenement."

Now, in the present case, not only is there no finding of fact that there has been any such permanence of adaptation, any such formed road, but there was no case of an implied grant from the severance of a heritage made or even suggested in the plaint or in the issues. Nor was the case put upon a ground like this in either of the Courts below.

That being so, we do not think that the first contention is at all tenable.

It was argued that even if the findings arrived at by the lower **[314]** appellate Court be not sufficient to entitle plaintiff to a decree, as the lower appellate Court has not considered the question whether a grant could not be implied from the severance of the original tenement into two, the case ought to be remanded to that Court in order that it may be dealt with from that point of view, and it was urged that the case cited, *Charu Surnokar* v. *Dokouri Chunder Thakoor* (1), was an authority in favour of the

(1) 8 C. 956.

(2) (1887) L.R. 20 Q.B.D. 225 (231).

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appellant. But, as we have said above, that case is quite distinguishable from the present, for there the way claimed was one leading to a *ghat*, and the way or path and the *ghat* were alleged to have been constructed by the original owner; and so there was a sufficient case made in the pleadings for the implication of a grant upon severance of the tenement by reason of the alleged permanence of adaptation evidenced by the construction of the way and *ghat*.

It is not, however, suggested in this case that the way claimed by the plaintiff is a metalled way, or is anything but an undefined track over a strip of land.

As to the second contention raised on behalf of the appellant we do not think that it arises in this case. For the learned Subordinate Judge, after having said in his judgment that he entertains doubt regarding the correctness of the proposition, that the burden of proof upon the question whether the user was as of right, lay upon the party who alleged that it was not as of right, goes into the entire evidence bearing upon the question and upon a consideration of the evidence adduced on both sides comes to the affirmative finding that the user was permissive. And if the second contention fails, it is conceded that the third contention must also fail.

The contentions urged before us, therefore, all fail, and this appeal must be dismissed with costs.

S. C. G. *Appeal dismissed.*

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26 C. 315=3 C.W.N. 194.

[315] APPELLATE CIVIL,

Before Mr. Justice Banerjee and Mr. Justice Rampini.

KALI NATH SEN AND ANOTHER (*Plaintiffs*) *v.* TRAILOKHYA NATH ROY (*Defendant*).* [19th January, 1899.]

Bengal Tenancy Act (*VIII of* 1885) *ss.* 67, 187—*Suit for arrears of rent and inerest at an exorbitant rate—Rule relating to hard and unconscionable bargains—Liability of a purchaser of a tenure at a sale for arrears of rent to pay interest.*

A stipulation for the payment of interest at an unusual and an exorbitant rate cannot be supposed to be an incident of a tenancy which would attach to it even after a sale for arrears of rent.

In execution of a decree for rent against a tenant who held under a *kabuliyat*, dated March 1880, the plaintiff put up the tenure for sale and the defendant purchased it on the 20th November 1891. Subsequently a suit for rent with interest at 225 per cent. per annum, specified in the *kabuliyat* executed by the former tenant, was brought by the plaintiff against the defendant. The defence was that the plaintiff was not entitled to interest at such a high rate.

Held, that the plaintiff was not entitled to recover interest at the rate claimed, it being an exorbitant one and not an ordinary incident of a tenancy.

Held, also, that in such a case the rule relating to hard and unconscionable bargains should apply, and the plaintiff would be entitled to interest at 12 per cent. per annum, being the ordinary rate of interest for arrears of rent.

Per RAMPINI, J.—By the sale of an ordinary *raiyati* tenancy for arrears of rent, a new contract is created between the auction-purchaser and the landlord at the date of the sale; therefore, in a case where the tenure was sold after the Bengal Tenancy Act came into operation, and a suit was brought by the landlord for rent with interest against the auction-purchaser, the provisions of s. 67 read with s. 178, sub-s. 3, cl. (*h*) of the Bengal Tenancy Act would apply.

[R., 1 N.L.R. 76 (79); D., 32 C. 258 (F.B.)=9 C.W.N. 175.]

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* Appeal from Appellate Decree No. 1445 of 1897, against the decree of Babu Dwarka Nath Mitter, Subordinate Judge of Faridpur, dated 30th of April 1897, affirming the decree of Babu Gobind Lal Gupta, Munsif of Madaripur, dated the 7th of August 1896.

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THIS appeal arose out of an action for rent, with interest, based upon a *kabuliyat*. The plaintiffs' allegation was that one Ratan Mandal took a settlement of a *raiyati* holding, and executed in his favour a registered *kabuliyat* in the year 1880, by which the said Ratan Mandal agreed to pay interest at the rate of three annas per rupee per month on his failure to pay rent according to [316] instalments. Ratan Mandal having allowed the rent to fall into arrear a suit was brought against him, a decree was obtained, and in execution of that decree, his tenure was sold after the expiration of the term and was purchased by the defendant in the year 1891. Subsequently the plaintiffs brought a suit against the defendant for arrears of rent with interest based upon the *kabuliyat* executed by the former tenant. The defence, *inter alia*, was that the claim for interest was illegal, and that he (the defendant) was not bound to pay interest according to the terms of the *kabuliyat* executed by his predecessor. The Court of first instance decreed the plaintiffs' suit in part, but held that the defendant was not liable for interest. On appeal by the plaintiffs to the Subordinate Judge, he held that the plaintiffs were not entitled to interest at the exorbitant rate specified in the *kabuliyat*, but he allowed interest according to the provisions of s. 67 of the Bengal Tenancy Act. Against this decision the plaintiffs appealed to the High Court.

Babu *Chunder Kant Sen*, for the appellants.

Babu *Jogesh Chunder Roy*, for the respondent.

The High Court (BANERJEE and RAMPINI, JJ.) delivered the following

JUDGMENTS.

BANERJEE, J.—This appeal arises out of a suit for arrears of rent with interest, based on a *kabuliyat*, and the suit was brought, not against the person who had executed the *kabuliyat*, but against the purchaser of his holding at a sale for arrears of rent.

The defence, so far as it is necessary to consider it for the purposes of this appeal, was that the claim for interest was illegal, and that the plaintiffs were not entitled to any interest, as the rent had been tendered.

The first Court found for the defendant upon most of the points raised, and decreed the claim of the plaintiffs only in part.

On appeal the lower appellate Court has modified that decree, and allowed interest in accordance with the terms of s. 67 of the Bengal Tenancy Act, holding that the rate of rent specified in the *kabuliyat* was not recoverable as against the defendant.

[317] In second appeal the only question raised is whether the decision of the lower appellate Court as regards interest is correct.

The learned vakil for the plaintiffs, appellants, contends that the interest claimed in this suit is perfectly legal, and that the defendant is bound to pay that interest, notwithstanding that he is the purchaser of the holding at a sale for arrears of rent due from the former tenant, who had executed a *kabuliyat*, inasmuch as the stipulation as regards interest was an incident of the tenancy.

On the other hand, it has been argued on behalf of the defendant respondent, that the plaintiffs are entitled to interest only in accordance with the provisions of s. 67 of the Bengal Tenancy Act: *Firstly*, because the *kabuliyat* relied upon by the plaintiffs created a tenancy from year to year only, so that at the commencement of each year of the tenancy, a fresh contract as to the terms of the tenancy is to be implied, and the contract as regards payment of interest, which was in contravention of the provisions

of s. 67 of the Bengal Tenancy Act, became inoperative by s. 178, sub-s. 3, cl. (*h*) from the year after that Act was passed; *secondly*, because even if the stipulation in the *kabuliyat* could be binding after the passing of the Tenancy Act as against the former tenant, by whom the *kabuliyat* was executed, it cannot be operative as against the purchaser of the holding at a sale for arrears of rent, the stipulation to pay interest at an exorbitant rate not being an ordinary incident of a tenancy, and that a fresh contract is to be implied as between the landlord and the tenant upon the transfer of the holding at a sale for arrears of revenue; and, *thirdly*, because the stipulation for the payment of the exorbitant interest claimed by the plaintiffs is such a hard and unconscionable contract that Courts of Equity ought not to enforce it.

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I am of opinion that the stipulation for the payment of interest upon arrears of rent is an ordinary incident of a tenancy in this country, unless there is something unusual in the stipulation, and that, as a rule, it would attach to the tenancy, not only so long as it remains in the possession of the tenant who enters into the stipulation, but would continue to attach to it, notwithstanding a sale for **[318]** arrears of rent. But though that is so, if there is anything unusual in the stipulation, it would not be an ordinary incident of a tenancy, and would not continue to be attached to the tenancy after a sale for arrears of rent. Let us then see whether the stipulation for the payment of interest in the present case ceases to be binding on account of any of the reasons specified in the argument of the learned vakil for the respondent.

With reference to the *first* reason assigned, I am of opinion that, having regard to the terms of the *kabuliyat*, it cannot be said that a fresh contract is to be implied at the commencement of each year of the tenancy. The *kabuliyat* does not specify any term. It stipulates for the payment of interest from year to year, and it further stipulates that, in case there be any default in the payment of any instalment, the tenant will pay interest for the over due instalment at a certain rate. That, in my opinion, is a contract entered into once for all, and would continue in force so long as the tenancy is not determined, and I see no reason for holding that at the commencement of each year there must be implied the making of a fresh contract. It was argued that the case of *Ali Mahmud Pramanick* v. *Bhagabati Debya* (1) favours the respondent's contention. On the other hand, it is argued that the case of *Kishore Lal Dey* v. *The Administrator-General of Bengal* (2) supports the opposite view.

I am of opinion that neither of the two cases cited touches, in any way, the present question. In the caee of *Kishore Lal Dey* v. *The Administrator-General of Bengal* (2) what was held was this, that where a tenant holds over after the expiry of his term, the correct view to take is that he enters into an implied contract once for all, at the beginning of the holding over, and there is no rule of law in support of the view that he enters into an implied contract at the beginning of each year of the holding over. The correctness of that view is questioned by one of the learned Judges who decided the case of *Ali Mahmud Pramanick* v. *Bhagabati Debya* (1), while the other learned Judge thought it unnecessary to consider the point, as the case before the Court **[319]** did not require the point to be determined. But in neither of the two cases had the Court to determine whether where a lease was for a term uncertain, any implied

(1) 2 C.W.N. 525.

(2) 2 C.W.N. 203.

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contract had to be presumed at the commencement of each year of the tenancy.

The *second* reason relied upon is a valid reason for holding that the stipulation for the payment of interest is not binding. Although, as I have said, a stipulation regarding the payment of interest is ordinarily one of the incidents of tenancy, a stipulation for the payment of interest at an unusual and an exorbitant rate cannot be supposed to be an incident of a tenancy which would attach to it even after a sale for arrears of rent.

No doubt the line between what rate of interest would be within the limits of an usual rate of interest, and what would exceed those limits, is not always easy to draw. But there can be little difficulty in saying that whereas the law, s. 21 of Bengal Act VIII of 1869, and s. 67 of the Bengal Tenancy Act, provides that 12 per cent. per annum shall be the ordinary rate of interest, 225 per cent. per annum, (for that is the rate of interest in the present case) falls outside the limits of ordinary interest for arrears of rent.

The distinction between usual and unusual terms of a contract of tenancy is a distinction which should be taken into consideration in determining whether the incident in question continues to attach to the tenancy, notwithstanding its sale for arrears of rent, and it is a distinction which has been given effect to by this Court in certain cases, of which I may refer to the following, namely, *Deendoyal Paramanick* v. *Juggeshur Roy* (1) and *Alim* v. *Satis Chandra Chaturdhurin* (2).

Following the principle laid down in these cases, I must hold that the stipulation for interest in the present case was not such an incident of the tenancy as would continue to be attached to it, notwithstanding the sale of the holding for arrears of rent.

In this view of the case it becomes unnecessary to consider the question whether the sale of a tenancy for arrears of rent involves a new contract between the auction-purchaser and the [320] landlord at the date of the sale, such as would bring into operation the provisions of s. 67 of the Bengal Tenancy Act.

I am also of opinion that the third reason put forward by the learned vakil for the respondent, for holding that the stipulation for the payment of interest is not enforceable, is a valid reason. The rate of interest, as I have already said, is the exorbitant rate of 225 per cent. per annum, and the contract was entered into between the landlord and a cultivating *raiyat*, that is a person belonging to a section of the community that has been considered entitled to some special protection, not only by the Legislature, as is evident from the provisions of the Bengal Tenancy Act, s. 67 and s. 178, sub-s. (3), cl. (*h*), but also by Courts of Justice, as will be seen from the observations of Mr. Justice Mahmood in the case of *Lalli* v. *Ram Prasad* (3).

Having regard then to the exorbitant nature of the interest claimed, and the parties to the stipulation, I am of opinion that the case is one to which the rule of law relating to hard and unconscionable bargains enunciated by their Lordships of the Privy Council in *Kamini Sundari Chaodhrani* v. *Kali Prossunno Ghose* (4) should apply. Applying that principle, I think that the stipulation for interest in this case is one that a Court of Justice ought not to enforce.

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(1) (1863) Marsh. 252.
(2) 24 C. 37.
(3) 9 A. 74.
(4) 12 C. 225 = 12 I.A. 215

For all these reasons I am of opinion that the judgment of the Court below is right, and ought to be affirmed, and this appeal dismissed with costs.

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26 C. 315 = 3 C.W.N. 194.

RAMPINI, J.—The only point for determination in this appeal is whether the defendant is liable to pay interest at the rate specified in the *kabuliyat* given by the former tenant, Ratan Mandal, or not.

This *kabuliyat* was executed in favour of the plaintiffs by Ratan Mandal on the 26th Falgoon 1286, which corresponds with some date in March 1880, that is, before the passing of the Bengal Tenancy Act. The *kabuliyat* is one executed by an ordinary *raiyat*. The tenancy is from year to year, and the rate of [321] interest stipulated for in it is three annas per rupee per mensem, or 225 per cent. per annum.

The Courts below have held that the defendant is not liable to pay interest at that rate. But the learned Vakil for the plaintiffs, appellants, contends that he is liable.

I am of opinion that the appeal fails, and that we cannot decree interest at this rate. I fully concur in what has been said by my learned brother as to the rate stipulated for being exorbitant and unconscionable, and, as to its being a rate at which no Court of Equity should give a decree. I further concur in what my learned brother has said as to the incident of paying interest on arrears being an ordinary incident of a tenancy in this country, and agree that a purchaser of a holding at a sale for arrears of rent must be liable to pay interest on arrears. But I do not think that it is one of the ordinary incidents of a *raiyati* tenancy in this country that interest at a higher rate than 12 per cent. should be paid. Section 67 of the Bengal Tenancy Act, read with s. 178, sub-s. 3, cl. (*h*), shows that the payment of interest at a higher rate than 12 per cent. per annum is not now one of the ordinary incidents of a *raiyati* tenancy. In support of this view, I would cite a passage from the judgment in the case of *Alim* v. *Satis Chandra Chaturdhurin* (1) which runs as follows: "We will assume, in the absence of anything to denote the contrary, that the original holder, while holding over, held under all the terms of the *kabuliyat* which he had given. When, however, the landlord put up the holding to sale for its arrears he must be taken to have put it up subject to all the ordinary incidents of such a holding. It was not an ordinary incident that interest on arrears should be payable at the very high rate claimed. On the contrary, there was no such incident, and if the landlord had put up the holding subject to an express condition that the higher rate should be paid, the condition would not bind the purchaser, in so far as it purported to create a new contract between himself and the landlord. If there was no such condition attached to the sale, the purchaser must be taken to have purchased subject to all [322] ordinary incidents of the holding. If there was such a condition and it was for the respondent to show it, which he has not done, the condition was, we consider, contrary to the provisions of the Act, and not binding on the purchaser. An agreement by a tenant of a holding for a term to pay interest at a certain rate may, if made before the passing of the Act, bind him so long as he continues to hold, but it does not attach to the land when the term has expired, and the holding by the act of the landlord passes into other hands, and if the landlord after the expiry of the term puts up the holding to sale under the Act, he puts it up subject to the express provisions of the Act in connection with it."

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(1) 24 C. 37.

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The learned Judges in the case quoted above appear to me to lay down that it is not an ordinary incident of a *raiyati* holding in this country, that interest on arrears should be paid at a higher rate than 12 per cent., and they further hold that even if the landlord had put the holding of the defendant in that case up to sale subject to the terms of the *kabuliyat* executed by him before the passing of the Bengal Tenancy Act, the stipulation for the payment of a higher rate of interest than 12 per cent. would not have been binding, as the defendant's lease was for a term which had expired, and the defendant, who was holding over, was to be regarded as holding the land under a new contract impliedly entered into on the expiration of the term of his lease.

Now, in this case it seems to be clear that the tenancy was not put up for sale subject to the terms of the *kabuliyat* executed by the former tenant. The defendant has expressly pleaded this in paragraph 2 of his written statement. He says: "He was not aware of a contract to pay such interest, nor did the plaintiffs cause the fact of the contract to pay such interest to be mentioned in the sale *ishtihar.*" There is no evidence, or even contention, on the part of the plaintiffs to the contrary. I am therefore of opinion that the defendant in this case is not bound to pay the higher rate of interest claimed by the plaintiff, (1) because the payment of more than 12 per cent. interest on arrears is not one of the ordinary incidents of a *raiyati* holding, and (2) because the holding was not put up for sale with notice that it was being sold subject to the terms of Ratan Mandal's *kabuliyat.*

[323] But I go further, and consider that, even if it had been put up for sale under the express terms of Ratan Mandal's *kabuliyat*, the defendant would not be liable to pay the higher rate, because a fresh contract must be regarded as having been entered into between him and the landlord, when the latter put the holding up to sale and the former purchased it, which he did on the 20th November, 1891. The holding is an ordinary *raiyati* tenancy not transferable except by custom or with the consent of the landlord. That being so, when the landlord put the holding up to sale he offered to accept the purchaser as a new tenant. The defendant, when he purchased, accepted his offer, and must now, I think, be regarded as holding under a new contract made after the passing of the Tenancy Act, and not under the terms of the old *kabuliyat*. Therefore, the provisions of s. 67 of the Bengal Tenancy Act, read with s. 178, sub-s. 3, cl. (*h*), must apply.

For these reasons I concur in dismissing this appeal.

I would add that to give effect to the contention of the appellants would, in my opinion, be contrary to the policy of the Tenancy Act. Section 67 lays down that an arrear of rent shall bear simple interest at 12 per cent. and cl. (*h*), sub-s. (3), s. 178, enacts that no contract made after the passing of the Tenancy Act is valid, which contravenes the provisions of s. 67.

If the contention of the learned Vakil, for the appellants were given effect to and if a landlord could enforce stipulations in contracts made before the passing of the Tenancy Act with former tenants for the payment of such exorbitant rates of interest on arrears as 225 per cent. per annum, the policy of the Tenancy Act as embodied in ss. 67 and 178 (3), cl. (*h*), would, in my opinion, be completely set at nought.

Appeal dismissed.

26 C. 324=3 C.W.N. 399.

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[324] APPELLATE CIVIL.

Before Mr. Justice Banerjee and Mr. Justice Rampini.

BHUBON MOHUN PAL AND ANOTHER (*Judgment-debtors*) v. NUNDA LAL DEY (*Auction-purchaser*).* [6th January, 1899.]

Sale in execution of decree—Fraud—Application to set aside sale on the ground of fraud in a case where a third party is the auction-purchaser—Code of Civil Procedure (Act XIV of 1882), *ss.*2, 244, 311 *and* 588—*Second Appeal—Limitation Act (XV of* 1877), *sch.* II, *arts.* 166 *and* 178.

The decision in the case of *Mohendro Narain Chaturaj* v. *Gopal Mondul* (1), has been in effect overruled by the decision of the Privy Council in the case of *Prosunno Kumar Sanyal* v. *Kali Das Sanyal* (2).

An application to set aside a sale on the ground of fraud would come under s. 244 of the Civil Procedure Code notwithstanding that the purchase was made by a person who was a third party.

Saadatmand Khan v. *Phul Kuar* (3) distinguished.

An application to set aside a sale on the ground of fraud is governed by art. 178 of the Limitation Act.

Nemai Chand Kanji v. *Deno Nath Kanji* (4) referred to.

[**F.**, 31 C. 385 (390); 6 C.W.N. 283 (288); **Appl.**, 26 C. 539; **R.**, 23 A. 478=A.W.N. (1901) 175; 24 A. 239 (241)=22 A.W.N. 49; 26 A. 447=A.W.N. (1904), 61=1 A. L.J. 65; 11 Bom. L.R. 699 (705); 27 C. 197 (200); 28 C. 4 (6)=5 C.W.N. 124 (125); 5 C.L.J. 328 (332); 11 C.L.J. 489 (498)=14 C.W.N. 560 (567)=5 Ind. Cas. 390; 16 Ind. Cas. 690 (691); 16 C.L.J. 96=16 Ind. Cas. 975 (976); 21 T.L. R. 206 (208); **D.**, 10. Ind. Cas. 412 (413).]

THE facts of this case, for the purposes of the report, and the arguments, appear sufficiently from the judgment of the High Court.

Babu *Nil Madhab Bose*, and Babu *Shib Chander Palit*, for the appellants.

Babu *Saroda Churn Mitter*, for the respondent.

The judgment of the High Court (BANERJEE and RAMPINI, JJ.) was as follows:—

JUDGMENT.

This appeal arises out of an application for setting aside a sale of immoveable property held in execution of a decree for arrears of rent, on the ground that the sale was brought about by fraud, and that the judgment-debtors were kept out of knowledge of **[325]** the sale until the time when the auction-purchaser took possession of the property.

The first Court found for the judgment-debtors and set aside the sale.

On appeal the lower appellate Court has reversed the order of the first Court, without coming to any finding as to whether the allegation that the sale had been brought about by fraud was correct, the ground being that the applicants had failed to show that they had been kept out of the knowledge of the sale by the fraud of the decree-holders and the auction-purchaser, and that their application was barred by limitation.

Against this decision of the lower appellate Court the present appeal has been preferred, and at the hearing of the appeal a preliminary objection is raised on behalf of the respondent that a second appeal does

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* Appeals from Orders Nos. 224 and 237 of 1898, against the order of A. E. Staley, Esq., District Judge of Hooghly, dated the 7th of May 1898, reversing the decree of Nalini Nath Mitter, Munsif of Howrah, dated the 7th of March, 1898.

(1) 17 C. 769. (2) 19 C. 683=19 I.A. 166.
(3) 20 A. 412. (4) 2 C.W.N. 691.

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not lie, the order of the lower appellate Court being final under s. 588 of the Code. The argument in support of this objection is this, that the application must be treated as one under s. 311 of the Code of Civil Procedure, that it cannot come under s. 244 of the Code as the auction-purchaser is a third party and not one of the parties to the suit, and that consequently the last paragraph of s. 588 makes the order of the lower appellate Court final. And in support of this contention a decision of a Full Bench of this Court in the case of *Mohendro Narain Chaturaj* v. *Gopal Mondul* (1) is relied upon. On the other hand it is argued by the learned Vakil for the appellants that the application for setting aside the sale in this case being based on the ground that the sale had been brought about by fraud, it comes under s. 244 and not under s. 311 of the Code, and that the fact of the auction-purchaser being a third party, does not prevent the application from being dealt with under s. 244, and, in support of this contention, the decision of the Privy Council, in *Prosunno Kumar Sanyal* v. *Kali Das Sanyal* (2), and the decisions of this Court in the cases of *Doyamoyi Dasi* v. *Sarat Chunder Mojumdar* (3), and *Nemai Chand Kanji* v. *Deno Nath Kanji* (4) are relied upon.

[326] We are of opinion that the preliminary objection urged on behalf of the respondents ought not to prevail, and that a second appeal lies in this case. It is true that the case of *Mohendro Narain Chaturaj* v. *Gopal Mondul* (1) cited by the respondents favours the objection raised on their behalf but the decision of the Privy Council in *Prosunno Kumar Sanyal* v. *Kali Das Sanyal* (2) must be taken to have overruled, in effect, the case of *Mohendro Narain Chaturaj* v. *Gopal Mondul* (1); we have had occasion to consider this matter in an unreported case, namely, second appeal No. 956 of 1895, *Moti Lal Chakrabutty* v. *Russick Chandra Bairagi* (5),

(1) 17 C. 769. (2) 19 C. 683 = 19 I.A. 166.
(3) 25 C. 175. (4) 2 C.W.N. 691.

(5) 26 C. 326 N = 3 C.W.N. 395,

Before Mr. Justice Banerjee and Mr. Justice Rampini.

MOTI LAL CHAKRABUTTY AND OTHERS (*Defendants*) *v.* RUSSICK CHANDRA BAIRAGI (*Plaintiff*).* [9th December, 1896.]

Civil Procedure Code (*Act XIV of* 1882), s. 244—*Suit to set aside a sale on the ground that the decree was obtained by fraud, whether maintainable, where third party is the auction-purchaser—Limitation Act* (*XV of* 1877), *sch.* II, *art.* 95.

A suit to set aside an execution sale on the ground of fraud is not maintainable under the provisions of s. 244 of the Civil Procedure Code, even in a case where the real or nominal auction-purchaser is a person who was not a party to the original suit.

Prosunno Kumar Sanyal v. *Kali Das Sanyal* (*f*) followed.

A suit to set aside an execution sale on the ground that the decree was obtained by fraud is maintainable and is governed by art. 95 of the Limitation Act.

[F., 26 C. 324 (326); 59 P.R. 1903 = 129 P.L.R. 1903; R., 24 A. 239 (241) = A.W.N. (1902) 49; 26 A. 447 = 1 A.L.J. 65 = A.W.N. (1904) 61; 27 A. 702 = 2 A.L.J. 469 = A.W.N. (1905) 162; 27 C. 197 (200); 5 C.L.J. 328; 7 Ind. Cas. 11 (14); 16 Ind. Cas. 690 (691); 7 O. C. 199 (201).]

THE facts of this case, so far as they are necessary for the purposes of this report, appear sufficiently from the judgment of the High Court.

Babu *Kulada Kinker Roy*, for the appellants.

Babu *Chunder Kant Sen*, for the respondent.

* Appeal from Appellate Decree No. 956 of 1895, against the decree of Alfred Fr. Sternberg, Esq., District Judge of Rungpore, dated the 28th of February 1895, affirming the decree of Babu Hari Prosanna Mukerjee, Munsif of Gyabanda, dated the 9th of July 1894.

(1) 19 C. 683 = 19 I.A. 166.

and the view we took there is also confirmed [327] by the decisions of this Court in the case of *Doyamoyi Dasi* v. *Sarat Chunder Mojumdar* (1) and *Nemai Chand Kanji* v. *Denonath Kanji* (2). 1899 JAN. 6.

It was contended on behalf of the respondents that the decision of the Privy Council in the case of *Saadatmand Khan* v. *Phul Kuar* (3) would go to show that the order of the first appellate Court in a case like this is final, and that a second appeal does not lie from such an order. The argument is based upon the fact that an appeal to Her Majesty in Council was allowed from an [328] order of the District Judge made in an appeal from an order passed on an application for setting aside a sale. This question was not raised in that case, and, moreover, the order made in that case was clearly under s. 312, the ground upon which the sale was

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26 C. 324 = 3 C.W.N. 399.

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[327] The judgment of the High Court (BANERJEE and RAMPINI, JJ.) was as follows:—

JUDGMENT.

This appeal arises out of a suit brought by the plaintiff-respondent to recover possession of certain lands on the allegation that they constitute his *jote* under defendants Nos. 2 to 4; that these defendants, in collusion with their servant the defendant No. 1, fraudulently obtained against the plaintiff an *ex parte* decree without serving any summons on him; that they then fraudulently caused the sale of the *jote* in execution of their decree without serving any writ of attachment or sale proclamation; that the *jote* was purchased at the execution sale by defendant No. 1 for the benefit of defendants Nos. 2 to 4; and that the plaintiff came to know of the decree and the sale on the 11th Falgoon 1299.

The defence was that no regular suit was maintainable for setting aside an execution sale; that the suit was barred by limitation; that the allegation of fraud was unfounded; and that the defendant No. 1 had purchased the property for his own benefit at an execution sale duly held.

The first Court, without going into the question whether the decree had been obtained by fraud, found for the plaintiff upon all the other questions that were raised in the case, and gave him a decree, and on appeal that decree has been affirmed by the lower appellate Court.

In second appeal it is contended for the defendants that s. 244 of the Code of Civil Procedure bars this suit. In support of this contention, the learned Vakil for the appellant relies upon the decision of the Privy Council in the case of *Prosunno Kumar Sanyal* v. *Kali Das Sanyal* (4), and he [328] argues that this case has in effect overruled the decision of the Full Bench of this Court in the case of *Mohendro Narain Chaturaj* v. *Gopal Mondul* (5), upon which the lower appellate Court has based its judgment. In answer to this contention, it is urged for the respondent that the case of *Prosunno Kumar Sanyal* v. *Kali Das Sanyal* (4) is distinguishable from the case before the Full Bench and from the one before us, and that the question that arises in this case did not properly arise in that case, nor was it determined by their Lordships of the Judicial Committee.

This contention is so far correct that, while the plaintiffs in *Prosunno Kumar Sanyal's* case raised no question affecting the validity of the decree, the plaintiff impugns not only the sale, but also the decree itself on the ground of fraud, and thus raises a question which does not relate to the execution, discharge or satisfaction of the decree and which cannot come within the scope of s. 244 of the Civil Procedure Code. But the Courts below have not gone into this last-mentioned question at all. They have set aside the execution sale and given the plaintiff a decree for possession solely upon the ground that the sale was brought about by fraud, and they have overruled the objection in bar based upon s. 244 solely upon the ground that the auction-purchaser, though a party to the fraud, was no party to the suit in which the decree was passed. The first question for determination in this appeal, therefore, is whether that decision is correct, and that question will have to be determined quite irrespectively of the fact that the plaintiff impugns the decree itself as fraudulent. If the question is answered in the negative, then the further questions will arise, whether the decree which led to the sale was obtained by fraud, and whether the defendant No. 1, the auction-purchaser, was a party to that fraud; and for the determination of these two questions the case will have to go back.

(1) 25 C. 175. (2) 2 C.W.N. 691. (3) 20 A. 412.
(4) 19 C. 683 = 19 I.A. 166. (5) 17 C. 769.

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sought to be set aside being irregularity in the conduct of the sale and not fraud. If that was so, the order complained of was one that came specifically under s. 588 of the Code and could not come within the definition of "decree" in the Code, and so no second appeal could lie in that case.

[329] It was further contended that the observation of the Judicial Committee in the case of *Prosunno Coomar Sanyal* v. *Kali Das Sanyal* (1) that the fact of the auction-purchaser being a third party, does not prevent a case from being dealt with under s. 244 of the Code of Civil Procedure was in the nature of an *obiter dictum*, and cannot be taken to overrule the decision of the Full Bench in *Mohendro Narain Chaturaj* v. *Gopal Mondul* (2).

[330] We have given our reasons for considering this argument untenable in our judgment in the unreported case referred to above and it is enough to say that the question, whether s. 244 of the Code would be a bar to a suit for setting aside an execution sale on the ground of fraud where a third party was the auction-purchaser, was a question that did directly arise before the Privy Council, and the decision of their Lordships was that that section was a bar to the suit.

The learned Vakil for the respondent contends that quite apart from the [329] question raised in the case whether the decree itself was obtained by fraud, the decision appealed against is correct.

After carefully considering the two cases referred to above, and the facts of this case as found by the Courts below, we feel bound to say that we are unable to accept this last-mentioned contention as correct. It is true that the judgment of this Court in *Prosunno Kumar Sanyal's* case was based upon the ground that the suit there as against the decree-holders was not maintainable by reason of the provisions of s. 244 of the Code of Civil Procedure, and as against the auction-purchasers it was not maintainable because there was no case made out at all upon the allegations in the plaint. But their Lordships of the Privy Council in confirming the judgment of this Court did not make any distinction of that kind at all, but held that s. 244 was a bar to the whole suit, notwithstanding that it was brought, not only against the decree-holders, but also against the auction-purchaser, who was a third party. That the question that arises in this suit, *viz.*, whether a suit to set aside an execution sale on the ground of fraud is maintainable notwithstanding the provisions of s. 244 of the Code by reason of the real or nominal auction-purchaser being a third party, did properly arise and was determined in the case of *Prosunno Kumar Sanyal* v. *Kali Das Sanyal* (1) is clear from the following passage in their Lordships' judgment. "Both Courts have held," observe their Lordships, "that the question which the plaint seeks to raise could only have been determined by the order of the Court which executed the decree, and that, in such a case as the present, a separate suit for the purpose of setting aside an execution sale is expressly forbidden by s. 244 of the Civil Procedure Code. Mr. Doyne, who appeared for the appellants, admitted that the question at issue was one 'relating to the execution, discharge or satisfaction of the decree.' But he argued with much ingenuity that the suit was not barred by the provisions of s. 244, because the question concerned the auction-purchasers as much as anybody, and therefore, as he contended, it could not properly be described as a question 'arising between [330] the parties to the suit in which the decree was passed.' At the same time he admitted that he was unable to produce any authority for his contention, and he also admitted that it was the common practice to make the auction-purchaser a party to an application for setting aside an execution sale. As the point appeared to be one of some importance, and the respondents were not represented at the Bar, their Lordships thought it desirable, before giving judgment, to examine the reported cases which have arisen under s. 244 of the Code of Civil Procedure. An examination of those cases, of which it is only necessary to mention *Sakharam Govind Kale* v. *Damodhar Akharam Gujar* (3) and *Kuriyali* v. *Mayan* (4), has satisfied their Lordships that the decision appealed from is in accordance with the construction which the Courts in India have uniformly placed on the section in question. It is of the utmost importance that all

(1) 19 C. 683=19 I. A. 166. (2) 17 C. 769.
(3) 9 B. 468. (4) 7 M. 255.

[331] The effect of that decision was therefore this, that an application for setting aside a sale on the ground of fraud would come under s. 244, notwithstanding that the purchase was made by a person who was a third party.

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The preliminary objection being disposed of against the respondents, let us now see how the appeal stands on the merits.

The point urged on behalf of the appellants is that the lower appellate Court was wrong in holding that the application for setting aside the sale in this case was barred by limitation. If the application was one governed by art. 166 of the second schedule of the Limitation Act, then the conclusion arrived at by the lower appellate Court would be one that would not be open to question in second appeal. Then, is the application one that is governed by art. 166? We are of opinion that this question must be answered in the negative. Article 166 of the Limitation Act applies only to an application to set aside a sale in execution of a decree on the ground of irregularity in publishing and conducting the sale, or on the ground that the decree-holder has purchased without the permission of the Court.

The ground upon which the sale now in question is sought to be set aside is not either of those two grounds, but is fraud on [332] the part of the decree-holder, and also on the part of the auction-purchaser in bringing about the sale.

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objections to execution sales should be disposed of as cheaply and as speedily as possible. Their Lordships are glad to find that the Courts in India have not placed any narrow construction on the language of s. 244, and that when a question has arisen as to the execution, discharge or satisfaction of a decree between the parties to the suit in which the decree was passed, the fact that the purchser, who is no party to the suit, is interested in the result has never been held as bar to the application of the section."

No doubt their Lordships observe that the Counsel for the appellants before them admitted that he was unable to produce any authority for his contention; and no doubt it is true that the Full Bench decision in *Mohendro Narain Chaturaj* v. *Gopal Mondul* (1) was authority in his favour; but that does not go to show that their Lordships' determination of the case is based upon the admission of Counsel and not upon their decision of the question raised. Their Lordships' observation that "the fact that the purchaser, who is no party to the suit, is interested in the result has never been held a bar to the application of the section," may not be quite reconcilable with the fact that [331] a Full Bench of this Court in the case of *Mohendro Narain Chaturaj* v. *Gopal Mondul* (1) has taken a somewhat different view. But it is not for us to say how far that may form a ground for inducing their Lordships in any future case to reconsider the question. All we can say is that it would be contrary to first principles and settled practice (see the Rules of this Court, chap. V, para. 6) for us not to follow a decision of the Privy Council which is in point for a reason like that. We must therefore follow in this case the decision in *Prosunno Kumar Sanyal* v. *Kali Das Sanyal* (2) and hold that s. 244 of the Code of Civil Procedure is a bar to this suit so far as it seeks to set aside the sale on the ground of fraud, notwithstanding that one of the parties to it is the auction-purchaser who was no party to the original rent suit.

It remains now to consider the further contention urged on behalf of the respondent, that, even if no separate suit is maintainable, the plaint in this [332] suit may be treated as an application under s. 244 of the Code of Civil Procedure; and the relief that has been given to the plaintiff may be granted to him, if not in the form of a decree in a regular suit, in the form of an order under that section, seeing that upon the facts found, an application under s. 244 was not barred by limitation, and that the suit was brought in the very same Court that would have had to hear such an application. Now if the assumptions of fact upon which this argument proceeds had all been correct, the case of *Purmessuree Pershad Narain Singh* v. *Jankee Kooer* (3) would have lent considerable support to it. But upon the facts of this case, we think the contention must fail. For we find on reference to the record that this suit was instituted in the second Munsif's Court at Gyabanda, while the Court executing the decree was a different Court, *viz.*, the Court of the first Munsif of that place. For the foregoing reasons we

(1) 17 C. 769. (2) 19 C. 683=19 I.A. 166. (3) 19 W.R. 90.

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That is a very different ground from irregularity in publishing the sale. The case, therefore, is governed, not by art. 166, but by art. 178, there being no other provision in the Act applicable to the case; and, if that is so, the question of limitation cannot arise, the application being within three years from the date when the right to apply accrued.

The view we take is supported by the decision of this Court in *Nemai Chand Kanji* v. *Deno Nath Kanji* (1).

It was argued that as one of the facts found by the lower appellate Court is that it is not shown that the auction-purchaser was a party to the fraud alleged to have been committed by the decree-holder in bringing about the sale, so far as the auction-purchaser is concerned, the case against him can only be regarded as one for setting aside the sale on the ground of irregularity, and that the extended period of limitation in the case of an application to set aside a sale on the ground of fraud, cannot **[333]** apply to the case, so far as it proceeds against the execution purchaser.

We are unable to accept this contention as sound. If the sale was a fraudulent sale, then, even if the auction-purchaser was not a party to that fraud, still it could not be said that the application ought not to be dealt with as one outside the scope of art. 166.

The application is one to have the sale set aside; and if it was vitiated by fraud, the consequence of that must attach, so far as the present question goes, as much to the case of the auction-purchaser as to the case of the decree-holder.

It would be different if it had been necessary for the applicant to obtain an extension of the period of limitation under art. 18 of the Limitation Act. That section expressly provides that the extended period of limitation on the ground of fraud is applicable only as against a party to the fraud. Here the applicant obtains the extended period, not by the application of art. 18, but because his case does not come under art. 166, but comes under a different article under which, quite apart from art. 18, the application is not barred.

[334] The application, as we have pointed out, is governed by art. 178 of the second schedule of the Limitation Act, there being no other

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must hold that the decision appealed against is wrong in law and must be set aside. But, as has been said above, that does not dispose of this case. The questions raised in the case, namely, whether the decree was obtained by fraud and whether the defendant No. 1 was a party to that fraud, must now be determined, and if they are answered in the affirmative, the plaintiff would be entitled to a decree. Those are questions which clearly do not come within the scope of **[333]** s. 244 of the Code of Civil Procedure, and so far as the suit depends upon their determination, that section can be no bar to it. It was urged for the appellant that the suit, so far as it seeks to set aside the decree, is barred by art. 164 of the second schedule of the Limitation Act. But that article has no application to this case. What the plaintiff seeks to do is, not to set aside the decree, merely as an *ex parte* decree passed without service of summons, but to set it aside on the ground that it was obtained by fraud. The provision of the Limitation Act applicable to it is art. 95; and upon the facts found, the suit is not barred under that article.

The result then is that the case must go back to the lower appellate Court for the determination of the two questions stated above. If that Court is satisfied that any evidence was excluded by reason of the view taken of the case by the first Court, it will allow the parties to adduce fresh evidence. Otherwise the questions will be determined upon the evidence on the record.

Costs will abide the result.

S. C. G. *Appeal allowed. Case remanded.*

(1) 2 C.W.N. 691.

provision of the law applicable to this case, which is one for setting aside a sale on the ground of fraud.

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For the foregoing reasons we are of opinion that the decision of the lower appellate Court that the application is barred by limitation must be set aside, and this case sent back to that Court in order that it may be determined on the merits.

The costs of this appeal will abide the result. The question for which the case is remanded is whether the sale in question was brought about by the fraud of the decree-holder.

S. C. G. *Appeal allowed. Case remanded.*

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26 C. 334.

ORIGINAL CIVIL.

Before Mr. Justice Sale.

MUGNIRAM AND OTHERS *v.* GURMUKH ROY.* [9th March, 1899.]

Evidence—Registration Act (III of 1877), *s.* 49—*Collateral purpose—Mortgage, unregistered—Limitation Act* (*XV of* 1877).

An unregistered document, the registration of which is compulsory, may be admissible in evidence for a collateral purpose, *i.e.*, to prove admission of liability on the part of the executant sufficient to prevent a claim from being barred by the Limitation Act.

[N.F., 12 C.L.J. 25 = 15 C.W.N. 375 (377) = 6 Ind. Cas. 346; R., U.B.R. (1904), 4th Qr., Registration, 1 (2); 5 N.L.R. 70 = 2 Ind. Cas. 744.]

IN this case the plaintiffs sued to recover the sum of Rs. 3, 801 by way of principal and the sum of Rs. 997-12-6 for interest, being at the rate of 9 per cent. per annum. The plaintiffs alleged that previous to 23rd December 1894 there had been monetary transactions between their own firm and the defendant's firm, and on 22nd December 1894 an adjustment of account was come to between them, by which the sum of Rs. 833-6-9 was found due to the plaintiffs as principal, and Rs. 253-4-9 as interest; and that Rs. 253-4-9, the amount of the interest, had been paid, and Rs. 32-6-9 on account of the principal, which left a balance in favour of the plaintiffs' firm of Rs. 801. The plaintiffs further alleged that on 23rd December 1894 they at the request of the defendant **[335]** advanced to certain persons a sum of Rs. 3,000 at the above rate of 9 per cent. *First* the plaintiffs produced as evidence of these transactions entries in their books to the following effect:—

Account 1 of Gurmukh Roy Dip Chand Bengum, Sambat 1951.

B. M. B. 15 cash book, page 313 Miti the 14th of the light side in Pous.

286-11-6 cash book, page 399, Amount given up to you in respect of interest up to Miti, the 11th of the dark side in Pous. The same is credited, 30-11-6.

On the other side.

1,086 11 6. Previous balance.

3,000 cash book, page 295 Miti, the 12th of the dark side in Pous 1-14 cash book, page 321 Miti, the 7th of the dark side in Magh 1 cash book, page 370 Miti, the 15th of the light side in Falgoon.

4,089-9-6.

These entries were not signed by the defendant, and it did not appear from the entries that any interest had ever been paid or that there had been an adjustment of account.

Secondly, as evidence of the defendant's liability the plaintiffs' firm produced a mortgage executed by him in the Hindi language, charging

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* Original Civil Suit No. 796 of 1897.

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his immoveable property in Ladnoo with the sum of Rs. 3,801, but it was found that the defendant had omitted to complete this mortgage by registering it.

Thirdly, the plaintiffs produced other entries in their books relating to monetary transactions with the defendant, but not signed by him, and

Fourthly, they tendered oral evidence.

The suit was instituted on 23rd November 1897.

Mr. *Chakravarti*, for the plaintiff.—The mortgage, although not registered, can be used as collateral evidence, and by way of an admission of liability on the part of the defendant, in spite of s. 49 of the Registration Act (III of 1877); see Field's Evidence Act, pp. 452, 453; and Woodroffe's Evidence Act, p. 415; also the case of *Lachmipat Sing Dugar* v. *Khairat Ali* (1), and the *Bengal Banking Corporation* v. *Mackertich* (2).

An unregistered document, the registration of which is compulsory, is nevertheless admissible in evidence for a collateral [336] purpose. If such a document is admissible as evidence of admission of liability on the part of the defendant it is sufficient to free the claim from being barred by the Limitation Act (XV of 1877).

No one appeared for the defendant.

RULING.

SALE, J.—I will allow the document to be admitted as evidence for the collateral purpose of shewing that there has been an admission of liability on the part of the defendant sufficient to prevent the claim from being barred by the Limitation Act.

Attorneys for the plaintiff: Babus *Kally Nath Mitter & Surbadhicary*.

C. E. G.

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26 C. 336.

APPELLATE CRIMINAL.

Before Mr. Justice O'Kinealy and Mr. Justice Stanley.

THE DEPUTY LEGAL REMEMBRANCER (*Appellant*) *v.* SARNA KAHMI (*Respondent*).* [26th January, 1899.]

Bigamy—Complaint by the husband—"Person aggrieved"—Criminal Procedure Code (*Act V of* 1898), *s.* 198—*Penal Code* (*Act XLV of* 1860), s. 494.

The husband is a "person aggrieved" within the meaning of s. 198 of the Criminal Procedure Code upon whose complaint the Court should take cognizance of an offence under s. 494 of the Penal Code.

Queen-Empress v. *Rukshmoni* (3), and *In the matter of Ujjala Bewa* (4), referred to.

[R., 3 C.L.J. 38 (41).]

THE accused in this case was on the complaint of her husband charged under s. 494 of the Penal Code with having committed bigamy. The Sessions Judge before whom the trial was held, without going into the facts of the case, directed the jury to return a verdict of "not guilty" inasmuch as, regard being had to the provisions of s. 198 of the Criminal Procedure Code, he was of opinion that the case could not proceed.

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* Criminal Government Appeal No. 4 of 1898.

(1) 4 B.L.R. F.B. 18.
(2) 10 C. 315.
(3) 10 B. 340.
(4) 1 C.L.R. 523.

The [337] husband in his opinion was not a "person aggrieved" within the meaning of that section. The jury in pursuance of the direction of the Sessions Judge returned a verdict of "not guilty" and the accused was acquitted. The Local Government appealed against this order of acquittal.

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The judgment of the High Court, (O'KINEALY and STANLEY, JJ.) was as follows:—

JUDGMENT.

In this case Government has appealed from a decision passed by the Sessions Judge of Jessore.

The accused was tried with the aid of a jury under s. 494 of the Indian Penal Code, namely, for marrying again during the lifetime of her husband. The Judge did not try the facts, but he directed the jury that, as a matter of law, the husband was not competent to carry on the case under the Procedure Code. Section 198 of the Procedure Code runs as follows: "No Court shall take cognizance of an offence falling under chap. XIX or chap. XXI of the Indian Penal Code or under ss. 493 to 496 (both inclusive) of the same Code, except upon a complaint made by some person aggrieved by such offence." Section 494 falls between ss. 493 to 496, and is therefore within s. 198. The Judge directed the jury that, as a matter of law, the husband is not the "person aggrieved" by such offence, and he thinks that the only "person aggrieved" is the person with whom the second ceremony was gone through. If he refers to the words of the section they would show him that the grievance may not be confined to a single individual. In the case of *Queen-Empress* v. *Bai Rukshmoni* (1) it was admitted by all at the Bar that a husband would be a "person aggrieved" under s. 494; and in *In the matter of Ujjala Bewa* (2) the Judges were of the same opinion.

We think, therefore, that the direction of the Court below was not correct, and, setting aside the judgment of acquittal, we direct that the case be re-tried.

S.C.B.

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26 C. 338.

[338] APPEAL FROM ORIGINAL CIVIL.

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, Mr. Justice Prinsep and Mr. Justice Hill.

MADHUBMONEY DASSEE (*Defendant*) v. NUNDO LALL GUPTA (*Plaintiff*).* [13th and 16th January, 1899.]

Landlord and Tenant—Assignment, by tenant, of goodwill, stock-in-trade, fixtures, furniture and chattels—Notice by landlord to lessee and to assignee to deliver up possession on expiration of lease, or to pay rent—Holding over—Use and occupation—Liability of assignee for compensation for use and occupation.

L assigned to *D* the stock-in-trade, goodwill, fixtures, chattels and premises in connection with a certain business carried on by him at the said premises which he held on lease from the plaintiff. The deed of assignment contained (*inter alia*) a provision empowering the assignee, in the event of any breach by *L* of the covenants contained in the said deed, to let the premises for any term or terms of

* Appeal from Original Decree No. 35 of 1897 from the decision of Mr. Justice Ameer Ali, dated the 17th August 1897, in Small Cause Court transfer suit No. 2 of 1896.

(1) 10 B. 340. (2) 1 C.L.R. 523.

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years for such rent and under such covenants and conditions as *D* might think fit; and there was a further provision that *L* should not remove any of the stock-in-trade, chattels, &c., without the permission of *D*. Shortly before the expiration of the lease, the plaintiff served a notice on *L* to deliver up possession of the premises on the expiry of the lease, or to pay an enhanced rent therefor, and a notice on *D* requiring *D* to deliver up possession, and stating that, in default, he would hold *D* jointly liable with *L* for the enhanced rent. *D* had durwans and a clerk on the premises to see that nothing was removed therefrom without his permission. *L* and *D* continued to keep the stock-in-trade on the premises after the determination of the lease, and the business was carried on as before. The plaintiff subsequently brought an action against *D* and *L* for compensation for use and occupation of the premises for four months.

Held (reversing the decision of AMEER ALI, J.) that the lease did not pass under the terms of the assignment to *D*, and that *D* was not liable to the plaintiff for compensation for the use and occupation of the premises.

ON the 19th August 1891, the plaintiff granted a lease of the premises Nos. 159 and 160, Dhurrumtollah, in the town of Calcutta, to one Joseph Lauter, a veterinary surgeon and stable-keeper for a term, which expired on the 31st August 1895. On the 30th September Lauter assigned to one Dwarka Nath Mitter [339] the good will and his interest in the business of veterinary surgeon and stable-keeper as the same was carried on at the said premises, and "all the horses, carriages, stock-in-trade, fixtures, furniture and other effects in any wise belonging to or used in the said business, and all the right, title, interest, property, claims and demands whatsoever of the said Lauter to, in, and upon the said business and other the premises" thereby assigned. The assignment contained (*inter alia*) provisions to the effect that "on default on the part of the said Lauter in payment of the principal money or interest thereby secured, or some part thereof, within twenty-four hours after the date appointed for payment thereof in case of breach of any of the covenants which the said Lauter had entered into with the said Dwarka Nath Mitter, then it sould be lawful for the said Dwarka Nath Mitter, or his executors, etc., at any time after the expiry of twenty-four hours from such default or breach of covenant to enter upon the said premises, or any other place in which the horses, carriages, and other chattels" thereby assigned, "should be or should be supposed to be, to seize the said horses, &c., and either remove them or allow them to remain on the said premises; and also at any time after the expiry of twenty-four hours from such default to sell the horses, carriages, goodwill, chattels and premises" thereby assigned; "and also at any time or times to let the said horses, carriages, goodwill, chattels and premises, or to grant any lease or leases thereof for any term or terms of years upon such terms and conditions, and subject to such covenants as he or they should think fit." Another clause prohibited Lauter from removing any of the chattels, horses, carriages, &c., without the consent of Dwarka Nath Mitter.

On and shortly after the 18th July 1895 certain letters passed between the pleaders of the plaintiff and Dwarka Nath Mitter, claiming, on the one side, rent from Dwarka Nath Mitter as mortgagee in possession of the premises, and on the other side, repudiating liability for the rent, and denying that Dwarka Nath Mitter was in possession of the premises as mortgagee.

In July 1895 the plaintiff brought a suit in the Small Cause Court to recover from Lauter and Dwarka Nath Mitter the rent of the premises for May and June 1895. The allegation against [340] Dwarka Nath Mitter was that he was jointly liable with Lauter because he was the mortgagee in possession of the stock-in-trade; but as against Dwarka

Nath Mitter the suit was withdrawn on the 21st August 1895. During the suit, a notice, dated the 14th August, was, according to the plaintiff, served on Lauter requiring possession of the premises on the 31st August, and claiming in default an enhanced rent of Rs. 500 per month in the event of his holding over. A similar notice was served on Dwarka Nath Mitter, stating that he would be held jointly liable with Lauter for the enhanced rent. They did not vacate the premises. Lauter was adjudicated insolvent on the 10th January 1896; but the plaintiff did not prove for his debt on the insolvency. Meanwhile, Dwarka Nath Mitter died. The plaintiff in January 1896 sued Lauter and the representatives of Dwarka Nath Mitter for compensation for the use and occupation of the premises during the period from September to December 1895, alleging that Dwarka Nath Mitter was a mortgagee in possession of the premises, and also that he had agreed to pay the enhanced rent. The suit was transferred to the High Court. The learned Judge who tried it (Ameer Ali, J.) found that the notice alleged had been served on Dwarka Nath Mitter; and that his alleged agreement to pay the enhanced rent was not proved; but he held that Dwarka Nath Mitter was the mortgagee in possession, and as such was as much in the occupation of the premises as Lauter himself, and that his representatives were liable for compensation for the period in respect of which the suit was brought. He, therefore, gave a decree in favour of the plaintiff with costs other than the costs of trial of the issue as to the alleged agreement.

The defendants appealed.

Mr. *Palit* and Mr. *H. D. Bose*, for the appellants.—Dwarka Nath Mitter was never in possession of the premises as mortgagee; he simply had a durwan and a clerk there to take charge of the horses, carriages, &c., and to see that they were not improperly removed, not to be in possession of the premises on his behalf.

The question raised by the learned Judge as to whether there had been use and occupation does not arise, because the plaint was based on an express contract. If Dwarka Nath Mitter had been [341] a sub-tenant of Lauter's, or even if he had been a trespasser, he would not be liable in an action for compensation for use and occupation.

On the plaintiff's own evidence it is clear that Lauter was not holding over after the determination of the lease, for he says that Lauter made a new agreement with him to pay the enhanced rent. And that being so, there could be no holding over by Dwarka Nath Mitter. A suit and a decree for compensation for use and occupation must be based upon some tenancy. No contract of tenancy can be created in such a case as the present. *Marquis of Camden* v. *Batterbury* (1). And in all tenancies by sufferance there is an underlying assumption that the letting was by implication; there must have been a previous permission to enter into possession. [PRINSEP, J., referred to the passage in Woodfall on Landlord and Tenant, 16th ed. p. 577: "A lessee or his assignee ....trespasser"]. But the holding over must be by the tenant—in this case, Lauter; Dwarka Nath Mitter never was a tenant. The plaintiff is endeavouring to convert his notice into a contract, which he cannot do. The decision in *Hellier* v. *Sillcox* (2), on which the respondents rely, is explained in *Churchward* v. *Ford* (3), and does not assist them.

The Court called upon the respondent's Counsel.

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(1) (1860) 7 C. B. (N. S.) 864 (878). (2) (1850) 19 L. J. (N. S.) Q. B. 295.
(3) (1857) 2 H. N. 446 (449).

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Mr. *Pugh* (with him Mr. *Hill* and Mr. *Dunne*), for the respondent.—The argument against us is that the question of use and occupation does not arise. But it was sufficiently raised before the lower Court. It was argued without objection on the defendants' part; and there is no ground of appeal with regard to it.

It is said that there was no holding over. But it was clearly the interest of Dwarka Nath Mitter that he and Lauter should not be ejected, but should be allowed to have the premises for carrying on the business, which otherwise would have suffered greatly. The mortgage was a mortgage, not of the stock-in-trade [342] merely, but also of the business and goodwill. Any interest that Lauter had in these premises Dwarka Nath Mitter got. He was entitled to carry on the business; and he did carry it on, through Lauter, and he got possession of the premises by his durwan and clerk. And for the purpose of looking after the stock-in-trade, he took possession of the premises. He was *de facto* in occupation of them, and it was essential that he should be, as the lease was coming to an end, and he had had the notice referred to served on him. At the time of the mortgage it was not an entry as a tenant; but even if he did not enter as a tenant at all, still the relation of landlord and tenant might arise by a notice given and a subsequent occupation. On the evidence there is use and occupation by Dwarka Nath Mitter prior to the end of August. On the 14th August the plaintiff did take steps to create the relation of landlord and tenant as from the expiration of the lease. The use and occupation by Dwarka Nath Mitter date from the time when he went into possession under the deed of assignment; Lauter's tenancy is a distinct matter. A man may occupy a place by putting his goods there; residence is not necessary. The occupation in such a case as this must be actual, *de facto*, occupation. *Robinson* v. *Briggs* (1). Where a grantor of a bill of sale makes over his goods in such a way that the grantee's durwans open and close the place of business (as they did in this case), and wait there to see that nothing is removed therefrom, the grantor is no longer in occupation. The assignment is of the goodwill, as well as of the stock-in-trade, and that is inseparable from the enjoyment of the premises. But then Dwarka Nath would be liable as assignee of the lease. But he has power under the assignment to let the premises on lease upon such terms as he may think fit. Lauter also agreed to pay the rent; and the object of that was to maintain Dwarka Nath Mitter's hold on the premises. He never said so in any form; and his whole conduct indicated the contrary. It is not correct to say that an action for compensation for use and occupation must be based on a contract, express or implied; it is more accurate to say that the defendant must have held or occupied the premises as tenant thereof to the plaintiff, [343] or by his permission or sufferance—Woodfall on Landlord and Tenant, 16th ed., p. 571. The implied contract is raised by law from the fact that land belonging to the plaintiff has been occupied by the defendant by the plaintiff's permission—*Gibson* v. *Kirk* (2).

Mr. *Hill* on the same side.—The very assignment of the goodwill shows that it was to carry with it the right of occupation of the premises where the business was carried on. The powers of the assignee, in the event of breach of covenant by Lauter, included a power to let the premises for a term of years; and that expression, while appropriate to any lease of the business premises, is certainly not appropriate to the

(1) (1870) L.R. 6 Exch. 1.

(2) (1841) 1 Q.B. 850 (856).

hire of horses. After default made, Lauter was only a licensee for the purpose of carrying on the business. No doubt the holding over would be *prima facie* a holding over by Lauter. But there are other circumstances; and those are that he could not remove the furniture, or even his name-plate on the door, nor could he carry on business elsewhere. All the fixtures and chattels were conveyed by the assignment; they passed by title, and not under any consideration operating in bankruptcy, such as apparent possession. The plaintiff was at liberty to allow both Dwarka Nath Mitter and Lauter to remain on the premises, and hold them jointly liable, though either of them was at liberty to go out. As between the landlord and Lauter, the latter could have gone out; but as between Lauter and Dwarka Nath Mitter, Lauter's hands were tied, so that the occupation was the occupation of Dwarka Nath Mitter, because he was the only person who could make any effective choice in the matter.

Mr. *Palit* called on by the Court only as to the effect of the notice and as to the argument that the assignment passed the lease of the premises, cited in reply. *Churchward* v. *Ford* (1), *Towerson* v. *Jackson* (2), *Ibbs* v. *Richardson* (3), *Moore* v. *Greg* (4), and *Cox* v. *Bishop* (5).

[344] Mr. *Pugh* in reply on the authorities.

JUDGMENTS.

The followin gjudgments were delivered by the Court (MACLEAN, C. J. and PRINSEP and HILL, JJ.):—

MACLEAN, C. J.—On the 29th of August 1891, the plaintiff in the present suit granted a lease of certain premises Nos. 159-160, Dhurumtollah Street, in Calcutta, to one Joseph Lauter for a term which expired on the 31st August 1895. On the 30th September 1893, Joseph Lauter assigned the goodwill and interest and the stock-in-trade, trade fixtures, &c., in the business which he then carried on as a veterinary surgeon and livery stable-keeper, on the above premises, to one Dwarka Nath Mitter, who has since died, and whose representatives are the defendants in the present case.

I will deal at once with the question of the construction of the above assignment before going into the further facts of the case. It is contended for the plaintiff that the assignment passed the lease as well as the stock-in-trade and trade fixtures, &c., but that contention is not, in my opinion, well founded. A distinction is drawn between the leasehold premises themselves and the goods and chattels in and upon them. The plaintiff says that the lease passed under the terms, "goodwill and interest of the said Joseph Lauter in the business of veterinary surgeon:" but I am unable to accept this view, or to say that under these words Dwarka Nath Mitter became the assignee of the lease, and in expressing this opinion I am not unmindful of the clause to be found at p. 29 of the Paper Book, which gives Dwarka Nath Mitter a power in certain events, not only to sell the chattels, but also to grant a lease of the premises. But in the view I take of the case I am not satisfied that this question is very material.

Passing on to the history of the case, it appears that on the 18th of July 1865, a suit was brought by the plaintiff in the Small Cause Court against Joseph Lauter and Dwarka Nath Mitter to recover Rs. 740 as the rent of the premises for the months of May and June 1895, at the rate of

(1) (1857) 2 H. & N. 446.
(2) L. R. (1891) 2 Q. B. 484.
(3) (1839) 9 Ad. &. E. 849.
(4) (1848) 2 Phillips, 717.
(5) (1857) 8 De. G. M. and G. 815.

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Rs. 370 per month. It is clear from the letter of the 11th of June 1895, which is set out at p. 45 of the Paper Book, what was the position which the plaintiff thought the appellant occupied in relation to those premises.

[345] The plaintiff treated Dwarka Nath Mitter as mortgagee in possession of the premises themselves and as jointly liable with Joseph Lauter for the rent. That position Dwarka Nath Mitter repudiated, and doubtless, in consequence of the letter of the 19th of August 1895, which is set out at p. 47 of the Paper Book, the suit in the Small Cause Court was withdrawn as against Dwarka Nath Mitter, and the plaintiff had to pay his costs. In that letter, Dwarka Nath Mitter, through his pleader, repudiates any tenancy, and tells the plaintiff what his position is. He says: " What he" (meaning his client, Dwarka Nath Mitter) " contends is that he is not the tenant of your client, nor he is bound to pay to your client the rent which he had sued him for. Your client well knows the fact that my client has a lien over the stock-in-trade of the said Joseph Lauter, as he has advanced Rs. 15,000 to him on the security of the same."

On the 14th August 1895, the plaintiff served Dwarka Nath Mitter with the notice, which will be found at p. 25 of the Paper Book, and great reliance is placed by the respondent on this notice. The plaintiff also sent a notice to Joseph Lauter, which will be found at p. 34 of the Paper Book.

According to the statement in the plaint Joseph Lauter " consented to the said enhancement of rent," which means, if it mean anything, that he consented to hold over on those terms. Dwarka Nath Mitter died on the 21st of November 1895, Lauter became a bankrupt on the 10th of January 1896, and on the 23rd of January 1896, this suit was instituted, claiming as against the representatives of Dwarka Nath Mitter Rs. 2,000 for the rent, use and occupation of the premises for four months, *viz.*, September, October, November and December 1895.

Mr. Justice Ameer Ali gave judgment in favour of the plaintiff, and hence the present appeal by the representatives of Dwarka Nath Mitter.

Two questions arise for our consideration: *Firstly*, whether the allegation made by the plaintiff that Dwarka Nath Mitter agreed to become tenant of the premises upon the terms of paying Rs. 500 a month is made out, and, if not ; *secondly*, whether the plaintiff is entitled to recover the sum of Rs. 2,000 upon the footing of use and occupation of the premises by Dwarka Nath Mitter.

[346] The learned Judge in the Court below has found as a fact that the agreement set up by the plaintiff has not been made out, but the respondents invite us to reverse that conclusion.

The agreement is not supported by any documentary evidence, and virtually the only evidence in support of it is the evidence of Harish Chunder Biswas, who was the sirkar of the plaintiff. He speaks of a certain conversation with Dwarka Nath Mitter, but no rent-bills are produced, and, as against a dead man, I am not disposed to place much reliance on this evidence, in which there are passages which show that it must be accepted with the greatest caution. For instance, he tells us at p. 12 of the Paper Book that the reason for not making out rent-bills was because of the uncertainty as to who was to pay the rent. But how could there be any uncertainty as to that, if there was, as he says, a clear agreement that Dwarka Nath Mitter was to pay it? Furthermore this story is inconsistent with the evidence of Joseph Lauter, who was called as a witness

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for the plaintiff, and he says at p. 20 : "There was a conversation between us as to notice at the end of September. I said, the "lease is over, and Mr. Gupta has put the rent to Rs. 500. What am I to do. I can't get money enough in. Will you help me ?" And he said he would. He said, "Sonnie, I will help you. I will give you Rs. 2,000, and he will help with the rent up to the end of the season. This was the conversation when the two nephews were present. I cannot give you the exact date. I would know the nephews if I see them." That is the evidence of their own witness, and it is perfectly inconsistent with the view that Dwarka Nath Mitter was under the impression that he had entered into an agreement with the plaintiff to pay any rent in respect of these premises, or to become, as between himself and the plaintiff, the tenant of the premises. Again, after Dwarka Nath Mitter's death, the plaintiff treated Lauter as in occupation of the premises, as appears from the letter of the 18th of January 1896 set out at p. 60 of the Paper Book : "We are instructed by Babu Nundo Lal Gupta, owner of the premises Nos. 159-160, Dhurumtollah Street, hitherto in the occupation of the insolvent above named, to request you will be so good as to see that the property belonging to the said insolvent is removed at once, and the premises vacated in the course [347] of a day or two," and so forth. That is only a few days before the present plaint was filed, and that letter shows that the view then taken by the plaintiff was that the premises were, up to the time of the letter, in the occupation, not of Dwarka Nath Mitter, but of the insolvent, and is absolutely inconsistent with the idea of any agreement by Dwarka Nath Mitter to become the tenant. I agree with Mr. Justice Ameer Ali upon this part of the case.

Then, is the plaintiff entitled to recover anything upon the footing of use and occupation ? To enable the plaintiff to recover upon that footing, there must be a tenancy, expressed or implied, there must be evidence of the existence of the relation of landlord and tenant, and of an entry into and occupation of the premises attributable to that tenancy. Where are those requisites to be found in the present case ? There is no evidence to support a claim upon the footing of use and occupation.

I have already pointed out that by his plaint the plaintiff says that Lauter consented to hold over, and this is consistent with the letter of the 18th of January which treats Lauter as in occupation of the premises. The case made by the plaintiff is that Dwarka Nath Mitter was in possession of the leasehold premises as mortgagee in possession. To my mind he was nothing of the sort. Under the deed he was entitled to keep a durwan on the premises, and clerk in charge of the books, &c. He put the durwan and clerk on the premises not to take possession of the premises, but to look after the chattels assigned to him by way of mortgage, and he did so on the very day that the deed was executed ; and so matters remained up to the time of Dwark Nath Mitter's death. There was no change in the position, and he never took possession as mortgagee of the leasehold premises. But if he had, I do not appreciate how this would have assisted the plaintiff. The mere fact of his being in possession would not constitute the relation of landlord and tenant, so as to entitle the plaintiff to sue for use and occupation,

But it is said that a tenancy is to be implied from the notice of the 14th of August, Dwarka Nath Mitter being in possession as mortgagee of the leasehold premises. I have exposed the fallacy of this latter view.

But, even if he were, the mere service of such a notice—and [348] when it was served Dwarka Nath Mitter according to the plaintiff's evidence, that of the man who took the notice, said he had nothing to do

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with it—will not constitute a tenancy. A mere notice such as that given in this case does not constitute a contract. When the tenancy terminated on the 31st of August the plaintiff could have adopted one of two courses. He could have turned Lauter and his horses and carts and chattels into the street, or he could have made a bargain with him or with Dwarka Nath Mitter for a fresh tenancy. As regards the latter, he adopted neither of these courses, but on his own statement, he did make a bargain with Lauter to hold over on an enhanced rent.

There was no express tenancy between the plaintiff and Dwarka Nath Mitter; nor is there anything in the circumstances from which any such tenancy can be reasonably implied. The facts all tend the other way.

Upon this part of the case I am unable to agree with the learned Judge in the Court below, and speaking with every respect I am at a loss to appreciate the bearing of the case upon which he appears to place so much reliance, namely, the case of *Ex parte National Guardian Assurance Co. In re Francis* (1), a long quotation from which is set out in the judgment. I may add that I scarcely think we should have heard of the present claim had Lauter not become a bankrupt.

For the reasons I have given, the appeal must be allowed. The suit ought to have been dismissed, and must now be dismissed with costs as against the representatives of Dwarka Nath Mitter, including the costs of the appeal.

PRINSEP, J.—I concur and have nothing to add.

HILL, J.—I also agree with the views expressed by the Chief Justice.

Appeal allowed.

Attorneys for the appellant: Messrs. *Sen & Co.*

Attorneys for the respondents: Messrs. *Morgan & Co.*

H. W.

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[349] ORIGINAL CIVIL.

Before Mr. Justice Sale.

LUTCHMANEN CHETTY *v.* SIVA PROKASA MODELIAR.*
[12th January, 1899.]

Hindu law—Joint family—Partnership—Infant sons—Mitakshara law—Promissory note, Suit on—Non-joinder of parties—Pleas in bar of suit.

In a suit on a promissory note executed by the defendant in favour of a firm whose original partners were two brothers, one of whom had previously died, leaving an infant son surviving, while the other, who also had infant sons, was at the date of the execution of the note, sole surviving partner of the firm:

Held, that a Hindu infant who by birth or inheritance becomes entitled to an interest in a joint family business does not necessarily become a member of the trading partnership carrying on the business. There must be some consentient act to that effect on the part of the infant and his partners. Even, therefore, where parties are governed by the Mitakshara law an infant need not be joined as a co-plaintiff in a suit by the father to recover a trade debt. Decrees obtained in such suits by or against the managers of the business are presumed to have been obtained by or against them in their representative capacity, and will be binding on the whole joint family.

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* Original Civil Suit No. 65 of 1895.

(1) (1878) L. R. 10 Ch. D. 408 (413).

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Bissessur Lall Sahoo v. *Luchmessur Singh* (1); *Petum Doss* v. *Ramdhone Doss* (2) and *Ramsebub* v. *Ramlall Koondoo* (3) referred to.

[Rel. on, 19 Ind.Cas. 6; R., 25 A. 378 (384) = 23 A.W.N. 76; 29 A. 176 = 4 A.L.J. 99 = A.W.N. (1907) 13; 34 A. 549 (566) = 9 A.L.J. 819 (837) (F.B.) = 15 Ind. Cas. 126 (134); 37 B. 340 = 14 Bom. L.R. 840 (843) = 17 Ind. Cas. 193 (194); 7 Ind. Cas. 584 (585) = 4 S.L.R. 2 (4 & 7); 69 P.R. 1906 = 118 P.L.R. 1906.]

THE plaintiff and one A.R.L.N. Ramanathen Chetty were undivided brothers constituting a joint family governed by the Mitakshara law. They carried on a business together at Devakotta in the Madras Presidency, and subsequently opened a branch business in Calcutta in the name of Ramanath Chetty, who was the elder brother, which was managed on their behalf by a *gomastah* of the name of Viena Ramanathen Chetty. In 1889 moneys were advanced to the defendant by the Calcutta firm through the *gomastah*. In March 1890 the plaintiff's brother, Ramanathen Chetty, died intestate leaving an only son. The business continued in the name of the deceased brother, and there were further monetary transactions between the firm and the [350] defendant, and an account was finally taken and adjusted of the dealings between the defendant and the firm of Ramanathen Chetty, when a sum of Rs. 12,000 was found due by the defendant to the firm, and for that sum and interest a promissory note, the subject of this suit, was executed by the defendant in favour of the firm on 31st January 1891, and given by the defendant to the *gomastah* Viena Ramanathen Chetty for and in respect of the debt due to the firm.

The defendant relied mainly in bar of the suit on the plea that all necessary parties to the suit had not been joined as plaintiffs.

The plaintiff, it was proved, had four sons living, the eldest of whom was nine or nine and-a-half, while the youngest was born since the institution of the suit. The son of the deceased brother Ramanathen Chetty died after the institution of the suit, leaving only a daughter. The plaintiff and his brother Ramanathen Chetty carried on their business both in Calcutta and at Devakotta jointly for the benefit of themselves and their families, and since the death of the plaintiff's brother the businesses were carried on for the benefit of the members of the joint family by the plaintiff as the manager or head of the family.

The defendant raised the contention that as the family was governed by the Mitakshara law the plaintiff's sons on birth became co-sharers in the joint family properties, which included the note in suit; that they succeeded to a share in the joint family property by inheritance on the death of their father's brother Ramanathen Chetty; that as such co-sharers they were necessary parties to the suit, and should have been joined as plaintiffs. It was not, however, shewn that the infants had been admitted into the trading partnership or taken any part in the business or exercised any control therein, or that the business was an ancestral business, or that the Calcutta business was started by the brothers with ancestral funds as distinguished from their own acquisitions.

None of the plaintiff's sons were in existence at the time the dealings with the defendant commenced. At the date of the execution of the note in suit the plaintiff's eldest son was probably in existence, and the plaintiff's brother's son was also in existence, but it did not appear when he was born.

[351] Mr. *Chakravarti* (Mr. *Woodroffe* with him), for the plaintiff.—This suit is brought on a promissory note executed for the sum of Rs. 12,000. The execution of the note is admitted, and the only defence is

(1) 6 I.A. 223. (2) (1848) Taylor, 279. (3) 6 C. 815.

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whether the plaintiff is entitled alone to maintain this suit. The note is in the name of the firm under which the Calcutta business was carried on. The note remained with the agent of the firm and was afterwards made over to the custody of the plaintiff. At the time the note was given the plaintiff was the sole partner of the business. His other partner was dead. We are now suing as the sole partner of the firm in whose favour the note was given. Lindley on Partnership, 5th Ed., p. 274. There is no question as to any assignment. At the date the note was given there is no doubt that the plaintiff's brother was dead.

Mr. *Henderson* (Mr. *Knight* with him), for the defendant.—The property of the firm was joint. The suit should be brought in the joint names and not in the name of the plaintiff alone. *Ramsebak* v. *Ramlall Koondoo* (1). The eldest son of the plaintiff was alive at the time of these transactions, and, if it was joint property, each son at the time of birth became interested in the firm. At no time was Lutchmanen Chetty entitled to the exclusion of his sons. *Surju Prasad Singh* v. *Kwahish Ali* (2), Woodroffe's Evidence Act, pp. 620, 692.

Mr. *Chakravarti*, in reply.—The fact that an infant has an interest in the firm does not make him a necessary party to the suit, see s. 247, Indian Contract Act. The case of *Ramsebuk* v. *Ramlall Koondoo* (1) does not assist the Court. There was no question there as to any party being an infant. There the parties were the actual partners. There was no infant. But if a member of a family takes out funds and starts a business of his own there is no presumption that there is any joint family business. If the infants do not become partners why cannot the sole surviving partner alone sue. In the case of the minor the contract must have been with the guardian. Every partner is entitled to give a discharge, but an infant cannot: *Rampartab Samrathrai* v. *Foolibai* (3). **[352]** Besides, three or four members of a Mitakshara family may start a business and all contribute out of the joint funds of their family, but that does not make it a joint family business. The cases cited are cases of an ancestral business where the right accrues by inheritance. There is no evidence here that the infants were taken in as partners. If two persons choose to start a business of their own and a son is born, does he immediately become a partner in the business? He must be admitted or become so by law. Each partner is an agent of the other, but an infant cannot be the agent of all. [SALE, J.—An infant can be made liable by a manager to a certain extent in an ancestral business.] Persons without their consent cannot be made partners, and these infants are of such tender years that they cannot give their consent. The letters of administration shew that this was a business started with their own money by the brothers. Mayne's Hindu Law, s. 274. Trevelyan on Minors, p. 185. *Bungsee Singh* v. *Soodist Lall* (4), and *Arunachala Pillai* v. *Vythialinga Mudaliyar* (5). The plaintiff besides is the manager of the family.

JUDGMENT.

SALE, J.—The plaintiff in this case claims judgment for the amount of principal and interest due on a promissory note executed by the defendant on the 31st January 1891.

The note is executed in favour of A. R. L. N. Ramanathen Chetty. It appears that the plaintiff and one A.R.L N. Ramanathen Chetty were

(1) 6 C. 815. (2) 4 A. 512. (3) 20 B. 767.
(4) 7 C. 739. (5) 6 M. 27.

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undivided brothers constituting a joint family governed by the Mitakshara law. They carried on a business together at Devakotta in the Madras Presidency and subsequently opened a branch business, in Calcutta in the name of Ramanath Chetty, who was the elder brother, which was managed on their behalf by a *gomastah* of the name of Viena Ramanathen Chetty. In the year 1889, dealings were commenced with the defendant, moneys being advanced to him by the Calcutta firm through their *gomastah* Viena Ramanathen Chetty. In the month of March 1890 the plaintiff's brother Ramanathen Chetty died intestate leaving an only son. The business in Calcutta was continued in the name of the deceased brother, and there were further dealings between the [353] firm of Ramanathan Chetty and the defendant till some time shortly before the execution of the promissory note in suit. It has been proved that an account was taken and adjusted of the dealings between the defendant and the firm of Ramanathen Chetty; that a sum of Rs. 12,000 was found due by the defendant to the firm: and that for that sum and interest the note in suit was executed in the name of the firm and was given by the defendant to the *gomastah* Viena Ramanathen Chetty for and in respect of the debt due to the firm. The defendant has filed three different written statements raising various grounds of defence, and there has been a considerable body of evidence adduced both at the hearing and on two commissions which were issued by this Court. At the hearing no serious attempt was made upon the evidence to contest the plaintiff's claim on the merits, but a plea of non-joinder of parties as plaintiffs was relied on in bar of the suit. The plea was raised in the second and third written statements after evidence had been taken on the first of the commissions issued by this Court. The facts which have been proved, and which it is necessary to state relative to this plea, are as follows: The plaintiff has now four sons living, the eldest of whom is nine or nine and-a-half years old, the youngest having been born since the institution of this suit. The son of the plaintiff's brother Ramanathen Chetty has died since the institution of this suit leaving only a daughter. The plaintiff and his brother Ramanathen Chetty carried on their business both in Calcutta and at Devakotta jointly for the benefit of themselves and of their families, and since the death of Ramanathen Chetty the businesses have been carried on for the benefit of the members of the joint family by the plaintiff as the manager or head of the family. It has not been shown by whom the Devakotta business was started, nor has it been shewn that it was an ancestral business, that is to say, a business which descended to the plaintiff and his brother from their father or their ancestors. Nor does it appear that the Calcutta business was started by the brothers with ancestral funds, as distinguished from their own acquisitions. None of the plaintiff's sons were in existence at the time the dealings with the defendant commenced. At the date of the execution of the note in suit [354] the plaintiff's eldest son was probably in existence, and the plaintiff's brother's son was also in existence, but it does not appear when he was born.

It is contended that the family being governed by the Mitakshara law, the plaintiff's sons on birth became co-sharers in the joint family properties, which included the note in suit, and that moreover they succeeded to a share in the joint family property by inheritance on the death of their father's brother Ramanathen Chetty, and that as such co-sharers they are necessary parties to the suit, and should have been joined as plaintiffs. A plea of non-joinder of plaintiffs in an action of contract is a plea in bar of the suit, and if established at the hearing must, as explained

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in the case of *Ramsebuk* v. *Ramlall Koondoo* (1), result in the dismissal of the suit.

No authority has been cited to show that infant members of a Hindu co-parcenary must be joined as co-plaintiffs in suits to recover claims arising out of a joint family business managed by adult members of the family. A debtor of a firm carrying on a joint family business is no doubt entitled to insist that all his co-contractors should join as plaintiffs in a suit instituted to recover the debt, but on what principle can it be said that infants, possibly of tender years as in this case, who are not shown to have been admitted into the trading partnership or to have taken any part in the business or exercised any control therein, are in any sense co-contractors of the debtor? A trade like other personal property is descendible amongst Hindus, but it does not follow that a Hindu infant, who by birth or inheritance becomes entitled to an interest in a joint family business, becomes at the same time a member of the trading partnership which carries on the business. He can only become a member of the partnership by a consentient act on the part of himself and his partners, and it was on this ground held by the late Supreme Court that an infant of tender years, whose name was used in a partnership business, need not be joined as a co-plaintiff in a suit by the father to recover a trade debt. *Petum Doss* v. *Ramdhone Doss* (2).

[355] It is true that the parties in that case were not governed by the Mitakshara law, and that the infant was not entitled to a share in the joint estate, but it seems to me that the same principle would have applied if the infant had been a member of a co-parcenary governed by the Mitakshara law.

In the case of *Ramsebuk* v. *Ramlall Koondoo*, already cited, the plea of non-joinder was held to be established on principles applicable to a case of an ordinary contractual partnership, although the plaintiffs, both original and added, were all members of a joint family governed by the Mitakshara law, and the debt sought to be recovered was a debt due in respect of the joint family business. Moreover, it is not necessary, in order to bind the interest of infant members of a Hindu co-parcenary, that they should be joined as co-plaintiffs in suits instituted by the adult members of the family who carry on the joint family business or contracts entered into with the firm, because decrees obtained in such suits by or against the managers of the business will be presumed to have been obtained by or against them in their representative capacity, and will be binding on the whole joint family—*Bissessur Lall Sahoo* v. *Luchmessur Singh* (3). It is settled law in England that dormant partners may join as co-plaintiffs in suits on contracts entered into with the firm, but that they need not do so—Lindley on Partnership, 5th Edition, Vol. I, p. 276.

It would seem that this rule would apply with greater force to the case of infant co-sharers of a Hindu joint family, who have not in fact been admitted into the trading partnership by which the family business is carried on for the mutual benefit of all the members of the family.

In the present case the evidence shows that the only original partners of the firm in whose name the note in suit was given were the plaintiff and his brother Ramanathen Chetty, and upon the death of the latter, and at the date of the note, the plaintiff was the sole surviving partner of the firm, and that as such and as the managing member of the family he continued to carry on the business of the firm in Calcutta, until it was closed.

(1) 6 C. 815. (2) (1848) Taylor, 279. (3) 6 I.A. 233.

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[356] These facts in my opinion are sufficient to establish the plaintiff's right to maintain this suit in his own name, without joining his sons as co-plaintiffs. Nor is the *gomastah* Viena Ramanathen Chetty a necessary party to this suit, as it has been shown that the defendant's dealings with him throughout were as agent of the firm, and that it was in that capacity the note in suit was given to him.

The result is that there must be judgment for the plaintiff for the amount claimed with costs of suit, including the costs of the commissions on scale 2.

Attorneys for the defendant: Messrs. *Orr, Robertson & Burton.*

Attorneys for the plaintiff: Messrs. *Wilson & Chatterjee.*

C. E. G.

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26 C. 356 = 3 C.W.N. 279.

APPELLATE CIVIL.

Before Mr. Justice Banerjee and Mr. Justice Rampini.

KASHI CHANDRA CHUCKERBUTTY (*Plaintiff*) *v.* KAILASH CHANDRA BANDOPADHYA AND OTHERS (*Defendants*).* [18th January, 1899.]

Mesne profits, Suit for—Turn of worship—Right of suit—A suit for wasilat *in respect of profits derived from a turn of worship, whether maintainable.*

A suit for *wasilat*, in respect of profits derived from a turn of worship, which are in their nature uncertain and voluntary, is not maintainable.

Ramessur Mookerjee v. *Ishan Chunder Mookerjee* (1) followed.

[**Diss.**, 17 M.L.J. 493 (494); **R.**, 13 C.L.J. 449 = 16 C.W.N. 347 (350) = 10 Ind. Cas. 41; **D.**, 27 C. 30 (33).]

THIS appeal arose out of an action for mesne profits. The allegation of the plaintiff was that he had purchased a *jama* out of the *debutter* of a goddess *Kali* in the village of Lakshmipur, as also the right to the turn of worship of the said goddess, in the name of his wife, but that the defendants dispossessed him from the said *jama* and turn of worship on the 1st Aughran 1299; that he had then to institute a suit against the defendants to recover possession [357] of the said *jama* and turn of worship, a decree was passed in his favour, and in execution of that decree he had obtained possession of the land in dispute, as well as of the turn of worship. The plaintiff thereupon brought this action for recovery of profits, (realized from the land as well as from the turn of worship), which were unjustly appropriated by the defendants, for the period he was kept out of possession by them. The defence mainly was that the suit was not maintainable, and that the claim was excessive. The Court of first instance decreed the plaintiff's suit against the defendants Nos. 1 and 3 for a certain amount, and dismissed the suit against defendant No. 2. On appeal by defendant No. 3 to the Subordinate Judge the whole suit of the plaintiff was dismissed. From this decision the plaintiff appealed to the High Court.

Babu *Surendra Chunder Sen*, for the appellant.

Babu *Tara Kishore Chowdhry* and Babu *Bidhu Bhusan Ganguli*, for the respondents.

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* Appeal from Appellate Decree No. 1427 of 1897, against the decree of Babu Jogendra Nath Roy, Subordinate Judge of Jessore, dated the 5th of May 1897, reversing the decree of Babu Purna Chandra Chowdhry, Munsif of Narail, dated the 27th of May, 1896.

(1) (1868) 10 W.R. 457.

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The judgment of the High Court (BANERJEE and RAMPINI, JJ.) was as follows :—

JUDGMENT.

This appeal arises out of a suit for *wasilat* in respect of a certain turn of worship and of certain land. The suit was brought against three persons. Their defence was, shortly, a denial of liability.

The Court of first instance decreed the suit against defendants Nos. 1 and 3 for a certain amount, and dismissed the suit as against defendant No. 2. Thereupon defendant No. 3 preferred an appeal, and, on the appeal of that defendant, the whole suit has been dismissed by the lower appellate Court, on the ground that no suit for *wasilat* could lie in respect of profits derived from a turn of worship.

In second appeal it is contended, on behalf of the plaintiff-appellant, *first*, that the lower appellate Court is wrong in holding that no suit for *wasilat*, in respect of profits derived from a turn of worship, could lie ; and, *secondly*, that the lower appellate Court is wrong in dismissing the whole suit when a part of the claim was for *wasilat* in respect of land.

[358] We are of opinion that the first contention of the appellant is untenable. It has been found, and it is practically undisputed, that the offerings to the idol, which constituted the profits of the *shebait* during his turn of worship, are in their nature uncertain and voluntary. That being so it cannot be said that the plaintiff is entitled to recover from the defendants that which they have received out of the offerings made by votaries during the time that the worship was performed by them, even if the plaintiff was the person entitled to perform the worship during that time. In so far as the offerings were intended for the idol the plaintiff can have no personal claim to them, and in so far as they were intended for the *shebait* of the idol they, being in their nature voluntary, must be taken to have been intended for the person who was then performing the worship, whether rightfully or wrongfully, as against any other person who had a better title to perform the worship during the same time.

Upon neither view can the plaintiff claim to recover the amount.

It has been argued that, if the plaintiff's right to perform the worship during his proper turn had not been interfered with by the defendant, he would have made *some* profit. But what the amount of that profit would have been is wholly uncertain, and there is no knowing whether any votaries would have paid anything if they knew that it would go to the plaintiff, and not to the defendant, who was then actually performing the duties of a *shebait*.

The view we take is in accordance with the decision of this Court in the case of *Ramessur Mookerjee* v. *Ishan Chunder Mookerjee* (1).

The second contention of the appellant is one on which he is entitled to succeed. The plaint shows that the suit was for *wasilat* in respect, not only of a turn of worship, but also of certain land; and, so far as the latter claim goes, it is not disputed that the suit is maintainable.

The learned vakil for defendant No. 3 asks us to absolve his [359] client from liability on the ground that defendant No. 3 did not interfere with the possession of the plaintiff.

Whether that is so or not is a question of fact which will have to be determined by the lower appellate Court.

The result is that the decree of the lower appellate Court must be set aside and the case sent back to that Court in order that it may

(1) 10 W. R. 457.

dispose of the appeal after determining the question, what is the amount the plaintiff is entitled to recover as mesne profits on account of his having been kept out of possession of the land referred to in the plaint, and against which of the defendants. Other questions arising in the case will also have to be dealt with by the lower appellate Court.

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The costs of this appeal will abide the result, and will be awarded in proportion to the success and failure of the parties in the lower appellate Court.

S.C.G. *Appeal allowed. Case remanded.*

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26 C. 359.

CRIMINAL REVISION.

Before Mr. Justice Prinsep and Mr. Justice Stanley.

CHANDRA MOHAN BANERJEE (*Petitioner*) v. BALFOUR (*Opposite party*).* [22nd February, 1899.]

Sanction for Prosecution—Criminal Procedure Code (*Act V of* 1898), s. 195—*Presidency Magistrate, Jurisdiction of—Penal Code* (*Act XLV of* 1860), ss. 116, 193—*Abetment —Instigating person to give false evidence.*

B, without having obtained sanction under s. 195 of the Criminal Procedure Code, charged *C* before the Chief Presidency Magistrate with instigating her to give false evidence in a certain divorce suit in which *C* was co-respondent.

Held, that the Chief Presidency Magistrate had no jurisdiction to try the case without the sanction of the Court before which the divorce proceedings **[360]** were pending, as the offence charged was alleged to have been committed in relation to those proceedings.

[D., 26 C. 786 (790).]

FOR the purpose of this report the facts are sufficiently stated in the judgment.

Sir *Griffith Evans*, Mr. *Allen*, Mr. *J. G. Woodroffe*, and Baboo *Dasarathi Sanyal*, for the petitioner.

Mr. *P. L. Roy*, for the opposite party.

The judgment of the Court (PRINSEP and STANLEY, JJ.) was as follows :—

JUDGMENT.

After a petition for a divorce had been made on the original side of this Court, Mrs. Mary Balfour complained to the Magistrate that an offence, being one under ss. 116 and 193 of the Indian Penal Code, had been committed in reference to her, inasmuch as an attempt had been made to instigate her to give false evidence in that matter on behalf of the co-respondent. An objection was at once taken that the Magistrate had no jurisdiction to take cognizance of the offence without sanction of the Court before which the proceedings in the matter of the divorce case were pending, and the Chief Presidency Magistrate has over-ruled this objection, holding that no sanction was necessary. It seems to us, having regard to the terms of sub-s. (*h*), cl. (1), s. 195 of the Code of Criminal Procedure read with cl. (3), that the sanction of the Court, before which the divorce suit is pending and in which Mrs. Mary Balfour is a witness, is absolutely necessary. The alleged offence is in relation to the proceedings in that Court. The rule will, therefore, be made absolute, and the Presidency Magistrate's Court set aside.

F.K.D. *Rule absolute.*

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* Criminal Revision No. 945 of 1898, made against the order passed by T.A. Pearson Esq., Chief Presidency Magistrate, Calcutta, dated 20th December 1898.

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[361] APPEAL FROM ORIGINAL CIVIL.

Before Sir Francis W. Maclean, K.C.I.E. Chief Justice, Mr. Justice Prinsep and Mr. Justice Ameer Ali.

TOOLSEE MONEY DASSEE AND OTHERS (*Defendants*) v. SUDEVI DASSEE AND OTHERS (*Plaintiffs*).* [17th February, 1899.]

Appeal—Order refusing to set aside award—Letters Patent, High Court, 1865, *cl.* 15—*Code of Civil Procedure* (*Act XIV of* 1882), *ss.* 2,588—*Preliminary objection to appeal—Costs.*

An order made by a Judge of the High Court in the exercise of original civil jurisdiction refusing to set aside an award is a "judgment" within the meaning of cl. 15 of the Letters Patent of the High Court; and an appeal therefore lies from such an order to the High Court in its appellate jurisdiction.

Such an appeal is not restricted by s. 588 of the Code of Civil Procedure. *Hurrish Chunder Chowdhry* v. *Kali Sunderi Debi* (1), referred to.

On an application to have an award set aside by reason of misconduct on the part of the arbitrators their action alleged was *held* not to amount to misconduct, and therefore the defendants were not entitled to have the award set aside.

An appeal was dismissed with costs notwithstanding that almost the whole time occupied in the hearing of the case on appeal was taken up by the argument on a preliminary objection that no appeal lay, which was taken by the respondents and was unsuccessful.

[**F.**, 25 M. 555 (558)=11 M.L.J. 346 (347); **R.**, 35 M. 1=8 Ind. Cas. 340=21 M.L.J. 1=8 M.L.T. 453; 14 C.L.J. 489=12 Ind. Cas. 745 (747); **D.**, 9 C.W.N. 502 (504)]

THIS suit was brought for the return of certain jewelry, and in the course of it, the questions at issue between the parties were referred to arbitrators. The order of reference, together with the record, was sent to them on the 26th May 1897. Notice was given to the parties that the first meeting before the arbitrators would be held on the 15th August 1897. The appellants (defendants in the suit) attended, and found that some of the other parties were represented by their attorneys; they therefore applied for, and obtained, a postponement of the meeting to the [362] 18th August. Several other meetings were held without any definite result. The sixth meeting was fixed for Sunday, the 21st November; and the appellants' attorney wrote to the arbitrators, protesting against the holding of meetings on Sundays or out of office hours, threatening that if the meetings were so held he would withdraw from the proceedings. The meeting, however, was adjourned for three weeks. It was subsequently postponed to the 3rd January 1898 and then to the 1st February. On the 7th January the arbitrators suddenly issued notices for the meeting to be held that evening at 6 30; this notice was sent to the appellants but not to their attorney. Objection was raised and the meeting was convened the next morning at 7-30. The defendants were not present either in person or by their attorney.

A correspondence ensued; the award was made; and the defendants applied to SALE, J., to set aside the award. He refused the application by an order made on the 22nd March 1898.

The learned Judge made his decree in the suit subsequently, namely, on the 5th May 1898.

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* Appeal from Original Civil No. 10 of 1898 from the order of Mr. Justice Sale in Suit No. 586 of 1895.

(1) 9 C. 482=10 I.A. 4.

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The defendants appealed against the order of the 22nd March 1898.

Mr. *Woodroffe* and Mr. *Garth*, for the appellants.

Mr. *Bonnerjee* and Mr. *Dunne*, for the respondents, raised a preliminary objection to the appeal. This is an interlocutory order, and is not appealable. If the defendants had waited until the decree of the 5th May, and had then appealed, they could in that appeal have questioned the propriety of this order; but they filed the present appeal in April. No appeal lies against this order; because cl. 15 of the Letters Patent of 1865 is made subject to the legislative powers of the Governor-General in Council and the Civil Procedure Code has modified it; and, to the extent that appeals are limited by s. 588, has prevented any appeal, under cl. 15 of the Letters Patent, from an interlocutory order. There is a unanimous series of decisions in the Indian Courts that cl. 15 of the Letters Patent must be taken to be modified by s. 588 of the Code—*Achaya* v. **[363]** *Ratnavelu* (1); *In re Rajagopal* (2); *Vasudeva Upadyaya* v. *Visvaraja Thirthasami* (3); *Banno Bibi* v. *Mehdi Husain* (4). Clause 44 of the Letters Patent expressly makes the powers of the High Court, thereby conferred, subject to the legislative powers of the Governor-General in Council.

The decision in the case of *Hurrish Chunder Chowdhry* v. *Kali Sunderi Debi* (5) is, no doubt, against me; but the observations of the Privy Council as to the right of appeal there must be taken as having reference only to that particular case, and not as laying down a general principle of such far-reaching consequences.

The order now questioned is not a final order, and it has been followed by a judgment: the order cannot under any circumstances be called a "judgment," but is governed by s. 591 of the Code. Such orders then as are contemplated by s. 588 are orders made before the final decree in the case, *i.e.*, are interlocutory orders. Those orders not referred to in s. 588 may be made the subject of an appeal if the decree by which they are followed is appealable. If this Court sets aside this order, the result will be that the award and the decree will stand while the order itself would be set aside. [AMEER ALI, J.— In *In the goods of Indra Chandra Singh* (6) Pigot, J., seems to take the observations of the Privy Council in *Hurrish Chunder Chowdhry's* case (5) as laying down principles of general application]. The judgment of this Court in that case may be explained by saying that there the Court held that Sale, J., had no jurisdiction to make the order, and the appeal Court, therefore, was entitled to hear an appeal from it and to set it aside; and the case came before the Court, not under the Code, but under the Probate and Administration Act. An order setting aside an award is an interlocutory order, and is not open to appeal except in an **[364]** appeal from the decree—*Mothooranath Tewaree* v. *Brindabun Tewaree* (7). In all civil matters of original jurisdiction coming before the Court, cl. 15 of the Letters Patent is governed by the Civil Procedure Code—*Navivahoo* v. *Narotamdas Candas* (8); *Justice of the Peace for Calcutta* v. *Oriental Gas Company* (9). Section 588 of the Code, taken with s. 591, deals with interlocutory orders; s. 244 deals with orders made after a final decree. An appeal lies against a decree given in accordance with an award under s. 522 of the Code; and that section has recently been held to include an invalid or illegal award—*Kali Prosanno Ghose* v. *Rajani Kant Chatterjee* (10).

(1) 9 M. 253. (2) 9 M. 447. (3) 20 M. 407. (4) 11 A. 375.
(5) 9 C. 482. (6) 23 C. 580. (7) 14 W.R. 327. (8) 7 B. 5.
(9) 8 B.L.R. 433 (453). (10) 25 C. 141.

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Mr. *Woodroffe*, for the appellants.—A Judge exercising the original civil jurisdiction of the High Court is not subordinate to the High Court; he is "the High Court." No appeal lies or can lie, under the Civil Procedure Code, from the decree or order of the High Court in the exercise of its original civil jurisdiction; the appeal is by virtue of cl. 15 of the Letters Patent. Chapter XLI of the Code deals with appeals from one Court to another and higher Court, and not with appeals from one branch of the High Court to another. Section 588 of the Code no doubt governs the High Court in all matters coming before it under the Code; but it does not touch the right of appeal under the Letters Patent. The case of *In re Rajagopal* (1) is not in point, because s. 413 of the Code makes the rejection of an application to sue in *forma pauperis* a bar to any further proceedings except on compliance with certain terms; and the matter, therefore, was regulated by the Code. The same observation applies to the decision in *Banno Bibi* v. *Mehdi Husain* (2). The case of *Navivahoo* v. *Narotamdas Candas* (3) was decided before the Privy Council's judgment was given in *Hurrish Chunder Chowdhry's* case (4) and the decision in *Vasudeva Upadyaya* **[365]** v. *Visvaraja Thirthasami* (5) is not consistent with itself. A refusal to confirm an award is a "judgment" and is appealable—*Howard* v. *Wilson* (6); and a refusal to set aside the award should likewise be deemed so. In the case cited the order came under the Letters Patent; in the case of *Ambica Dasia* v. *Nadyar Chand Pal* (7), which dissented from *Howard* v. *Wilson*, the order did not come under the Letters Patent but under the Code. The word "judgment" in the Letters Patent is purposely used so as to include decisions whether interlocutory or final; and the authorities show that anything is a "judgment" within cl. 15 of the Letters Patent which determines any right. The order we complain of did determine a right; the decree merely followed it as a matter of course.

Mr. *Bonnerjee* in reply on the objection.—The argument that appeals from the original side of the Court can only be made under the Letters Patent is not sound; because, under s. 2 of the Civil Procedure Code, the term "District Court" includes the High Court in its original civil jurisdiction. Section 540 applies to the High Court, because it is not one of the excepted sections; and therefore the High Court exercising original civil jurisdiction is in reality distinct from the High Court exercising appellate jurisdiction.

If the contention of the appellants as to cl. 15 of the Letters Patent is correct, then, if under s. 321, Sale, J., had set aside this award, there would have been an appeal; but no such appeal would be allowed in the mofussil because it would be a mere interlocutory order, so that there would be more appeals from the original side of the High Cout than from mofussil Courts.

[Their Lordships decided to hear the appeal. After a little time, the Court, without calling upon Mr. Bonnerjee, expressed itself opposed to the appellants on the merits, and called upon Counsel to argue the question of costs.]

[366] Mr. *Woodroffe*.—If the appeal had been heard as to its merits on the first day it would, as we have seen, been quickly disposed of. The respondents, however, have raised the preliminary objection, and it has

(1) 9 M. 447. (2) 11 A. 375. (3) 7 B. 5. (4) 9 C. 482=L.R. 10 I.A. 4. (5) 20 M. 407. (6) 4 C. 231. (7) 11 C. 172.

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taken about two whole days to discuss it. The objection has been overruled, and the appellants ought to have the costs of these two days—*Tarachand Mookerjee* v. *Jadoonath Mookerjee* (1).

Mr. *Bonnerjee*.—When an appeal is brought, the respondent is entitled to raise a preliminary objection as to its admissibility, and if it be not unreasonable he ought not to be made to pay all costs relating to it if the objection is disallowed.

The following judgments were delivered by the Court (MACLEAN, C. J., and PRINSEP and AMEER ALI, JJ.)

JUDGMENTS.

MACLEAN, C. J.—This is an appeal from an order of Mr. Justice Sale, dated the 22nd March 1898, refusing to set aside an award made in the suit.

The suit was for the recovery of jewellery of the value of Rs. 2,600 or thereabouts: it was by consent referred to arbitration on the 22nd February, 1897, and the award, which the present appellants seek to set aside, was made on the 9th January 1898.

It is sought to set aside the award on the ground of the misconduct of the arbitrators.

A preliminary objection, however, has been taken on behalf of the respondents (the successful plaintiffs in the suit) that no appeal lies to this Court, and that contention is based on two grounds, (1) that the right of appeal from the decision of a single Judge conferred by cl. 15 of the Letters Patent of 1865 is controlled by s. 588 of the Code of Civil Procedure, and (2) that the decision of Mr. Justice Sale is not a "judgment" within the meaning of cl. 15 of the Letters Patent.

To my mind the first of these points has been authoritatively decided against the view of the present respondents by the Judicial Committee of the Privy Council in the case of *Hurrish* [367] *Chunder Chowdhry* v. *Kali Sunderi Debi* (2). I need not travel into the facts of that case, but there their Lordships said at p. 494 of the report in the Indian Law Reports: "It only remains to observe that their Lordships do not think that s. 588 of Act X of 1877, which has the effect of restricting certain appeals, applies to such a case as this where the appeal is from one of the Judges of the Court to the Full Court." It is clear from the report that the point was elaborately argued, and the clear expression of their Lordships' opinion must be read in connection with that argument. But we are told there are reported decisions of the High Courts of India which conflict with this view of the Privy Council, and that there is virtually a current of judicial authorities in this country against the view. Great reliance is placed upon a decision of the Allahabad High Court in *Banno Bibi* v. *Mehdi Husain* (3), but the reasons there given for distinguishing that case from the one in the Privy Council are not to my mind sufficiently convincing. In a later case, *Muhammad Naimullah Khan* v. *Ishanullah Khan* (4), the same Court assigns other possible reasons for the decision of the Privy Council, but it seems a little forced to say these were the reasons of the Privy Council when their Lordships have said that s. 588 does not apply, "when the appeal is from one of the Judges of the Court to the Full Court." Then again we are referred to two cases of the Madras High Court—*Achaya* v. *Ratnavelu* (5) and *In re Rajagopal* (6). But in

(1) (1862) Marsh 79. (2) 9 C. 482 = 10 I.A. 4. (3) 11 A. 375.
(4) 14 A. 226 (230). (5) 9 M. 253. (6) 9 M. 447.

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neither of these cases, which were respectively decided in 1885 and 1886, was the case in the Privy Council cited, though previously decided in 1882, so they can scarcely carry much weight. In the case of *Vasudeva Upadyaya* v. *Visvaraja Thirthasami* (1) Mr. Justice Benson at p. 412 tells us what, in his opinion, their Lordships' language in the Privy Council amounts to, and it is this: "Section 588 no doubt has the effect of restricting appeals in the case of orders which are not decrees, but it does not apply to such a case as this before us, [368] which is an order in execution and, therefore, a 'decree.' When, therefore, such an order has been made by a single Judge an appeal lies to the Full Court." This may be what their Lordships meant, but it is not what they have said. And the learned Judge goes on to say at the same page: "It is impossible to suppose that their Lordships, in a mere observation of four lines, without any explanation or reasoning, laid down a rule of such far-reaching importance and opposed to what appears to be the plain language and intention of the Legislature."

To my mind the language of the Judicial Committee is not very aptly described as "a mere observation."

Mr. Justice Benson's opinion, however, is not shared by his learned colleague in the case, and I am not disposed to accept the view that, in advising Her Majesty, the members of the Judicial Committee of the Privy Council are so unguarded in their language—especially when the precise point has been urged before them by most experienced Counsel—as Mr. Justice Benson seems inclined to assume. I am but little disposed to whittle away decisions of the Privy Council. I prefer to accept, and, as I am bound, to follow them if really in point, and if they be regarded as requiring reconsideration to let them be reconsidered by the members of the Judicial Committee themselves. I notice that two of the members of the Judicial Committee on this occasion were retired Chief Justices of Bengal, and I may add that the majority of the Judges of this Court held that an appeal would lie, and that Garth, C.J., dissented only because he doubted whether Mr. Justice Pontifex's decision was a "judgment" within the meaning of cl. 15 of the Letters Patent.

In my opinion then the first question is concluded by the decision of the Privy Council. So also virtually is the second, for the decision proceeds upon the footing that Mr. Justice Pontifex's order was a "judgment" within the meaning of cl. 15 of the Letters Patent of 1865. But whether that be so or not, I am clearly of opinion that Mr. Justice Sale's order was a "judgment" within the meaning of that section. I concur in the definition of a "judgment" given in the case of *The Justices of the Peace of Calcutta* v. *Oriental Gas Company* (2). Mr. [369] Justice Sale's order was a decision upon the question of whether the award was to stand or to be set aside. If this be not a "judgment," I scarcely see what a judgment can well be. I therefore overrule the preliminary objection.

I will now pass to the merits. The appellants charge the arbitrators with misconduct, and upon this they base their claims to have the award set aside.

The arbitration commenced on the 15th August. Certain witnesses were examined, and cross-examined, and adjournments were from time to time made, and although there was a little skirmishing as to whether the arbitrators should sit on Sundays or out of office hours, no case of

(1) 20 M. 407.

(2) 8 B.L.R. 433 (452).

misconduct is alleged against the arbitrators up to the early part of January 1898. **1899** FEB. 17.

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But on the 3rd January 1898 the defendants' attorney received a letter from the plaintiffs' attorney, saying that the hearing of the arbitration would be postponed for four weeks on account of the absence from Calcutta of one of the arbitrators. Notwithstanding that intimation, on the 7th January the arbitrators sent a notice to the defendants that they intended to proceed with the arbitration at 6-30 that same evening. This to my mind was not reasonable conduct on their part having regard to their notice a few days before, that the meeting had been adjourned for a month, and if the arbitrators had insisted on proceeding with the arbitration that evening. I am not prepared to say that my conclusion on the case would not have been adverse to the plaintiffs. The defendants say they did not receive this notice until 5 o'clock, but be that as it may, they attended the meeting, and the hearing was postponed until 7-30 on the following morning, although, as the defendants say, they protested that this was too short an adjournment, and that they would not have time to consult their attorney. The plaintiffs say they heard nothing of any such protest. Except extending the time for making the award nothing was done at this meeting. The fact of fixing so early an hour in the morning for the meeting may appear somewhat strange to European ideas; but it must be remembered that this was an arbitration between native litigants with native arbitrators, and that the evidence shows it was to be **[370]** conducted out of office hours, and in that view a meeting at such an hour is, perhaps, nothing very extraordinary. However, on the 8th January the defendants did not appear at the meeting, and after waiting nearly two hours, the arbitrators adjourned till 8 A.M. on the 9th, notice of which was given in the forenoon of the 8th to the defendants and to their attorney. But on the 8th the defendants' attorney wrote the letters set out at pp. 9 and 10 of the Paper Book. After that at p. 9 had been written—but whether or not before it had been sent is not apparent on the evidence—the defendants' attorney received the notice of the postponement of the meeting until the 9th, and thereupon wrote the letter on p. 10 saying "the whole thing seems to be a farce; my clients will have nothing further to do with the arbitration." Now, were the defendants under these circumstances justified in withdrawing from the arbitration? I think not. The arbitrators to put at it the lowest had displayed a readiness to adjourn the case when the defendants said they were not prepared to go on; they adjourned the meeting on the 7th, and again they adjourned it on the 8th, and proceeded on the 9th only after they had been told that the defendants had withdrawn. It is their action on these occasions which is said to constitute the misconduct on their part. I do not think such action amounts to misconduct. On the contrary I think the defendants, under the circumstances, put themselves in the wrong by withdrawing from the arbitration. When they were told the meeting was adjourned until the 9th, their reasonable course would have been to have appeared before the arbitrators, and urged the necessity, if it existed, of a further and reasonable adjournment. Looking at some of the objections raised from time to time by the defendants' attorney I am not disposed to think that the defendants were over-anxious that the arbitration should proceed with too much rapidity. However, be that as it may, I agree with Mr. Justice Sale that there was no misconduct on the part of the arbitrators, and the rule must be discharged with costs.

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APPEAL FROM ORIGINAL CIVIL.

26 C. 361 = 3 C.W.N. 347.

PRINSEP, J.—This appeal is against an order of Mr. Justice Sale under s. 522 of the Code of Civil Procedure refusing to set aside an award,

[371] A preliminary objection has been taken to the hearing of this appeal on the ground, first, that it is barred by s. 588 of the Code of Civil Procedure, and next that if not so barred it is not appealable as a "judgment" within the terms of cl. 15 of the Letters Patent.

Briefly the law bearing on this subject may be thus stated:—Suits brought in the ordinary original civil jurisdiction may be tried by one Judge, whose proceedings are regulated by rules and orders made by the High Court as far as possible in accordance with the Code of Civil Procedure.

Clause 15 of Letters Patent, 1865, declares that an appeal shall lie to the High Court from the judgment, not being a sentence or order passed or made in a criminal trial of one Judge. Clause 15 therefore constitutes a Court of appeal in such cases, and it further declared that the appeal shall lie from a judgment of a single Judge.

It is contended that this clause of the Letters Patent; 1865, has been modified by the Code of Civil Procedure, 1882, and especially by s. 588 of that Code. The Supreme Legislative Council has the power to amend the Letters Patent (cl. 44), but the question is whether such power has been exercised in this respect.

Clause 15 of the Letters Patent, 1865, is like the Bengal Civil Courts Act and similar Acts constituting a Court to hear appeals in cases where the right of appeal is given by law, but cl. 15 goes further than those Acts, because it limits the cases appealable. It provides for an appeal to the High Court against the judgment of a single Judge of that Court not being a sentence or order passed or made in a criminal trial, and this applies where such judgment may have been passed by such Judge sitting as a Division Court in the exercise of civil jurisdiction, either as a Court of appeal or as a Court of original jurisdiction. But the right of appeal is against a judgment only and against a judgment of only a single Judge. I do not refer to the other part of this clause because it is irrelevant for the purposes of the case now before us. Without cl. 15 of the Letters Patent, although an appeal might lie under the Code of Civil Procedure, [372] 1882, there would be no Court constituted to hear the appeal against a judgment decree or order on the original civil jurisdiction of the High Court, for cl. 16 relates to a different matter, and it would confer no such appellate jurisdiction, and the portions of the Code of Civil Procedure, which relate to appeals to Her Majesty in Council. would give the right of appeal only in a small number of cases of a special character, either in regard to the points of issue or the value of the subject-matter of the particular suit. We have it, therefore, that if beyond cl. 15 of the Letters Patent, 1865, s. 588 of the Code of Civil Procedure gives the right of appeal against any order of the description specified therein, there is no Court of appeal constituted to hear it, if such order not being a judgment had been made by the Judge on the original side of the High Court. There would be another difficulty, which it is inconceivable that the Legislature should have contemplated. If irrespective of cl. 15 of the Letters Patent an appeal lies undes s. 588 of the Code it must be against an order passed by any Divisional Court exercising the original civil jurisdiction of the High Court. To what Court would it lie? There is no Court constituted by the Letters Patent or by any local law to hear it. Clause 16 of the Letters Patent does not apply, nor does cl. 15. Then, again, if such an order be appealable, it

would be appealable if passed by a Division Court consisting of more than one Judge. The Court might have consisted of the majority or even of all of the Judges of the High Court. I would also point out that the same difficulty would arise if an order of remand be passed by a Division Court hearing an appeal whether that appeal be from the High Court in its original jurisdiction or from a subordinate Court such as the Court of a District Judge or Subordinate Judge. These considerations lead me to conclude that it was never intended by the Legislature to alter the effect of cl. 15 of the Letters Patent by such indirect legislation. If it had been intended to do so the alteration in the law would have been expressly declared, and such difficulties as I have indicated would have been provided for. The contention of the learned counsel proceeds upon ss. 632 and 638 of the Code of 1882. Section 632 provides that "except as provided in this chapter the provisions of this **[373]** Code apply to such" that is, to all "High Courts" established by 24 and 25 Victoria, chap. 104, and s. 638 sets out the sections of the Code which are so excepted. Amongst these s. 588 does not appear, and so it is contended that an appeal lies under s. 588 against an order passed on the original civil jurisdiction of the High Court; that only such orders as are specified in s. 588 are appealable; and lastly that as the order on the case before us is not within s. 588 it is not appealable. But to complete this line of argument it would be necessary to go further and to hold that the term "judgment" in cl. 15 of the Letters Patent must be read as synonymous with "decree" as defined in the Code. There is no authority for this, and we cannot alter the meaning of "judgment" in the Letters Patent, 1865, as it has always been accepted, by inferentially making it synonymous with the definition of "decree" as given in the Code of 1882.

I have so far considered this matter as if it were *res integra*. But fortunately we have authority for our guide. In *Hurrish Chunder Chowdhry* v. *Kali Sunderi Debi* (1) their Lordships of the Privy Council held that an order made by Mr. Justice Pontifex on the original side of the High Court under s. 610 of the Code rejecting an application to execute an order of Her Majesty in Council was a "judgment;" and in dealing with that case their Lordships were pressed with the argument that the right of appeal in that case was regulated by s. 588 of the Code of Civil Procedure which had modified cl. 15 of the Letters Patent. Their Lordships of the Privy Council disposed of this in these words: "It remains only to observe that their Lordships do not think that s. 588 of Act X of 1877, which has the effect of restricting certain appeals, applies to such a case as this, where the appeal is from one of the Judges of the Court to the Full Court." I observe that Act X of 1877 is here mentioned, but as a matter of fact the order under appeal was passed in 1880, and was consequently under the Act of 1877, as modified by Act XII of 1879, and the Code of Civil Procedure in this respect is the same as the Code of **[374]** 1882, which is now in force. I understand this to mean that s. 588 does not affect any matter coming within cl. 15 of the Letters Patent, and, if I may venture to say so, the reasons which led to the expression of that opinion and which have not been given in the judgment reported may be those stated by me for arriving at the same conclusion. It is much to be regretted that the terms of s. 638 of the Code should have been so expressed as to give good ground for entertaining a doubt, but in my opinion the matter has been definitively settled by the highest authority in the case mentioned by me.

(1) 9 C. 482 = 10 I.A. 4.

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Some cases have been cited to us, in which there has been a reluctance to accept this expression of opinion regarding the operation of s. 588. An endeavour has been made to explain it as not binding to the full extent of the meaning. I find myself unable to accept this view of the law, both because the terms of this expression of opinion by their Lordships are clear and emphatic, and also because, if I may be permitted to say so, a careful examination of the law on the subject fully bears it out.

In *Bonno Bebi* v. *Mehdi Husain* (1) the case of *Hurrish Chundra Chowdhry* v. *Kali Sunderi Debi* (2) was considered, and that case was distinguished having regard to the matter then before their Lordships of the Privy Council. With every respect to the learned Judges I am unable to agree with their views of the distiuction. Whatever may have been the grounds upon which two of the Judges (White and Mitter, JJ.) in *Hurish Chunder Chowdhry's case* may have decided that matter it was considered by their Lordships of the Privy Council that they had held Mr. Justice Pontifex's order was " a 'judgment' within the meaning of cl. 15 of the Letters Patent;" and in their observations in dealing with the dissentient judgment of Garth, C.J., they show no indication of any doubt on this point. On the contrary they follow this up by adding " their Lordships do not think that s. 588 of Act X of 1877 (Code of Civil Procedure) which has the effect of restricting certain appeals applies to such a case as this where the appeal is from one of the Judges of the [375] Court to the Full Court." I observe that Edge, C. J., in this case states that " considerable difference exists between s. 588 of the present Code and s. 588 of Act X of 1877 which was the Act under consideration in the case before the Judicial Committee." I cannot find to what the learned Chief Justice refers, for after a careful comparison of these sections of the two Codes of 1877 as amended by the Act of 1879 and of 1882, I am unable to find any difference affecting this particular matter.

Two cases *Achaya* v. *Ratnavelu* (3) and *In re Rajagopal* (4) were relied upon in the case of *Banno Bibi* v. *Mehdi Husain* (1). In the first of these cases it was held that, notwithstanding cl. 15 of the Letters Patent, there was no appeal against the order of a single Judge of the High Court rejecting an application for review of judgment. The reason given for this was that cl. 15 of the Letters Patent was controlled by s. 659 of the Code, which declared that such an order shall be final. The other case is exactly in point, and it was there held that cl. 15 of the Letters Patent was controlled by s. 588 of the Code, which gave no appeal against an order rejecting an application to sue in *forma pauperis*. But the reports of these cases show that in neither of them was the judgment of their Lordships of the Privy Council cited or considered. I do not, therefore, propose to discuss them in detail. It is sufficient to state that they express a different view of the law, which I am not disposed to follow against the higher authority of the Judicial Committee of the Privy Council.

In *Muhammad Naimullah Khan* v. *Ishanullah Khan* (5) the case of *Hurrish Chunder Chowdhry* v. *Kali Sunderi Debi* is incidentally referred to, the interpretation of that expressed in the earlier case of the Allahabad Court being maintained.

The matter was also considered by the Madras High Court in *Vasudeva Upadyaya* v. *Visvaraja Thirthasami* (6), which was [376] an

(1) 11 A. 375. (2) 9 C. 482 = 10 I. A. 4. (3) 9 M. 253.
(4) 9 M. 447. (5) 14 A. 226 (230). (6) 20 M. 407.

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appeal under cl. 15 of the Letters Patent, 1865, against the order of a single Judge of the High Court dismissing an appeal against an order passed by a lower appellate Court remanding a suit. The learned Judges in that case (Benson and Subramanya Ayyar, JJ.) did not take the same view of the law regarding the effect of s. 588 of the Code of Civil Procedure on cl. 15 of the Letters Patent. The order under consideration was, I would again state it so as to express the case clearly, an order passed by a single Judge of the High Court sitting as an appellate Court on an appeal under s. 588 from the order of a lower appellate Court remanding a suit. Benson, J., held that cl. 15 of the Letters Patent had been modified by s. 588 of the Code, that is to say, of the Code of 1882; that the order in question was not appealable under s. 588 because it was an order passed by a single Judge in an appeal which had been heard under s. 588, and the concluding words of s. 588 barred a further appeal; whether such an order would be a "judgment" within the terms of cl. 15 of the Letters Patent apparently was not considered. Mr. Justice Benson referred to the case before the Privy Council, and notwithstanding the emphatic terms in which their Lordships expressed their opinion that s. 588 does not apply to a case such as that before them, in which the appeal is from one of the Judges of the High Court to the Full Court, he stated that in his opinion "these words refer only to the actual case before the Privy Council." Whatever may have been the case before their Lordships their observations clearly were directed to every case in which "the appeal is from one of the Judges of the High Court to the Full Court," which I understand to be that, notwithstanding s. 588 of the Code, cl. 15 of the Letters Patent, 1865, remains in full force and untouched, and I certainly do not agree in the paraphrase of those observations as expressed by that learned Judge in p. 412 of the report.

Mr. Justice Subramanya Ayyar, on the other hand, reluctantly yielded to the force of authority in previous cases of the Madras High Court supported by the Allahabad cases which I have mentioned; but he was not prepared to set aside the opinion of [377] their Lordships of the Privy Council as mere *dicta*. He says: "The tenor of the observations seems clearly to indicate that they were intended to be a decision on the point irrespective of the circumstances of the particular case in which the observations were made," and he left the matter to be finally settled at some future time by a Full Bench of the Madras High Court. I may here state that in another case, *Sankaran* v. *Raman Kutti* (1), the Madras High Court (Collins, C. J. and Benson, J.) held that in a similar case an appeal did not lie by reason of the concluding words of s. 588 against an order passed on appeal by a single Judge of that Court against the orders of a lower appellate Court remanding a suit. The case before the Privy Council was not referred to in the report of that case. The High Court followed previous cases on the subject, and amongst these the case of *Loki Mahto* v. *Aghoree Ajail Lall* (2). I have not referred to that case, as it was decided before the Privy Council case was decided. There are only two reported cases of this High Court in which the case of *Hurrish Chunder Chowdhry* v. *Kali Sunderi Debi* has been referred to, and in each of these cases that case was explained and distinguished in this way, that their Lordships held that where the order of a single Judge decided finally or otherwise any question at issue in the case or the rights of any of the parties to the suit it is appealable to

(1) 20 M. 152. (2) 5 C. 144.

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this Court under cl. 15 of the Letters Patent. How far s. 588 of the Code has touched cl. 15 of the Letters Patent, 1865, has never, that I am aware of, been considered until now.

I do not desire to discuss this subject any further. I entirely agree with the manner in which Mr. Justice Subramanya Ayyar had expressed himself in the words which I have quoted from the case of *Vasudeva Upadyaya* v. *Visvaraja Thirthasami* (1) and I have no doubt that we are bound to follow to the fullest extent the opinion expressed by their Lordships of the Privy Council that s. 588 of the Code does not apply to the case now before us, and that this matter has thus become settled law.

[378] I confess, however, to have had some doubt whether the order under s. 522 of the Code refusing the application to set aside the award is a "judgment" within the terms of cl. 15 of the Letters Patent, and whether the appeal before us has not been prematurely made. Section 522 declares that after such an order "the Court shall proceed to give judgment according to the award" and that "upon judgment so given a decree shall follow."

This appeal has been preferred before judgment and decree on the case, and it seems therefore to have been somewhat premature. This, however, is after all a mere matter of form. The question is whether the order is a "judgment" within cl. 15 of the Letters Patent, 1865. The order is so far final that judgment must follow on it on the terms of the award, and it so far concludes the rights of the parties in the suit. So far, therefore, as held in *Hurrish Chunder Chowdhry* v. *Kali Sunder Debi* it is a "judgment" within the meaning of s. 15 of the Letters Patent. There are other cases to the same effect to which I might refer, but this is unnecessary.

On the merits of this appeal I agree with the judgment of my Lord the Chief Justice just delivered.

AMEER ALI, J.—After the well-reasoned judgments just delivered, it only remains for me to express my entire concurrence with them.

I only wish to observe that where the Legislature intended to give finality to an order, whether made by a single Judge of a High Court established by Royal Charter or by any other Judge, it has declared so in explicit terms. The effect, therefore, of acceding to the objection taken by the learned counsel for the respondents, would be to cut down by implication the provisions of cl. 15 of the Letters Patent, which I think would be against all principle; for a right or power vested by statute can be taken away or divested only by express enactment and not by mere suggestion based upon inferences. In my opinion s. 588 of the Code of Civil Procedure applies only to orders made by subordinate Courts, which derive their powers from the Code. The Civil Procedure Code is applicable to the original [379] side of the High Court in so far as the procedure is concerned, and some of its provisions have no doubt had the effect of curtailing the right of appeal by giving finality to certain orders of a Judge exercising singly the ordinary original civil jurisdiction of the High Court. In other words, it lays down uniform procedure for all Courts of original civil jurisdiction, including the High Court on its original side. But the powers of the High Court are not derived from the Code, and consequently an order of a Judge of the High Court exercising its original civil jurisdiction, though made in accordance with the procedure laid down in

(1) 20 M. 407 (417).

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the Code, can hardly be said to be made "under the Code." Besides, s. 589 of the Code indicates to my mind that the preceding section was applicable only to the orders of subordinate Courts.

Another argument advanced on behalf of the respondent requires some attention. It was contended that it would be anomalous to give a right of appeal from every order of a Judge of the High Court exercising singly its ordinary civil jurisdiction whilst restricting that right in the case of orders made by a subordinate Court. To my mind the anomaly suggested is hypothetical. In the first place, only such orders of a Judge of this Court are appealable under cl. 15 as fall within "the category of judgments." In the second place many of the orders of subordinate Courts not appealable under s. 588 are subject to revision under s. 622 of the Code. And as this section is not applicable to the High Court, the Legislature, it seems to me, has advisedly left untouched the provisions of cl. 15. Apart, therefore, from the express ruling in the case of *Hurrish Chunder Chowdhry* v. *Kali Sunderi Debi* (1), I am of opinion that the objection is untenable. The Madras and Allahabad High Courts have tried to restrict the decision of their Lordships on the point in question to what is called "the facts" of the particular case. I am not prepared to adopt either the reasoning or follow the views expressed by the learned Judges. The scope of their Lordships' decision must be understood by the light of the contention raised before them.

[380] As regards the contention that the order appealed against is not a "judgment" within the meaning of cl. 15, it must be remembered that it was made under s. 521 of the Code, which provides the different grounds on which (and no other) an award shall be set aside, one being the corruption or misconduct of the arbitrators or umpire. And it decides the merits of the question between the parties by determining the right of the appellant to have the award set aside on the ground of the misconduct of the arbitrators. Section 522 does not affect the character of the decision under s. 521, for the judgment under s. 522 follows as a matter of course when the right of the party questioning the award is once determined or adjudicated. The order, therefore, falls strictly within the definition of the word "judgment" in cl. 15, given by Couch, C. J., in the case of *Justices of the Peace for Calcutta* v. *The Oriental Gas Company* (2).

I agree, therefore, in holding that the present appeal is maintainable.

As regards the merits of the case it seems to me difficult to say that the view taken by Mr. Justice Sale is incorrect. It is possible that the arbitrators acted somewhat unreasonably in cancelling the date fixed on the 3rd of January and taking up the case on the evening of the 7th. That evening, however, nothing was done in consequence of the protest of the appellants, and the arbitrators appointed next morning to proceed with the arbitration on the 8th. Neither the appellants nor their attorney appeared, and the case was again adjourned. On that same date Mr. Rutter, attorney for the appellant, wrote to the arbitrators the letter to which attention has already been called. No step was taken to obtain an adjournment from the arbitrators or to represent to them in a proper spirit that the hasty manner in which they were proceeding prejudiced the appellants, and that they (the appellants) required more time to get themselves ready. Had the arbitrators refused to accede to such an application, matters might have stood on a different footing, but in the

(1) 9 C. 482 = 10 I.A. 4. (2) 8 B.L.R. 433.

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face of Mr. Rutter's letter it is difficult to say that the learned Judge in the Court [381] below is wrong in holding that the appellants had failed to make out a sufficient case for setting aside the award. I therefore agree in dismissing appeal No. 11 of 1898.

Appeal dismissed.

Attorney for the appellants: Mr. *Rutter.*
Attorney for the respondents: Mr. *S. D. Bonnerjee.*

H. W.

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26 C. 381=3 C.W.N. 468.

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Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, Mr. Justice Prinsep, and Mr. Justice Ameer Ali.

BROHMO DUTT (*Defendant*) v. DHARMO DAS GHOSE (*Plaintiff*).*
[8th, 9th and 12th December, 1898.]

Estoppel—Minor—Mortgage by minor—Attorney for both mortgagor and mortgagee—Notice of minority—Evidence Act (I of 1872), s. 115—contract Act (IX of 1872), ss. 11, 64—Avoiding contract—Compensation—Specific Relief Act (I of 1877) ss. 38, 41.

Section 115 of the Evidence Act has no application to contracts by infants; but the term " person " in that section applies only to a person of full age and competent to enter into contracts.

The words "person" and " party " in s. 64 of the Contract Act are interchangeable, and mean such a person as is referred to in s. 11 of that Act, *i.e.*, a person competent to contract.

A mortgagor employing an attorney, who also acts for the mortgagee in the mortgage transaction, must be taken to have notice of all facts brought to the knowledge of the attorney; and, therefore, where the Court rescinded the contract of mortgage on the ground of the mortgagor's infancy, and found that the attorney had notice of the infancy, or was put upon enquiry as to it. *Held* (affirming the decision of JENKINS, J.) that the mortgagor was not entitled to compensation under the provisions of ss. 38 and 41 of the Specific Relief Act.

Ganesh Lala v. *Bapu* (1) dissented from. *Mills* v. *Fox* (2) distinguished.

[**Affir.**, 30 C. 539=5 Bom.L.R. 421=7 C.W.N. 441=30 I.A. 114 (P.C.)=8 Sar. P.C.J. 374; **R.**, 5 A.L.J. 674=A.W.N. (1908) 267; 13 C.L.J. 228 (232)=15 C.W.N. 239 =9 Ind. Cas. 110; 16 C.L.J. 185 (190)=17 C.W.N. 10 (13)=16 Ind. Cas. 825 (828); 9 Ind. Cas. 124=4 S.L.R. 250 (253).]

THE facts of this case are fully stated in the judgment of JENKINS, J., which is reported in I. L. R., 25 Calc., 616. His decision was in favour of the plaintiff.

[382] The defendant appealed.

Mr. *J. T. Woodroffe* (with him Mr. *Garth*, Mr. *A. Chowdhry*, and Mr. *J. G. Woodroffe*) for the appellant.—Even if the plaintiff was not actually of age, he was, even on the finding of the lower Court, within two months of his majority. It was proved that the plaintiff had instituted legal proceedings, in his own name as a person *sui juris*, and on the very day that he executed the mortgage deed in favour of the defendant, he made a declaration, before a notary, that he was of age. He is, therefore, though an infant, estopped from asserting the contrary,—*Ganesh Lala* v. *Bapu* (1). We submit that that decision is good law although Jenkins, J.,

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* Appeal No. 7 of 1898 from the decree of Mr. Justice Jenkins in original civil suit No. 630 of 1895.

(1) 21 B. 198. (2) (1888) L. R. 37 Ch. D. 153.

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has held that it is not, and is of opinion that an infant, though not excepted by s. 115 of the Evidence Act, does not impliedly come within it.

Section 229 of the Contract Act, as to notice, does not apply to a case like the present where the agent is the agent of both parties: the language of the section is limited to the case of third parties. Either the attorney had notice of the plaintiff's minority or he had not. If he had not, the defendant is entitled to the return of the money he lent: if he had, he was conspiring with the plaintiff to defraud the defendant. And where an attorney acts fraudulently, notice is not necessarily to be imputed to the client— *Cave* v. *Cave* (1), because the fact raises a presumption against the communication being made to the client; *Espin* v. *Pemberton* (2). Fraud is not an essential ingredient of estoppel—*Sarat Chunder Dey* v. *Gopal Chunder Laha* (3). The result of acceding to this argument would be not to take away the protection the law gives to an infant but would merely be to prevent him from committing a fraud, and depriving the person who had dealt with him in good faith of the benefit of the transaction. The Privy Council has laid it down that an infant may be of such an age as either to consent or to bind himself by his conduct. And it is submitted that even if he cannot contract he can make a representation binding on himself—*Mills* v. [383] *Fox* (4). In *Raj Coomary Dassee* v. *Preo Madhub Nundy* (5) Jenkins, J., held that a contract made by an infant was not void, but only voidable.

Under s. 64 of the Contract Act, the defendant is entitled to a refund of the money advanced. The word "person" in that section must not be limited to mean a person of full age; such a construction would unduly narrow the scope of the section, and is not justifiable. [Mr. *Bonnerjee*—Section 64 evidently refers to a contract voidable under s. 19.] It does not follow that s. 64 refers only to cases falling within s. 19; because s. 19 is not exhaustive. But even if the defendant should not succeed under s. 64 of the Contract Act, then, if this mortgage deed is cancelled, he would be entitled to a *restitutio in integrum* under ss. 38 and 41 of the Specific Relief Act.

Mr. *Garth*, on the same side.—The discretion vested in the Court should in the present case be exercised on behalf of the defendant. The case of *Saral Chand Mitter* v. *Mohun Bibi* (6) is distinguishable; for there the lender admittedly knew that the borrower was a minor. All that the defendant asks is that the Court will not give the plaintiff the equity he asks, without doing equity to the defendant. It should not be forgotten that it is the plaintiff who invokes the equity of the Court; and if he seeks equity he must do equity.

As to imputing any knowledge to the defendant about the plaintiff's age,—it is clear that not even the attorney had or could have any such knowledge; nobody could have, until the case was decided in Court after the hearing of all the evidence; and the Court, in order to come to any conclusion, had to have before it the evidence on oath of all persons able to assist it in the matter.

Mr. *Bonnerjee* (with him Mr. *Chuckerbutty*), for the respondent.—Section 64 of the Contract Act contemplates contracts voidable under s. 19, and does not apply to contracts voidable under other circumstances than those of s. 19. Section 11 shows what persons are incapable of entering into a [384] contract, and, among others, persons not of age according to

(1) (1880) L. R. 15 Ch. D. 639 (643).
(2) (1859) 3 De G. & J. 547.
(3) 20 C. 296.
(4) (1888) L.R. 37 Ch. D. 153.
(5) 1 C. W. N. 453.
(6) 25 C. 371.

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the law to which they are subject. Apart from that argument, the illustrations to s. 65 show that contracts with minors are not contemplated.

Section 38 of the Specific Relief Act has no application to the present case. The suit was for cancellation of the mortgage deed; s. 39 (if any) was the only one applicable. The appellant has shown no case upon which he is entitled to say, in the words of s. 41, that "justice requires' that compensation should be given him.

Mills v. *Fox* (1) is no authority in support of the defendant's case; all that it shows is that the representation by the settlor, in the course of negotiations under the Infants' Settlement Act, 1855, that she was entitled to deal with her property, should be made good in equity. And *Buckmaster* v. *Buckmaster* (2) [taken to the House of Lords under the name of *Seaton* v. *Seaton* (3)] shows that that Act has removed the disability of infancy only as regards settlements made by minors in contemplation of marriage and with the sanction of the Court of Chancery; and the judgment of Sterling, J., must be taken to have reference only to that Act.

Mr. *Woodroffe*, in reply.

The following judgments were delivered by the Court (MACLEAN, C. J., and PRINSEP and AMEER ALI, JJ.).

JUDGMENTS.

MACLEAN, C. J.—This is an appeal from the decision of Mr. Justice Jenkins, in which he held that a certain alleged mortgage deed executed by the plaintiff on the 20th of July 1895, was void and inoperative, and ought to be cancelled.

The circumstances of the case are these: The suit is brought by a minor, suing by his mother as his next friend, to set aside a mortgage which the plaintiff had undoubtedly executed. I will take it for the purposes of this judgment that the contract was not a void one, but a voidable contract.

[385] The defence was that, even if the plaintiff were a minor, he fraudulently represented that he was of age and that fraudulent representation was acted upon, and that consequently, by a well recognised principle of equity, the plaintiff was not entitled to succeed.

The first point for consideration is, whether or not the plaintiff, on the 20th of July 1895, was a minor or of full age. Upon that part of the case, we have heard but little argument from the appellant's counsel. The learned Judge in the Court below has stated that he had no hesitation in holding that the plaintiff was not of the age of twenty-one years, on the 20th of July 1895; and substantially that issue has not been contested before us, although, during the course of the argument, it was rather feebly suggested that Mr. Justice Jenkins, in allowing the mother to refresh her memory from a certain document which was shown to her when giving evidence, had admitted evidence which was not admissible. That point, however, is not raised as one of the grounds of appeal, and under these circumstances we declined to allow the matter to be gone into. Upon the first issue then, I see no ground whatever to dissent from the view expressed by the Judge in the Court below, that on the 20th July 1895 the present plaintiff was a minor.

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(1) (1889) L. R. 37 Ch. D. 153. (2) (1887) L. R. 35 Ch. D. 21.
(3) (1888) L. R. 13 App. Cas. 61.

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The next question is, did the plaintiff fraudulently represent to the defendant that he was of age? This representation is alleged to have been made in a declaration, which he swore, and which is set out at p. 132 of the Paper Book. It is a long document, but the pith of it lies in the last paragraph, in which the plaintiff says or is made to say that he came of age on the 17th of June then last past, that would be the 17th of June 1895. This is the alleged fraudulent representation.

Now, let us consider the circumstances under which that document was obtained. One Kedar Nath Mitter, an attorney of this Court, was acting as solicitor both for the present appellant (the intending mortgagee) and for the plaintiff, the intending mortgagor. It appears that on the 15th of July this attorney received a letter from the solicitor of the mother [386] and guardian of the infant, (she having been appointed guardian by an order of Court) telling him in the clearest terms that the plaintiff was not of age. There was a dispute upon the evidence as to whether or not Kedar Nath Mitter ever received that letter. I do not entertain the slightest doubt that he did receive it, and, notwithstanding his denial, I am satisfied that the letter is the letter which is spoken of as a "thundering letter" by his own witness, whose evidence will be found at p. 100 of the Paper Book. In consequence of that letter what does Kedar Nath Mitter do? Although he is told in the most explicit terms by the attorney of the mother that the plaintiff is an infant, under the age of 21 years, and that any one lending money to him would do so at his own risk and peril, he thinks fit to proceed, and obtains a declaration on the 19th July from one Nanda Lal Ghose, and from another person, who is described as the family astrologer, and both these declarants say that the plaintiff was of age. But Kedar Nath Mitter does not rest there. Although he was acting as the solicitor of the plaintiff, and it was his clear duty, as such solicitor, to protect him, he thinks it right to obtain the declaration in question from him. That declaration is obviously prepared and drawn up by Kedar Nath Mitter himself. Its language is not the language of the plaintiff, it is the language of Kedar Nath Mitter, and to my mind it was a most reprehensible act on the part of Kedar Nath Mitter to have prepared, and allowed his client to have sworn, this declaration, when he had received the clearest notice from the mother that her son, as has proved to be the case, was a minor. The declaration was not prepared or sworn until after the mortgage had been prepared, and when it was ready for execution; and when according to the defendant's own story, negotiations had been going on regarding it, since the previous May. It was prepared and sworn, in fact, at the very last moment. These are the circumstances under which this declaration was taken.

Now taking that declaration to contain a fraudulent representation as to the plaintiff's age, was this attorney misled or defrauded by it. He had received the clearest notice, by the letter of the 15th of July, that the plaintiff was not then of [387] age, he pays no heed to that notice, he obtains this declaration under the circumstances. I have mentioned, and it is to my mind almost absurd to ask us to believe that he was deceived by any statement contained in it. I entirely agree with the conclusion arrived at by Mr. Justice Jenkins that Kedar Nath Mitter was not misled by it.

But then it is said that, although Kedar Nath Mitter may not have been misled by it, there is nothing to show that the defendant himself, who was advancing the money, was not misled by it. That is an argument to which I am quite unable to accede. The defendant thought fit to employ

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this attorney in the matter, and the knowledge acquired by the attorney in a case such as this must be taken to be the knowledge of the defendant himself, and the attorney must be taken in an ordinary mortgage transaction such as the present, to have communicated to his client the facts which were communicated to him. At any rate as between the plaintiff and defendant it does not lie in the defendant's mouth to say that he was not bound by the knowledge which his agent, whom he employed in this transaction, had acquired.

Then it is urged that Kedar Nath Mitter practised a fraud, not upon the infant plaintiff, but upon the defendant, and we are asked upon that footing to adopt the view laid down by Lord Chelmsford in the case of *Espin* v. *Pemberton* (1), where he says: "I would rather say that the commission of the fraud broke off the relation of principal and agent, or was beyond the scope of the authority, and, therefore, it prevented the possibility of imputing the knowledge of the agent to his principal. I think that Pemberton was not the solicitor of Browne in the assignment, as there is not only no proof of consent that he should act in that capacity, but something approaching to proof of the contrary."

We are invited upon that principle to hold that any knowledge acquired by Kedar Nath Mitter could not be fairly imputable as knowledge acquired by the defendant himself. This is a perfectly new case; no such case was ever suggested **[388]** in the Court below, and there is no evidence to support such a case; on the contrary the evidence shows that Kedar Nath Mitter, so far from practising any fraud upon the defendant, took this declaration from the plaintiff, either with the object of holding it *in terrorem* over him, when he attained his majority, as a lever, possibly, for a threat of criminal proceedings, or, alternatively as a basis for his present contention that the plaintiff, even though a minor, could not take advantage of his own fraud. It would appear, therefore, that Kedar Nath Mitter obtained the declaration, not with the view of defrauding the defendant, but of protecting the defendant's interest.

Then it is contended that under s. 115 of the Evidence Act, the plaintiff, though a minor at the time, is estopped from saying that he did not make the representation in question. In my opinion, this section has no application to the case of a minor. A minor cannot be estopped by a deed or by the recitals in a deed, and if he cannot be so estopped, it seems incongruous to say that he can be estopped by a parol declaration, for this is the contention. We must read the language of the Legislature if we can, so as to make it harmonize, and not conflict, with the general law, though remembering at the same time that the office of the Legislature by its legislative Acts is to define, and even alter, the law. The term "person" in s. 115 is amply satisfied by holding it to apply to one who is of full age, and competent to enter into a contract, and I cannot bring myself to think that it could have been the intention of the Legislature, by such a general expression, to institute such a grave change in the law of estoppel in relation to minors.

Our attention has been directed to a case decided by the High Court at Bombay, which holds that s. 115 of the Evidence Act is applicable to the case of a minor. Speaking with every respect, I am unable to assent to that view, and I may point out that the cases upon which the learned Judges in that Court rely as substantiating their proposition when carefully examined appear to me not to warrant the conclusion arrived at. This

(1) (1859) De G. & J. 547.

has been pointed out by Mr. Justice Jenkins, and concurring as I do in his criticism I need not refer to what he [389] has said. The case of *Mills* v. *Fox* (1) is quite distinguishable. That was a case under the Infants' Settlement Act, which for the purposes of the settlement treats the infant *pro tanto*, as *sui juris*, and I am satisfied that Mr. Justice Sterling in that case did not intend to lay down any such proposition in relation to estoppel against a minor, as that for which the present appellant now contends.

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Now I pass on to the argument raised in relation to s. 64 of the Contract Act. Section 64 again speaks of a "person" and the "party," and I think that the terms "person" and "party" must be regarded as interchangeable terms.

The observations I have made as to the meaning of the term "person" in s. 115 of the Evidence Act apply with even greater force to that expression as used in s. 64 of the Contract Act.

In my opinion the term "person" in s. 64 means such a person as is referred to in s. 11, that is to say, a person competent to contract who is of the age of majority according to the law to which he is subject, and it would be an extraordinary result to hold that this section applies to the case of a minor. Moreover, as was pointed out by Mr. Bonnerjee, although it is unnecessary for us to decide the point, it is certainly open to argument that, when s. 64 of the Contract Act speaks of "voidable" contracts, it refers to such contracts as are spoken of as voidable in s. 19 of the same Act. But I express no final opinion on this point. If we were to accede to the appellant's argument as to the application of s. 64, the protection, which the law has so carefully thrown around minors in relation to matters of this nature, would be virtually destroyed, or I might almost say shifted to protect the very parties who pray upon the weakness and folly of the young.

Then, we are asked to exercise the discretionary powers vested in us under ss. 28 and 41 of the Specific Relief Act. That is a matter for the discretion of the Court; the learned Judge in the Court below has exercised his discretion adversely to the [390] appellant, and I see no reason which would justify us in differing from that conclusion. On the contrary I do not think that in a case of this class where a man, who has been told that the person with whom he is dealing is a minor, still chooses to lend him money, "justice requires" that it should be returned to him.

The last point was that the minor when he had attained majority ratified the bargain, but there really is no evidence to support this view, and I agree with Mr. Justice Jenkins upon the point. I have now dealt with the many points which have been urged for the appellant; in my opinion they all fail, and the appeal must be dismissed with costs.

PRINSEP, J.—I agree in dismissing the appeal with costs for the reasons just given by my Lord, the Chief Justice.

AMEER ALI, J.—As the questions raised in this case are of some importance, I desire to add a few observations. It was urged in the first place that assuming the letter of the 15th of July 1895 was received by Kedar Nath Mitter, it did not amount to a notice such as would compel him to make any enquiry with reference to the statement contained therein. It was further urged that notice to Kedar Nath would

(1) (1888) L.R. 37 Ch. D. 153.

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not affect the defendant in the case; and that, as a matter of fact, Kedar Nath acted fraudulently towards Brahmo Dutt, the defendant.

In considering these questions it is necessary to bear in mind one of the salient facts of the case. It has been abundantly proved, amongst other things, that the defendant is a money-lender, who, at the time of the transaction under enquiry, was not in Calcutta, and that all his business here was managed by his *monib gomasta* Dudraj. This man admits in his deposition that the defendant's entire business was in his charge, and that throughout the transaction Kedar Nath acted on behalf of his master. He admits further that he had known Kedar Nath for about twelve years, and that during that period a considerable amount of business had been done for him by the latter. The evidence of Dudraj clearly shows that he was on intimate terms with Kedar Nath Mitter. Dudraj states that when the question of the plaintiff's minority was broached before him, he told Kedar "to remove all doubts about the man's infancy," whilst Kedar says [391] that "he obtained the declaration of the plaintiff concerning his age and the exhibits ten and eleven for the greater security of the interest of my client" meaning the defendant. Throughout the evidence of Kedar Nath or Dudraj there is not the faintest ground for the suggestion that the former was acting fraudulently towards the defendant or his *gomasta*. Not only is there no ground in support of that suggestion, but the evidence given in the case directly contradicts it.

As regards the contention that the letter of the 15th of July 1895 did not amount to a notice, according to my apprehension of the subject, any information which puts a person upon enquiry is a notice. Apart from what is admitted by Dudraj and Kedar Nath Mitter, namely, that the plaintiff himself stated to the latter, that there was a question about his majority, I entertain no doubt whatever, upon the evidence, that Kedar Nath did, on the 15th of July, receive the letter which was addressed to him by Babu Bhupendra Nath Bose on behalf of the mother and constituted guardian of the infant. I do not attach the smallest credence to Kedar Nath Mitter's denial of the fact; and, if he did receive that letter, it undoubtedly did put him upon enquiry. The information conveyed to him in that letter was as clear and explicit as it could well be. And what did Kedar Nath, who was the defendant's attorney, do upon receipt of that letter? If he had been acting as he ought to have done, he would have told the plaintiff that, if he had attained his majority he should go and get his guardian discharged. Instead of doing that, he goes and induces the plaintiff to make a declaration of the character already described. Instead of going to the mother or the mother's brother for further information on the subject of the plaintiff's minority he obtains some affidavits from two persons, one of whom cannot be regarded as otherwise than his creature. Nanda Lall Ghose is an attorney's clerk, who is or was in the habit of bringing work to Kedar Nath, as he says. We all know what that means. This Nanda Lall Ghose is said to be an uncle of the plaintiff, but it is in evidence that he was litigating with the plaintiff's mother, that he has lost all his property, and for a considerable number of years has held no communication with the plaintiff's family. It was upon these declarations that Kedar [392] Nath proceeded, as he says, to get this money advanced to the plaintiff. There can, therefore, be no doubt that, so far as Kedar Nath was concerned, he was not misled by any statement made by the plaintiff regarding his age. The plaintiff himself stated to Kedar that there was a doubt about his age, and that his mother was questioning his majority. The mother's attorney wrote to Kedar Nath on the subject, so

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that when he advanced the money to the plaintiff he advanced it with his eyes open.

The contention that notice to the attorney is not notice to the defendant is, I must say, wholly unsupported by authority. There is a presumption that the solicitor or attorney does his duty. It was Kedar Nath's duty to convey to the defendants the information which was given to him in that letter of the 15th of July, and if he failed to do so, the defendant must take the consequences.

In *Boursot* v. *Savage* (1) the same question that has been attempted to be raised in the case before us was presented for decision. In that case one Holmer, a solicitor, was one of the trustees under a certain indenture of trust. By an indenture in which he forged the names of his co-trustees, Holmer assigned to the defendant Savage certain lease-hold hereditaments covered by the trust. Upon the discovery of the fraud the beneficiary sued for the cancellation of the indenture of assignment. At the trial it was proved that Savage had no knowledge of the forgery or fraud committed by Holmer; but it was not disputed that he had acted in the transaction as the defendant's solicitor. On the question of notice to Savage in respect of the trust, it was contended by his Counsel that Holmer had acted as solicitor for both parties, and that when the fraud commenced the connection of solicitor and client was broken off. Dealing with this contention Kindersley, V. C., at pages 141 and 142 of the report, expressed himself as follows: "Supposing, however, that actual knowledge of the existence of a trust cannot be imputed to the defendant Savage, still I think he is affected by constructive notice. He employed Holmer as his solicitor in the transaction of the purchase; and, according to the doctrine of Equity, a purchaser [393] has constructive notice of that which his solicitor, in the transaction of the purchase, knows with respect to the existence of the rights which other persons have in the property." He then goes on to say: "It is a moot question upon what principle this doctrine rests. I confess my own impression is that the principle on which the doctrine rests is this: that my solicitor is *alter ego*; he is myself; I stand in precisely the same position as he does in the transaction, and therefore his knowledge is my knowledge; and it would be a monstrous injustice that I should have the advantage of what he knows without the disadvantage. But, whatever be the principle upon which the doctrine rests, the doctrine itself is unquestionable. It is insisted, however, that the doctrine cannot apply to this case because Holmer was committing a fraud, and the client is not to be affected with constructive notice of a fraud, committed by his solicitor. But if the client would be affected with constructive notice of a trust, the existence of which is known to his solicitor, in the case where there is no fraud, the fact that the solicitor, is committing a fraud in relation to that trust cannot afford any reason why the client should not be affected with constructive notice of the existence of the trust. It is the existence of the trust, and not the fraud, of which he is held to have constructive notice, and the constructive notice, of the existence of the trust must be imputed to him, whether there is a fraud relating to it or not."

I am not aware that that case has been overruled or dissented from in any subsequent case. On the contrary in the case of *Bradley* v. *Riches* (2), L. J. Fry gave expression to the same view, in other words that the knowledge of the solicitor was the imputed knowledge of the client.

(1) (1866) L. R. 2 Eq. 134. (2) (1878) L.R. 9 Ch. D. 189.

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But I go further and hold upon the evidence that the present case does not rest upon constructive notice. For Dudraj admits that a day or two before the execution of the deed he was informed that there was a question as to the plaintiff's age, and I regard that as sufficient information to put him upon enquiry. If the [394] enquiry is not sufficient, if it turns out that he did not take proper steps to satisfy himself, and if, afterwards, it is established by judicial investigation that the fact of which he purported to be satisfied was not the true fact, he must take the consequences.

Then it was argued that the plaintiff was estopped under s. 115 of the Evidence Act by his representation in respect of his age. To hold that an infant may be estopped in regard to contracts by conduct or misrepresentation would be practically to sweep away all the limitations the law has imposed on the capacity to contract; and a person labouring under a disability would be enabled to enlarge by his own act his legal capacity to contract. *In the Liverpool Adelphi Loan Association* v. *Fairhurst* (1) it was held that a person under a disability to contract was not liable upon the contract, nor for a wrong arising out of or directly connected with the contract, and which is the means of effecting it and parcel of the same transaction. The same principle was followed in *Bartlett* v. *Welles* (2).

It follows, therefore, that when the present law declares that an infant shall not be liable upon a contract, or in respect of a fraud in connection with a contract, he cannot be made liable upon the same contract by means of an estoppel under s. 115. I, therefore, agree that there is no estoppel whatsoever in this case founded upon any representation or alleged representation on the part of the plaintiff.

As regards s. 64 of the Contract Act I agree that the contracts there referred to are contracts by persons who have the capacity to contract or who are not labouring under any disability from contracting. As at present advised I agree with the decision of this Court holding that the contract of an infant is voidable at his option, but that must be understood as meaning that it is voidable to his advantage and not to his disadvantage. No reason has been shown in this case for the exercise of the equitable jurisdiction of this Court. Undoubtedly a Court of Equity has the power, if the minor has derived any benefit by [395] means of a fraudulent representation—to order compensation, to use a common maxim—to compel a person seeking equity to do equity. In the present case I see absolutely no foundation whatever for the defendant's invoking the equitable jurisdiction of the Court. I agree, therefore, in dismissing this appeal.

Appeal dismissed.

Attorneys for the appellant: Messrs. *Manuel & Augurwallah.*
Attorney for the respondent: Babu *B. N. Bose.*

(1) (1854) 9 Exch. 422. (2) (1862) 1 B. & S. 836.

26 C. 395 (P.C)=7 Sar. P.C.J. 449.

PRIVY COUNCIL.

PRESENT:

Lords Hobhouse, Macnaghten, and Morris, and Sir R. Couch.

[*On appeal from the Court of the Judicial Commissioner of Oudh.*]

1898 Nov. 11.

PRIVY COUNCIL.

26 C. 395 (P.C.)=7 Sar. P.C.J. 449.

THE LAND MORTGAGE BANK OF INDIA (*Defendants*) v. ABDUL KASIM KHAN AND OTHERS (*Plaintiffs*). [11th November, 1898.]

Mortgage—Construction of Mortgage—Operative words in a Mortgage deed—General language.

A mortgage deed having specifically charged the property originally offered as security, extended the operation of the mortgage by general language to include all interests in the mehals, villages, and lands, comprised in the sanad of a talukhdari estate. It was now questioned whether one of the villages comprised in the sanad was part of the mortgaged property. The operative words, uncontrolled by anything in any recital, declared all the above subject to the mortgage. The deed was, accordingly, *held* to include the village in question, effect being given to the operative words in their ordinary meaning.

APPEAL from a decree (25th July 1889) of the Judicial Commissioner of Oudh, reversing a decree (31st March 1888) of the District Judge of Faizabad.

This suit was brought on the 30th May 1887 by the representatives of Umres Singh, a talukhdar, deceased in 1880. They claimed the right of possession against the appellant, the Land Mortgage Bank, of the village Bazidpur in the Faizabad District, alleging that the Bank had no title thereto, as the result of a judicial sale in execution of a decree obtained by the Bank against Umres Singh upon a mortgage, dated the 23rd August 1871. The plaintiffs, respondents, alleged that Bazidpur [396] was not entered in the schedule of the mortgaged property that accompanied the mortgage deed, and that this village had been wrongly attached and sold on the 3rd March 1877, in execution of a decree obtained by them in 1875 for Rs. 1,22,131 against Umres Singh. The defence was that an entire taluk named Meopur Baragaon, comprising the village Bazidpur, in question, was included in the mortgage of 1871; not only the mauzas specified in the schedule to the mortgage having been mortgaged but also all other mauzas appertaining to that taluk, which included Bazidpur. Also that the sale, after contest on application to have it set aside, had been confirmed by the Deputy Commissioner of the Faizabad District on the 3rd April, 1877. On the 17th September, 1878, the appellants sold the village to the other defendants in the present suit.

In evidence was the mortgage deed of the 23rd August 1871, executed by Umres Singh in favour of the appellants, by which he conveyed, subject to the mortgage, all the estate known by the above name, the particulars being given in a schedule annexed to the deed. It was added in the deed that the estate was granted to Umres Singh by sanad under the hand of the Chief Commissioner of Oudh; and the deed conveyed, also, all other, if any, the mauzas, mehals, villages, lands, and shares of and interests in the same, comprised in the said sanad. Also was in evidence the decree of 1st June 1875 in favour of the Bank for the above sum, and declaring their lien on Meopur Baragaon till payment.

The District Judge decided that the deed of the 23rd August, 1871 mortgaged all the villages in the taluk and not merely those specified in the schedule. But he held the suit to be barred by limitation.

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On the plaintiffs' appeal, the Judicial Commissioner was of opinion that there was no bar by lapse of time. But his judgment was that Bazidpur was not intentionally included in the mortgaged property, and was therefore excluded by his decree.

On this appeal,—

Mr. *J. D. Mayne*, for the appellants, argued that Bazidpur was included in the mortgage by the general language of the deed of 1871.

[397] Mr. *A. Cohen*, Q. C., and Mr. *C. W. Arathoon*, for the respondents argued that as the earlier language of the deed differed from the later, and as a reference to what had been mentioned in the preliminary arrangements did not make it appear that the parties to the mortgage intended to effect the inclusion of Bazidpur, their intention should be taken to be against the inclusion of the village. The principle of construction in the case of general language following and exceeding more detailed description was that the object and intention of the parties must be regarded.

There was here a resemblance to the cases of discrepancy between recital and conveyance; and in the latter cases where the recital clearly indicated what was intended to be conveyed, and operative words of a general character went beyond that recital, the operative words were construed with a restriction. They cited *Jenner* v. *Jenner* (1), *Rooke* v. *Lord Kensington* (2).

Mr. *J. D. Mayne*, was not heard in reply.

JUDGMENT.

Their Lordships' judgment was then given by

LORD MACNAGHTEN.—The learned Counsel in this case have very properly agreed that if their Lordships should be of opinion that the village of Bazidpur is included in the mortgage, the appeal must succeed. It appears to their Lordships perfectly plain that the village is included. After conveying by specific description the property originally offered in security, the mortgage deed throws in as an additional subject of conveyance "all other (if any the mauzas, mehals, villages, lands, and shares of and interest in mauzas, mehals, villages, and lands comprised in the said sanad." It is admitted that this village was comprised in the sanad; it follows therefore that it passed by words, which include everything that the sanad comprised. There is no contradictory recital. After noticing the original application for the loan, the narrative winds up by saying that the Bank have agreed to make the advance on having repayment of the sum advanced and interest thereon secured "in manner hereinafter appearing." That recital points to the operative part of the deed as complete in itself, without [398] anything in the preamble to control or confuse the natural and ordinary meaning of the language used. There is surely nothing so very strange in finding that a mortgage deed as finally settled contains something more than the security originally proposed. The reference to the sanad in the original proposal seems to suggest the course which the negotiations must have taken. Their Lordships will therefore humbly advise Her Majesty that the appeal ought to be allowed, and the suit dismissed with costs in the Courts below. The respondents must pay the costs of the appeal.

Appeal allowed.

Solicitors for the appellants : Messrs. *Ashurst, Morris, Crisp and Co.*

Solicitors for the respondents : Messrs *T. L. Wilson and Co.*

C. B.

(1) (1866) L.R. 1 Eq. 361.

(2) (1856) 2 K. & J. 753.

26 C. 398 (P.C.)=26 I.A. 1=3 C.W.N. 145.

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PRIVY COUNCIL.

26 C. 398 (P.C.)= 26 I.A. 1=3 C.W.N. 145.

PRIVY COUNCIL.

PRESENT :

Lords Ashbourne, Hobhouse, Macnaghten and Morris, and Sir R. Couch.

[*On appeal from the High Court at Fort William in Bengal.*]

THE RIVERS STEAM NAVIGATION COMPANY (*Defendants*) *v.* CHOUTMULL DOOGAR AND OTHERS (*Plaintiffs*). [17th November, 1898.]

Carriers' Act (III of 1865), ss. 6, 8, and 9—Negligence—Accident, Loss by—Burden of proof in a suit for damages for non-delivery.

The plaintiffs sued a company, who were common carriers, for damages for the non-delivery of goods entrusted to them for carriage, destruction of the goods by fire having taken place on board the company's flat when moored off the place of destination. How the fire originated was not shown. The company did not prove absence of negligence on their part nor was there placed before the original Court a case inconsistent with their negligence.

The Judicial Committee dismissed an appeal from the decree of the appellate High Court, which proceeded on the 9th section of the Carriers' Act(III of 1865), that Court having taken the non-delivery as placing the burden of proving absence of negligence on the carriers.

There were facts showing that no adequate means had been provided by the defendants for extinguishing a fire on board, and that the watch was inefficient. The defendants, accordingly, had failed to exonerate themselves.

[**Rel. on.** 16 Bom.L.R. 467 (506)=25 Ind. Cas. 241 ; **R.**, 37 B. 1 (17)=14 Bom. L.R. 165 (176)=14 Ind. Cas. 793 (798).]

APPEAL from a decree (29th January 1897) of the appellate High Court, reversing a decree (26th February 1896) of the **[399]** High Court in its original jurisdiction. The plaintiffs, who now appealed, were merchants trading at Calcutta and at Serajgunge. The Company defending the suit were common carriers by inland navigation. The suit was to recover the value of 432 drums of jute received on board their flat *Khyber* by the company in November 1893 at Serajgunge, to be delivered to the plaintiffs at Calcutta. The flat arrived there ; but whilst moored off Jagarnath Ghat (where the jute had to be delivered) on the morning of the 7th December 1893, the flat and its cargo were destroyed by fire, the origin of which did not appear.

The forwarding note contained the following :—

"The Company will not be under liability for damages, or compensation, in respect of loss or damage to goods. . . except such liability as they are, or may be, subject to under the provisions of any law for the time being in force, or of any contract other than this, for the time being in existence between the Company and the shipper."

The question raised and decided on this appeal was whether the appellants were liable as common carriers by river for the loss of the goods.

The circumstances of the loss are stated in their Lordships' judgment, and also appear in the report of *Choutmull Doogur* v. *The Rivers Steam Navigation Company* (1). The plaintiffs filed this suit in the Court below on the 5th January 1895, charging that the defendants were liable as common carriers for the loss of the jute. The defendants in their written statement alleged that the goods were received by them to be carried, on the terms of the forwarding note, and that they had been lost without any negligence on their part.

(1) 24 C. 786.

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By the Carriers' Act (III of 1865), it is provided as follows :—

Section 6. "The liability of any common carrier for the loss of or damage to any property delivered to him to be carried, not being of the description contained in the schedule to this Act, shall not be deemed to be limited or affected by any public notice, but any such carrier not being the owner of a railroad or tramroad, constructed under the provisions of Act XXII of 1863 may by special contract, signed by the owner of such property so delivered as last aforesaid or some person duly authorised in that behalf by such owner, limit his liability in respect of the same."

[400] Section 8. "Notwithstanding anything hereinbefore contained every common carrier shall be liable to the owner for loss of or damage to any property delivered to such carrier to be carried when such loss or damage shall have arisen from the negligence or criminal act of the carrier or any of his agents or servants.

Section 9. "In any suit brought against a common carrier for the loss, damage, or non-delivery of goods entrusted to him for carriage, it shall not be necessary for the plaintiff to prove that such loss or damage or non-delivery was owing to the negligence or criminal act of the carrier, his servants, or agents."

The suit was heard by SALE, J., in the original jurisdiction of the High Court. The principal issue was whether the loss was due to the negligence of the defendant Company, and whether the forwarding note protected them. On the latter point the Judge held that the defendant Company were relieved from liability for loss not occasioned by their negligence. On the issue of fact he held that the Company had proved that the loss was not so occasioned, thereby discharging the burden imposed upon them by the Carriers' Act.

Upon the evidence he came to the conclusion that the fire did not originate from anything on the flat, and that all reasonable precautions had been taken to prevent the cargo from taking fire from outside. He was also of opinion that the appliances on board for extinguishing fire were fairly sufficient, and that the inability of the crew to put out the fire was caused by the rapidity with which it spread. The Judge accordingly dismissed the suit with costs.

On appeal the Appellate High Court (MACLEAN, C.J., and MACPHERSON and TREVELYAN, JJ.) reversed the above judgment on the ground that the defendants had not discharged the burden cast upon them of showing that the loss was not due to their negligence. The decree was that the defendants should pay to the plaintiffs Rs. 3,324, with interest thereon at 6 per cent. with costs.

The judgments are reported at length in I. L. R. 24 Cal. 786.

On this appeal—

[401] Mr. *Joseph Walton*, Q. C., and Mr. *J. F. Clerk*, appeared for the appellants.

Mr. *A. Cohen*, *Q. C.*, and Mr. *A. Phillips*, for the respondents.

The argument for the appellants was that the defendants had proved that the loss was not caused by their negligence or default or by any act or omission on the part of their servants.

Counsel for the respondents were not called upon.

JUDGMENT.

Their Lordships' judgment was delivered by

LORD MORRIS.—Their Lordships do not require to hear counsel in support of the decision of the High Court, as they are of opinion that there

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has been no case shown to alter the judgment that was pronounced by that Court.

It appears that the jute in question was put on board the appellants' vessel, and put on board, so far as can be ascertained, in a proper manner in a proper flat, properly arranged, and under proper circumstances. It appears that upon the night in question, about half-past twelve, from some rather incomprehensible cause or other, the jute caught fire, and the whole cargo was burnt.

The plaintiffs do not rely upon any special construction of the forwarding note other than that which is relied upon by the defendants, who contend that they have brought themselves within the protection of the Carriers Act; that is, that they are exempt, if they satisfy the onus which is imposed upon them of showing that there was no negligence on their part.

The plaintiffs have also given up any question as to holding the defendants liable on the ground of having deviated from the agreement, and therefore the question comes to the simple and—in form, at all events—narrow one, whether the defendants have exonerated themselves by showing that there was no negligence on their part.

A fire took place, and it is the common case that it did not arise from spontaneous combustion. It, therefore, must have arisen from some cause either external to the flat or internal in the flat. If it occurred from a fire within, it would appear that the onus is not discharged by the defendants, because they had [402] the control of the flat. If the fire took place inside, they must have done something or other, or something must have happened on the vessel inside of the flat, which led to the fire. They are, therefore, driven to suggest causes for its occurring from something external to the flat; and it certainly is a very remote, and rather a fanciful, suggestion that it arose from some spark coming from certain dinghies or smaller boats that were in the neighbourhood.

In the first place, on the evidence of the captain and of the serang, the fires were put out in those small boats about 9 P. M. It was suggested that a man throwing the end of a cigar or lighting a pipe might have caused the fire. But that seems most improbable, because the flat was guarded by the corrugated iron at the top and bottom, and by a purdah or thick canvas all round about it, and it would have taken the fire a very considerable time to reach the jute if it had arisen externally. Therefore it appears that the fire must have originated from some cause inside. If the cause was inside, as has been said, the onus is not discharged, because the whole of the flat was under the control and management and care of the defendants.

Again, they were bound to watch; that is their own case; and accordingly they allege that they did watch, and that about 12 o'clock, just shortly before the fire, two persons named Tamiz-ud-din and Omed Ali were the watchmen; that Tamiz-ud-din was to watch on the starboard side and that Omed Ali was to watch upon the port side. Tamiz-ud-din did not watch on the starboard side. If he had watched, and the fire had arisen from any external cause, he would have perceived it almost at once, and if he had not been for a very considerable time engaged in rather a curious sort of investigation (he appears, namely, to have been watching an accumulation of jungle upon an anchor that was hung up and no way concerned in the anchoring of the vessel, or in directing its course, or in keeping it where it was) he would have seen the fire arise, and he could have given outcry at the time, and notice that would have led in all

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probability to its being extinguished. The fire, however, had taken such hold of the jute that it had gone too far by the time he noticed it, a [403] notice which really arose not from his looking at the matter at all, but by the fires being reflected by the water, which he appears to have been watching, instead of watching that which he was put there to watch, namely the flat.

Then the absence of the other witness, as described by the Chief Justice of the High Court, is, to say the least of it, unfortunate. It is very unfortunate, because he might have shown that Tamiz was much longer absent than seven or eight minutes—a most peculiar time for him to select, as if anybody could distinguish between seven or eight minutes and a quarter of an hour, or 17, or 18 or four or five minutes, when their attention was not directed to investigating it at the time.

At all events the observation of Tamiz-ud-din was for such a substantial time withdrawn from the matter which it was his proper business to watch, that all the misfortune occurred, practically speaking, by reason of his not watching. If he had been walking up and down on the starboard side, as he ought to have been, he would have observed this fire coming against the purdah; or he would have observed the fire from within, and not have waited to observe it from the glare in the water. It appears that the defendants have not at all exonerated themselves from the onus cast upon them of showing that the fire originated from causes over which they had no control, and could not have been expected to have had any control; and the evidence would really go to show that the fire must have originated from within the flat, and therefore from a place for which they were liable for its being in a proper position, and free from any inflammatory article that would have set the jute on fire when it could not have got on fire of itself.

In addition to that it also appears that when the fire did take place there was an utter absence of any power of extinguishing it, except by the primitive mode of the crew throwing buckets of water upon it. There were two pumps, and they were both useless—the pump in the fore-part of the vessel was useless because the captain was alone there, and he could not work the pump by himself, and the men could not get there. Why had he not the men at his disposal? What is the use of having a [404] pump if you have nobody to work it? Then there was a pump aft; and that pump could not be worked because it appears that the jute was piled up close to the bulkhead, and that the hose was too short; so both the pumps become utterly useless, and the conflagration goes on until, not alone is the jute destroyed, but the vessel sinks.

Their Lordships are clearly of opinion that there is no reason for disturbing the conclusion come to by the High Court upon both grounds.

Their Lordships will therefore humbly advise Her Majesty that the judgment of the High Court should be affirmed. The appellants will pay the costs.

Appeal dismissed.

Solicitors for the appellants: Messrs. *Budd, Johnson and Yecks.*
Solicitor for the respondents: Mr. *W. W. Box.*

26 C. 404=3 C.W.N. 298.

1899 MARCH 24. — TESTAMENTARY JURISDICTION. — 26 C. 404= 3 C.W.N. 298.

TESTAMENTARY JURISDICTION.

Before Mr. Justice Sale.

IN THE GOODS OF P. J. AVDALL (*Deceased*). [24th March, 1899.]

Letters of administration—Administrator-General's Act (*II of* 1874), *s.* 12—*Verification of Petition—Court Fees Amendment Act* (*XI of* 1899).

The Administrator General as a public officer is exempted from verifying otherwise than by his signature any petition presented by him under the provisions of Act II of 1874.

In the goods of Mc Comiskey (1) followed.

The form of affidavit prescribed by Act XI of 1899 indicates that it does not apply to an application by the Administrator General.

[R., 18 C.L.J. 308 (315)=18 C.W.N. 121 (122)=21 Ind. Cas. 502.]

THIS was an application by the Administrator-General for letters of administration to the above estate. The sole question raised was whether the signature of the Administrator-General was a sufficient verification to the petition, or whether he was required to make an affidavit. The petition of the Administrator General was as follows:—

[405] *First.*—That Paul Johannes Avdall, the deceased above named, who was an Armenian inhabitant of the Town of Calcutta, and who was an Insurance Broker, departed this life at No. 29, Pollock Street, in the Town of Calcutta, on the 11th day of January 1899 intestate, leaving property and effects within the jurisdiction of this Hon'ble Court to be administered unto and leaving, as your petitioner is informed and believes, a brother named Peter Johannes Avdall and a sister named Elizabeth Sarkies, who, your petitioner is informed and believes, is the widow of Carapiet Johannes Sarkies, deceased, and who your petitioner is also informed and believes is seriously ill, his only next of kin him surviving.

Second.—That the amount and value of the assets left by the said deceased which are likely to come to your petitioner's hands, in case letters of administration be granted to him, will not, as your petitioner verily believes, exceed the sum of Rs. 6,000, and that the same consists of the property, estate and effects appearing in the schedule hereunder written.

Schedule of assets left by the deceased.

I.	Household furniture and effects, carriages and horses in Calcutta of the estimated value of Rs. ...	Rs. 2,000	...	...
II.	Amount of commission due to the deceased abovenamed by Messrs. Walker, Goward & Company of the Strand Road in Calcutta estimated at Rs. ...	4,000	...	...
	TOTAL RS. ...	6,000	...	...

Third.—That your petitioner is informed and believes that the said Peter Johannes Avdall, who, your petitioner is also informed, is the brother of the said deceased, and who resides at No. 4, Shurruf Duftry's Lane in Calcutta, is of unsound mind, and incapable of managing his affairs, and your petitioner is also informed and believes that the said Elizabeth Sarkies, the sister of the deceased abovenamed, is seriously ill and unable to sign her consent at foot of this petition.

(1) 20 C. 879.

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Fourth.—That more than a month has elapsed since the date of the death of the said Paul Johannes Avdall, deceased, and, as your petitioner is informed and believes, none of the next-of-kin of the said deceased have applied for a grant of letters of administration to his estate.

Fifth.—That no previous application has been made to this Hon'ble Court or to any other Court for grant of probate of any will of the deceased abovenamed, or for letters of administration of the property, assets, credits and effects of the deceased abovenamed, as appears from the certificate of the Registrar of this Hon'ble Court herewith produced.

Sixth.—That your petitioner is desirous of obtaining an order that letters of administration, as in case of intestacy, to the property, assets, credits and **[406]** effects of the deceased abovenamed be granted to your petitioner with effect throughout the Province of Bengal.

Your petitioner therefore humbly prays your Lordships for an order that letters of administration as in case of intestacy to the property assets credits and effects of the deceased above named be granted to your petitioner with effect throughout the Province of Bengal.

The petition was verified only by the signature of the Administrator-General, without affidavit.

ORDER.

SALE, J.—This is an application by the Administrator-General for letters of administration. The petition contains a schedule of assets, from which no deduction is claimed. The only question is whether the signature of the Administrator General should be accepted as a sufficient verification under s. 12 of the Administrator-General's Act II of 1874, or whether he should be required to make an affidavit in the form prescribed by Act XI of 1899. The form of affidavit prescribed by this Act in itself sufficiently indicates that it was intended to be used by applicants other than the Administrator-General. The Administrator-General, as a public officer by s. 12 of Act II of 1874, is exempted from verifying otherwise than by his signature any petition presented by him under the provisions of the Act. See *In the Goods of McComiskey* (1). This section, unless expressly repealed, cannot be treated as having ceased to be operative.

Under the circumstances an order for grant of letters of administration may be made on a certificate being produced from the Registrar that the administration duty has been paid and a statement to that effect being inserted in the petition.

Attorney for the petitioners : Mr. *Camell.*

C. E. G.

(1) 20 C. 879.

26 C. 407=3 C.W.N. 392.

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[407] TESTAMENTARY JURISDICTION.

Before Mr. Justice Sale.

IN THE GOODS OF OMDA BIBEE (*Deceased*). [6th April, 1899.]

Letters of Administration—Court Fees Act (*VIII of* 1870), *s.* 3, *sch. I, art.* 11, *s.* 19 *H.* *—Court fees Amendment Act* (*XI of* 1819),*—Practice—Payment of* ad valorem *fee on Probate or Letters of Administration.*

In an application for probate or letters of administration the *ad valorem* fee prescribed by statute should be prepaid to the satisfaction of the Court. Such payment must be made to the Registrar and certified by him or by the Taxing Officer where an exemption is claimed and allowed. This certificate should be produced to the Court with the application and affidavit of valuation.

[R., L.B.R. (1893—1900) 623 (625).]

IN this case an exemption from the total amount of the *ad valorem* fee payable to the Court was claimed, but no certificate from the Taxing Officer was produced to the Court at the time of the application for letters of administration.

RULING.

SALE, J.—In the High Court the fee mentioned in art. 11 of the first schedule to the Court Fees Act is, under s. 3 of the Act, payable, to the Registrar. In case of difference as to the fee or the amount thereof payable, the question is by s. 5 of the Act referred to the Taxing Officer. These sections have not been repealed by the amending Act XI of 1899. By that Act the High Court, when an application is made to it for probate or letters of administration, is required to cause notice to be given to the chief controlling revenue authority, that is to the Board of Revenue. The object is not to delay the grant, which may be made as soon as the Court is satisfied that the *ad valorem* fee payable on the valuation of the assests furnished in the prescribed form has been paid. The fee is required to be prepaid to the satisfaction of the Court. Such payment should be made to the Registrar and certified by him to the Court. This certificate or a certificate from the Taxing Officer, where exemption is claimed and allowed, should be produced to the Court with the application and the affidavit of valuation.

This petition may, therefore, be returned to the applicant in order that it may be re-submitted with a certificate from the Taxing Officer.

Attorney for the petitioner: Mr. *N. C. Bose.*

C. E. G.

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26 C. 408=3 C.W.N. 364.

[408] TESTAMENTARY JURISDICTION.

Before Mr. Justice Sale.

IN THE GOODS OF A. S. GUBBOY (*Deceased*). [28th March, 1899.]

Letters of Administration—Bond, Form of—Succession Act (*X of* 1865), *s.* 256*—Practice.*

The Indian Succession Act, s. 256, requires that an administration bond should be taken in every case. It may, however, be varied, by special order of the Court, in the case of a limited or special administration and follow the English form.

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TESTAMENTARY JURISDICTION.

26 C. 408 = 3 C.W.N. 364.

THIS was an application for letters of administration in limited form, and it was prayed that, having regard to the limited nature of the grant asked for, an administration bond might be dispensed with :—

ORDER.

SALE, J.—This is an application for a grant of letters of administration of the property and credits of Aaron Shalome Gubboy, deceased, limited for the purpose of reconveying the premises comprised in a mortgage to the mortgagor.

It is stated in a petition verified in the usual way that the "deceased died without leaving any properties or effects to be administered unto," and that he had no beneficial interest in the mortgage the premises comprised in which are to be reconveyed.

It appears that this mortgage has been treated as belonging to the estate of the brother of the deceased, and that the *ad valorem* fee on the amount secured thereby has been paid.

It is said that having regard to the nature of the limited grant prayed for, no assets can come into the hands of the administrator, and that this is a case in which an administration bond may be dispensed with. But the law does not admit of this being done. Section 256 of the Indian Succession Act requires a bond to be given in every case, but in such form as the Judge shall from time to time by any general or special order direct. It is only open to the Court to make a special order as to the form of the bond.

In England an administration bond is also required to be given in all cases, and the bond in the case of a limited or special administration provides that the administrator " will [409] exhibit a true and perfect inventory of the said estate and effects *limited as aforesaid* and render a just and true account thereof whenever required by law so to do." Coote, p. 663. This form may, it seems to me, be adopted in the present case, and I direct that this may be done.

Attorneys for the petitioners: Messrs. *Gregory and Jones.*

C. E. G.

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26 C. 409 (F.B.) = 3 C.W.N. 271.

FULL BENCH.

Before Sir Francis W. Maclean, K.C.I.E., Mr. Justice Prinsep, Mr. Justice O'Kinealy, Mr. Justice Banerjee and Mr. Justice Hill.

PYARI MOHUN BOSE (*Plaintiff*) *v.* KEDARNATH ROY AND OTHERS (*Defendants*).* [31st January, 1899.]

Parties—Co-contractors—Right of some of several co-contractors to sue alone—Refusal to join in the suit as plaintiff, Effect of.

Where two parties contract with a third party, a suit by one of them making the other a co-defendant ought not to be dismissed, merely because the plaintiff has not proved that the co-defendant had refused to join as a co-plaintiff.

[F., 24 A. 226 (228) = 22 A.W.N. 31; 26 M. 461 (462); 26 M. 649 (F.B.); 29 M. 302 (303); 18 M.L.J. 495 = 4 M.L.T. 194;, 3 C.W.N. 509 = 9 C.L.J. 331; R., 35 C. 331 (P.C.) = 10 Bom. L.R. 66 = 7 C.L.J. 139 = 12 C.W.N. 249 = 18 M.L.J. 43 = 3 M.L.T. 151; 38 C. 342 (353) = 13 C.L.J. 3 = 8 Ind. Cas. 837; 34 M. 406 = 7 Ind. Cas. 422 = 20 M.L.J. 951 (959) = 8 M.L.T. 208; 17 C.L.J. 372 = 19 Ind. Cas. 865

* Reference to the Full Bench from Appellate Decree No. 1469 of 1896.

9 C.W.N. 34; 12 Ind. Cas. 850=57 P.R. 1911=49 P.L.R. 1912; 19 C.L.J. 327; =25 Ind. Cas. 440; D., 5 C.L.J. 527; 7 C.L.J. 251; 69 P.R. 1906=118 P.L.R. 1906; 189 P.L.R. 1908.]

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FULL BENCH.

26 C. 409 (F.B.)= 3 C.W.N. 271.

THIS case was referred to a Full Bench by O'KINEALY and GUPTA, JJ., on the 30th June 1898. The order of reference was as follows :—

The question raised in this reference is that where two parties contract with a third party, can a suit by one of the two, making the other a co-defendant, be dismissed under our procedure, because the plaintiff had not proved that the co-defendant had refused to join as plaintiff.

This very point was raised in the case of *Tarini Kant Lahiri* v. *Nund Kishore Patronovis* (1), and with reference to it the Judge said: "It may be that the proper course would be to ask him to join as a plaintiff, but it is a matter of perfect indifference to the substantial defendant whether the co-sharer is joined as a plaintiff, or joined as a defendant. The tenant is concerned to have all **[410]** parties interested in the rent made parties to the suit, so that he may not be liable in a subsequent suit for rent. If the third defendant were to complain that he has been made a defendant without being asked to join as a plaintiff, there might have been ground of complaint, and the mistake might be undone by amending the plaint, or it might be a ground for giving him his costs, but it is not a ground for dismissing the suit at all."

This decision was followed by another Divisional Bench of this Court in the case of *Bissesswar Roy Chowdhry* v. *Brojo Kant Roy Chowdhry* (2).

In the case of *Dwarka Nath Mitter* v. *Tara Prosunna Roy* (3) a Divisional Bench of this Court, on the authority of *Luke* v. *South Kensington Hotel Co.* (4) decided that some of the parties interested as plaintiffs cannot sue alone unless the co-sharers have refused to join or have otherwise acted prejudicially to the plaintiffs, and the suit was dismissed on this ground. That case was followed in the case of *Soshee Shekhareswar Roy* v. *Giris Chundra Lahiri* (5).

It must be borne in mind that under our Code no person can be made a plaintiff without his consent. In England this consent must be given in writing; so that the rules point to consent and not to refusal. Under s. 32, the Court has the greatest powers for transferring parties, and under s. 34, all objections in regard to parties must be taken at the earliest opportunity, or else they are regarded as waived. In all these points the rules of our Court conform more or less to the rules of the Supreme Court in England, and their dismissal for want of a co-plaintiff is unknown. See *Roberts* v. *Holland* (6).

We, therefore, refer this second appeal to a Full Bench for disposal.

Babu *Dwarka Nath Chuckerbutty*, for the appellant.

Dr. *Ashutosh Mookerjee*, Babu *Gyanendra Nath Bose*, and Babu *Biraj Mohun Mazumdar*, for the respondents.

[411] Babu *Dwarka Nath Chuckerbutty*.—It is not necessary for the plaintiff to make out that the co-contractor refused to join. In this case the co-contractor was made a defendant, and if she liked, she could have got herself added as a plaintiff—see the cases of *Tarini Kant Lahiri* v. *Nund Kishore Patronovis* (1), and *Bissesswar Roy Chowdhry* v. *Brojo Kant Roy Chowdhry* (2). The case of *Soshee Shekhareswar Roy* v. *Giris Chander Lahiri* (5) was not correctly decided. The case of *Dwarka Nath Mitter*

(1) 12 C. L. R. 588.
(2) 1 C.W.N. 221.
(3) 17 C. 160.
(4) (1879) L.R. 11 Ch. D. 121.
(5) 1 C.W. N. 659.
(6) (1893) L.R., 1 Q. B. 665 (669).

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v. *Tara Prosonna Roy* (1) is distinguishable, and that was not a rent suit. A suit ought not to be dismissed if the plaintiff does not make out a refusal: see *Roberts* v. *Holland*(2), *Ram Chunder Chuckurbutty* v. *Giridhur Dutt*(3), *Chuni Singh* v. *Hera Mahto* (4), and *Guni Mahomed* v. *Moran* (5).

Dr. *Asutosh Mookerjee*, for the respondents.—The principle laid down in *Dwarka Nath Mitter* v. *Tara Prosunna Roy*(1) is correct: see also Indian Contract Act, s. 45. One of the several joint promisees can sue alone only when some special circumstance is shewn—see *Luke* v. *South Kensington Hotel Co.* (6). The rule in India has always been the same. See *Ramsebuk* v. *Ram Lall Koondoo* (7), *Jagadmba Dasi* v. *Haran Chandra Dutt* (8), *Uma Sundari Dasi* v. *Ramji Haldar* (9), *Jibanti Nath Khan* v. *Gokool Chunder Chowdry* (10), *Bindu Bashini Dasi* v. *Peari Mohun Bose* (11), and *Jagdeo Sing* v. *Padarath Ahir* (12). Having reference to **[412]** s. 188 of the Bengal Tenancy Act, the suit is also not maintainable—See the case of *Baidiya Nath De* v. *Ilim* (13).

Babu *Dwarka Nath Chuckerbutty* in reply.

The opinion of the Full Bench was delivered by MACLEAN, C.J., PRINSEP, O'KINEALY, BANERJEE, and HILL, JJ. concurring).

OPINION.

MACLEAN, C.J.—The question raised on this reference is whether, where two parties contract with a third party, a suit by one of them, making the other a co-defendant, ought to be dismissed because the plaintiff has not proved that the co-defendant had refused to join as co-plaintiff. Upon this question, there is some diversity of opinion in the decisions of this Court. In the case of *Tarini Kant Lahiri* v. *Nund Kishore Patronovis*(14), it was held that such non-joinder was not sufficient ground to justify the dismissal of the suit, and that view has been given effect to by another Division Bench of this Court in the case of *Bissesswar Roy Chowdhry* v. *Brojo Kant Roy Chowdhry* (15). It has been considered that the opposite view was taken by another Division Bench of this Court in the case of *Dwarka Nath Mitter* v. *Tara Prosunna Roy* (1), and in the case of *Sohsee Shekhareswar Roy* v. *Giris Chandra Lahiri*(16). The case of *Dwarka Nath Mitter* v. *Tark Prosunna Roy* (1) was a case of an exceptional nature, and upon a minute examination of its facts, it is at least questionable whether it intended to lay down any such general proposition as that for which it has been cited as an authority governing the present case. As a general rule all co-contractors ought to be joined as plaintiffs, but at the same time where, as here, there are three co-contractors, say three co-sharers, two of them co-plaintiffs, and the other a co-defendant (being all the parties interested under the contract), the suit ought not in my opinion to be dismissed simply because it has not been shown that the co-sharer defendant has refused to join as a co-plaintiff. If so, in each such **[413]** case there would have to be a preliminary issue as to such refusal, and the inconvenience of that, is shown by the proceedings in the present case, where one Judge has decided there was such refusal, and another Judge has decided the very opposite. In cases of this class the defendant—the active defendant, not

(1) 17 C. 160. (2) (1893) L.R. 1 Q.B. 665. (3) 19 C. 755.
(4) 7 C. 633. (5) 4 C. 96. (6) (1879) L.R. 11 Ch. D. 121.
(7) 6 C. 815 (822). (8) 6 B L.R. 526 note = 10 W.R. 108.
(9) 7 C. 242, (10) 19 C. 760. (11) 20 C. 107.
(12) 25 C. 285 (289). (13) 25 C. 917. (14) 12 C.L.R. 598.
(15) 1 C.W.N. 221. (16) 1 C.W.N. 659.

the co-sharer defendant—should, as soon as the trial is commenced, direct the Court's attention to the supposed non-joinder; the Court would then call upon the defendant co-sharer to say whether he was willing to be a co-plaintiff; if he say "yes," he can then be shifted from the ranks of the defendants to the side of the plaintiffs and be made a co-plaintiff; and if, as the result of that shifting, the acting defendant satisfy the Court that he ought to have an opportunity of considering the new position, the Court can adjourn the trial, upon such terms as to payment of any costs thrown away, as it may deem just; but if the co-sharer defendant decline to be made a co-plaintiff then the trial can proceed with him as a co-defendant. I certainly do not think the suit ought to be dismissed, simply by reason of such non-joinder, when at any rate, all the parties interested are before the Court, which has ample power to do what I have said under s. 32 of the Code of Civil Procedure. In order to avoid the throwing away of costs, and to ensure the saving of time, an objection as to non-joinder ought to be taken in the written statement, and when so taken the plaintiff should use his best endeavours to get the other co-sharer to join, and if successful, apply at once to have him joined as a co-plaintiff, and if unsuccessful, he would then be in a better position to satisfy the Court, when the objection is raised at the trial, that he has done his best to have him made a co-plaintiff.

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We are asked, however, what is to happen if the co-sharer defendant be not represented, or present, at the trial? I think the answer is simple. His absence would indicate that he took no real interest in the dispute, and would raise a strong inference that he did not wish to be made a co-plaintiff, in which case the trial could proceed with him as a co-defendant.

As regards the other question whether the point in relation to s. 188 of the Bengal Tenancy Act has been decided by the lower appellate Court, looking at the first judgment of [414] the Subordinate Judge, it is so very doubtful, that in my opinion that question ought to be regarded as still open, and as one to be dealt with on the remand.

The case must be remanded to the Subordinate Judge, and the costs will abide the result.

PRINSEP, J.—I agree in the judgment which has just been delivered.

O'KINEALY, J.—I agree.

BANERJEE, J.—I agree with the learned Chief Justice in the view taken by him in this case.

HILL, J.—I also agree.

S. C. G. *Appeal allowed; case remanded.*

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FULL BENCH.

26 C. 414 (F.B.) = 3 C.W.N. 233.

26 C. 414 (F.B.) = 3 C.W.N. 233.

FULL BENCH.

Before Sir Francis W. Maclean, K.C.I.E., Mr. Justice Prinsep, Mr. Justice O'Kinealy, Mr. Justice Banerjee, and Mr. Justice Hill.

BISHAMBHUR HALDAR (*Defendant No.* 2) *v.* BONOMALI HALDAR AND OTHERS (*Plaintiffs*).* [30th January, 1899.]

Public Demands Recovery Act (Bengal Act VII of 1880) *ss.* 2 *and* 7—*Bengal Act VII of* 1868, *s.* 8—*Certificate of Sale—Evidence of sufficiency of service of notice—Act X, of* 1859, *s.* 28.

Section 8 of Bengal Act VII of 1868 does not apply to a certificate of title granted to a purchaser at a sale in execution of a certificate issued under s. 7 of Bengal Act VII of 1880, for arrears of rent alleged to be due to an estate under the Court of Wards, but it is limited in its application to the two descriptions of certificates of title therein referred to, namely, certificates granted under s. 28 of Act XI of 1859, and those granted under s. 11 of Bengal Act VII of 1868.

Pulin Chandra Roy v. *Akbar Hossein* (1) and *Bhola Nath Maiti* v. *Mohinuddin Mahomed* (2) approved.

[F., 3 C.L.J. 280 (284); R., 22 A. 248 (F.B.) = 20 A.W.N. 64; 29 C. 94 (97); 34 C. 811 (817) (F.B.) = 5 C.L.J. 696 = 11 C.W.N. 756; 6 C.L.J. 472; D., 13 C.W.N. 750 = 10 C.L.J. 201 (205).]

THIS case was referred to a Full Bench by BANERJEE and PRATT, JJ., on the 8th July 1898. The reference was in the following terms:— [415]

This appeal arises out of a suit brought by the plaintiff respondent for cancellation of a certificate under Bengal Act VII of 1880, made on the 2nd of April 1890, in favour of defendant No. 1, and of a sale in execution of the certificate at which certain immoveable property of the plaintiff was purchased by defendant No. 2, and for confirmation of the plaintiff's possession of such property. The material allegations of the plaintiff are that the certificate is invalid, because the arrears of rent in respect of which it was made were not really due, the party in whose favour it was made was not in separate receipt of rent of the tenure in question, and the officer by whom it was signed was not the Collector of the District; that no notice of such certificate was issued; that the plaintiff was kept out of knowledge of the certificate and of the proceedings and sale in execution thereof by the fraud of defendant No. 2; and that the plaintiff came to know of the sale on the 29th of July.

The defence was that the suit was barred by limitation; that the suit was not maintainable as the plaintiff did not proceed in accordance with s. 8 (*b*) of Bengal Act VII of 1880; and that the certificate and the sale in execution thereof were valid and not tainted with fraud.

The Courts below have found for the plaintiff and decreed the suit. In second appeal it is contended for the defendant No. 2, *first*, that the suit is barred by limitation; and, *secondly*, that the suit is not maintainable as the plaintiff did not proceed according to s. 8, cl. (*b*) of Bengal Act VII of 1880.

In support of the first contention, it is urged that as the sale was confirmed on the 28th of May 1894 and the suit was instituted on the 29th of July 1895, that is, after more than one year, the time allowed by art. 12, cl. (*b*) of the second schedule of the Limitation Act, which

* Reference to the Full Bench in Appeal from Appellate Decree No. 335 of 1897.

(1) 21 C. 350. (2) 21 C. 350, note.

governs the case, the suit is barred by limitation, and that the lower appellate Court is wrong in excluding the time during which the plaintiff's appeal to the Commissioner was pending, the **[416]** said appeal having failed not "from defect of jurisdiction or other cause of a like nature" within the meaning of s. 14 of the Limitation Act, and the deduction of time allowed by that section being claimable only in favour of a proceeding resorted to by the plaintiff under a *bona fide* mistake of fact, and not in favour of one resorted to under a mistake of law even though *bona fide*. On the other hand, it is contended for the plaintiff respondent, that the plaintiff is not only entitled to the deduction of time allowed by the lower appellate Court under s. 14 of the Limitation Act, but is further entitled under s. 18 of that Act to reckon time from the 29th of July 1894, the date on which he became aware of the fraud of the defendants by which, as found by the first Court, he had been kept out of the knowledge of the sale now sought to be set aside.

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If the finding of the first Court on the question of fraud had been affirmed by the lower appellate Court, the plea of limitation would no doubt have been completely met. But the lower appellate Court has based its decision upon the question of limitation on the provisions of s. 14 of the Limitation Act, without adverting to those of s. 18 or affirming the finding of the first Court on the question of fraud. So that if that decision is incorrect, and if the suit does not fail on the ground involved in the second contention of the appellant, it will be necessary to remand the case to the lower appellate Court, in order that it may determine whether s. 18 of the Limitation Act does not save the suit from being barred.

Turning now to the contention of the learned Vakil for the appellant upon the question of limitation, we are of opinion that the second branch of that contention, namely that the deduction of time under s. 14 of the Limitation Act is not available for a party who resorted to the previous infructuous proceeding under a mistake of law though *bona fide*, is not sound. There is nothing in the language of the section to warrant this view, and we think it would be unreasonable to restrict its operation in the manner contended for **[417]** seeing that a *bona fide* mistake of law upon a doubtful point of jurisdiction or procedure is as much entitled to the benefit of the section as a *bona fide* mistake of fact. As for the case of *Ramjiwan Mal* v. *Chando Mal*(1) cited for the appellant, it is sufficient to say that it has been dissented from by a Full Bench of the Allahabad High Court in *Brij Mohan Das* v. *Mannu Bibi* (2). Nor do we think that the mere fact of the Commissioner having rejected the appeal on the ground of limitation is sufficient to disentitle the plaintiff to the deduction of the time during which that appeal was pending, if, in the opinion of the Court which has to determine the question whether this suit is barred by limitation, that appeal was not really out of time, but failed "from defect of jurisdiction or other cause of a like nature" within the meaning of s. 14 of the Limitation Act. But in this case the appeal to the Commissioner was clearly out of time as well under s. 2 of Bengal Act VII of 1868 as under s. 16 of Bengal Act VII of 1880, the only provisions of the law under which such an appeal could lie; and though under s. 5 of the Limitation Act, the appeal could be admitted for sufficient cause though out of time, it was for the Court to which the appeal was made to say whether there was any sufficient cause for admitting it. As no such sufficient cause was shown before the Commissioner, the appeal to

(1) 10 A. 587. (2) 19 A. 348.

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him must be taken to have been barred by limitation, and it, therefore, failed for a reason other than "defect of jurisdiction or other cause of a like nature" within the meaning of s. 14 of the Limitation Act.

The ground upon which the lower appellate Court has overruled the plea of limitation is therefore not sound, and if the suit is not open to the objection raised in the second contention of the appellant, it will be necessary to remand the case to the Court of appeal below to determine whether the plaintiff is, as has in effect been held by the first Court, entitled to reckon time under s. 18 of the Limitation Act from the date when he became aware of the sale of which he had been kept out of knowledge by the fraud of the defendant No. 2.

[418] This brings us to the consideration of the second contention of the learned Vakil for the appellant. It is argued that a suit like the present for cancellation of a certificate under Bengal Act VII of 1880 can be entertained only if the preliminary step required by s. 8, cl. (*b*) of the Act, has been taken, or good cause is shown why it was not taken; and as this has not been done, the suit is not maintainable. The first Court in its judgment on the 4th issue which raised this point has found that no notice (that is notice under s. 10 of the Act) was served, nor was any sale proclamation published, and so the plaintiff was not bound to proceed under s. 12 as required by s. 8, cl. (*b*) of the Act, and he was not debarred from maintaining the suit; and the correctness of that finding of the first Court was not questioned in the lower appellate Court, nor was it questioned before us. And if that finding be correct, the conclusion based upon it, namely, that the plaintiff was not bound to proceed under s. 12 of Bengal Act VII of 1880 and was not debarred from maintaining this suit, must also be correct—See *Saroda Charan Bandopadhaya* v. *Kisto Mohun Bhattacharjee* (1). But the learned Vakil for the appellant argued that, as a certificate of sale had been granted to the auction-purchaser, defendant No. 2, it was under s. 8 of Bengal Act VII of 1868, which is by s. 2 of Bengal Act VII of 1880 to be construed as one with the last mentioned Act, conclusive evidence that all necessary notices have been duly served, and that it was not open to the Courts below to inquire whether the notice in question was served or not; and in support of this argument the case of *Rajoni Kanto Roy* v. *Champa Dasi* (2) is cited. That case no doubt supports the contention for the appellant, but it is opposed to two earlier cases, not referred to in it, namely, *Pulin Chandra Roy* v. *Akbar Hossein* (3) and *Bhola Nath Maiti* v. *Mohinuddin Mahomod* (4); and we must, therefore, refer the matter to a Full Bench. We should add that our own opinion is in favour [419] of the view taken in the two earlier cases, for the reasons given in those cases.

The question for the determination of which this case is referred to a Full Bench is, whether s. 8 of Bengal Act VII of 1868 applies to a certificate of title granted to a purchaser at a sale in execution of a certificate issued under s. 7 of Bengal Act VII of 1880 for arrears of rent alleged to be due to an estate under the Court of Wards, or whether it is limited in its application to the two descriptions of certificates of title therein referred to, namely, certificates granted under s. 28 of Act XI of 1859, and those granted under s. 11 of Bengal Act VII of 1868.

As the question arises in a second appeal, according to the rules

(1) 1 C.W.N. 516. (2) 2 C. W. N. (S. N.) ccli.
(3) 21 C. 350. (4) 21 C. 350 (note).

relating to Full Bench references, the whole case must be referred for decision to a Full Bench.

Dr. *Asutosh Mookerjee*, Babu *Jnanendra Nath Bose*, and Babu *Biraj Mohun Mazoomdar*, for the appellant.

Babu *Shyma Prosunna Mazumdar*, for the respondents.

Dr. *Asutosh Mookerjee.*—The question is whether s. 8 of Bengal Act VII of 1868 applies to a certificate of title issued under Bengal Act VII of 1880; in other words what is the meaning of s. 2 of Bengal Act VII of 1880? Practically, therefore, the question is, under what section is the certificate granted—whether it is under s. 28 of Act XI of 1859, read with s. 2 of Bengal Act VII of 1880, or under s. 316 of the Code of Civil Procedure? It is clear from the language of s. 19 of Bengal Act VII of 1880 that s. 316 of the Civil Procedure Code does not apply. I, therefore, submit that the certificate in question, which on the face of it purports to have been granted under s. 28 of Act XI of 1859, was rightly granted. Section 2 of Bengal Act VII of 1880 incorporates Act XI of 1859 and Bengal Act VII of 1880 and Bengal Act VII of 1868 into one Code. The case of *Sadhu Saran Singh* v. *Panchdeo Lal* (1) shows that ss. 311 and 312 of the Civil Procedure Code do not apply to sales under a certificate issued under Bengal Act VII of 1880; from this it would follow that s. 316 of the Code also will not **[420]** apply. See also the case of *Monindra Nath* Mookerji v. *Saraswati Dasi* (2). It has no doubt been recently held in the cases of *Mohibul Huq* v. *Shew Sahay Singh* (3), and *Mahomed Abdul Hye* v. *Gajraj Sahai* (4), that ss. 33 and 34 of Act XI of 1859 are not applicable to sales under Bengal Act VII of 1880, but the terms of those sections are quite different from those of s. 28 of Act XI of 1859. There is nothing in the terms of s. 28 of Act XI of 1859 which would contradict the view that it is applicable to sales under Bengal Act VII of 1880. The case of *Rajoni Kanta Roy* v. *Champa Dasi* (5) supports my contention.

Babu Shymb Prosunna Mazumdar for the respondents.—Section 8 of Bengal Act VII of 1868 enacts a provision of a stringent character, and the scope of the section ought not to be extended beyond what has been expressly mentioned by the Legislature. The heading of the certificate in this case may show that it was granted under s. 28 of Act XI of 1859, but that cannot be conclusive. The body of it is substantially in the form prescribed under s. 316 of the Code of Civil Procedure, and not in the form prescribed under sch. A of Act XI of 1859. Then there is a vital distinction. In the case of a certificate under Act XI of 1859 the title of the purchaser accrues from the date fixed for the last day of payment, whereas in this case the title purports to accrue from the day of the confirmation of the sale. It was never intended by the Legislature that Act XI of 1859, Bengal Act VII of 1868, and Bengal Act VII of 1880, should be read together as one Act. The qualifying words in s. 2 of Bengal Act VII of 1880 "so far as is consistent with the tenor thereof," are important and ought not to be lost sight of. Section 10 of Bengal Act VII of 1880 makes the notice imperative. Their Lordships of the Privy Council observe in the case of *Baijnath Sahai* v. *Ramgut Singh* (6) that the forms required by the Act are matters of substance. See also the cases the *Saroda Charan Bandopadhaya* v. *Kisto Mohun Bhattachrajee* (7), *Uzir Ali* v. **[421]** *Kartick* (8). As for the three Acts being read together as one, see the remarks of Pigot and Rampini, JJ., in the case of

(1) 14 C. 1. (2) 18 C. 125. (3) 25 C. 85.
(4) 25 C. 283. (5) 2 C.W.N. (S.N.) ccli. (6) 23 C. 775=23 I.A. 45.
(7) 1 C.W.N. 516. (8) 2 C.W.N. 363.

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Gujraj Sahai v. *The Secretary of State for India* (1). The policies of the two sets of Acts are different. The notice under s. 10 of Bengal Act VII of 1880 is to be issued in accordance with the provisions of the Civil Procedure Code; see *Rakhal Chandra Rai Chowdhuri* v. *The Secretary of State for India* (2), whereas in Act XI of 1859, or Bengal Act VII of 1868, notices and other processes are required to be served in accordance with the special provisions contained therein. The cases of *Pulin Chandra Roy* v. *Akbar Hossein* (3) and *Bhola Nath Maiti* v. *Mohinuddin Mahomed* (4) are rightly decided. The case of *Rajoni Kanta Roy* v. *Champa Dasi* (5) cannot be regarded as an authority, inasmuch as it loses sight of the important saving clause in s. 2 of Bengal Act VII of 1880, and also because it does not notice the previous cases. The case of *Sadhu Saran Singh* v. *Panchdeo Lal* (6) proceeds upon a different principle. The remarks of Petheram, C.J., in the case of *Monindra Nath Mookerji* v. *Saraswati Dasi* (7) would show that a sale under Bengal Act VII of 1880 would require to be confirmed under s. 314 of the Civil Procedure Code. The case of *Mahomed Abdul Hye* v. *Gajraj Sahai* (8), and the case of *Mohibul Huq* v. *Shew Sahay Singh* (9) cited by the other side support my contention.

Dr. *Ashutosh Mookerjee* in reply.

The following judgments were delivered by the Full Bench:—

JUDGMENTS.

MACLEAN C. J.—In this case I agree with the view expressed by the two referring Judges, which is in accord with [422] that expressed in the two cases of *Pulin Chandra Roy* v. *Akbar Hossein* (3) and *Bhola Nath Maiti* v. *Mohinuddin Mahomed* (4). Agreeing as I do with the reasons upon which those decisions are based, no useful object will be attained by my merely repeating them. The question then must be answered in the negative, and the case must be remanded, as is suggested in the reference, for the purpose of ascertaining whether the case is brought within s. 18 of the Limitation Act, Act XV of 1877.

The costs will abide the results of the re-trial.

PRINSEP, J.—I am of the same opinion. The difficulty in this case has arisen from the attempt to consolidate, by reading as one Act, three different Acts of a different character, and passed after some interval of time, relating to the recovery of public demands. To provide against any possible confusion that may arise from such circumstances the words "so far as is consistent with the tenor" of the Acts specified in s. 2 of Bengal Act VII of 1880, have been used in that section; and accordingly it has now fallen upon us to decide what is the real meaning and effect of s. 8 of Bengal Act VII of 1868, as applied to proceedings taken under the Act of 1880. The conclusion that I have arrived at, after giving full consideration to the matter, is that the terms of s. 8 of Bengal Act VII of 1868, must be limited to sales held in respect of arrears of public revenue provided for by Act XI of 1859, and to none other, and that it does not apply to sales held to realize public demands under s. 8 of Bengal Act VII of 1880.

O'KINEALY, J.—I agree with the decision in the case of *Pulin Chandra Roy* v. *Akbar Hossein* (3), and think that the certificate in this case is not one under s. 28 of Act XI of 1859.

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(1) 17 C. 414. (2) 12 C. 603. (3) 21 C. 350. (4) 21 C. 350 note. (5) 2 C.W.N. (S.N.) ccli. (6) 14 C. 1. (7) 18 C. 125. (8) 25 C. 283. (9) 25 C. 85.

BANERJEE, J.—I am of the same opinion. The question for the determination of which this case has been referred to a Full Bench is, "whether s. 8 of Bengal Act VII of 1868 applies **[423]** to a certificate of title granted to a purchaser at a sale in execution of a certificate issued under s. 7 of Bengal Act VII of 1880, for arrears of rent alleged to be due to an estate under the Court of Wards, or whether it is limited in its application to the two descriptions of certificates of title therein referred to, namely, certificates granted under s. 28 of Act XI of 1859 and those granted under s. 11 of Bengal Act VII of 1868."

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Upon that question, besides certain cases which have only an indirect bearing, there are three cases having a direct bearing, namely, the cases of *Pulin Chandra Roy* v. *Akbar Hossein* (1) and *Bhola Nath Maiti* v. *Mohinuddin Mahomed* (2) referred to, and the case of *Rajoni Kanta Roy* v. *Champa Dasi* (3). Of these, the first two affirm the view indicated in the latter alternative of the question, whilst the last mentioned case answers the former alternative in the affirmative; and the question is, which of these two views is correct.

I am of opinion that the view taken in the two first mentioned cases is correct. Section 8 of Bengal Act VII of 1868 enacts that "Every certificate of title which may be given to any purchaser under the provisions of s. 28 of the said Act XI of 1859, or of s. 11 of this Act, shall be conclusive evidence in favour of such purchaser and of every person claiming under him, that all notices in or by this Act or by the said Act XI of 1859 required to be served or posted, have been duly served and posted." This being then, "an enactment" to use the language of Erle, C. J., in the case of *Nothard* v. *Pepper* (4) "altering the law as to evidence and creating statutory evidence whereby the rights of parties may be defeated" must be construed strictly, and the plain language of the section would limit its application to the two descriptions of certificates therein expressly mentioned. But then it is contended that though s. 8, standing alone, might bear that construction, yet the effect of s. 2 of Bengal Act VII of 1880, under which the sale in question was held, would be to make s. 8 of the Act of 1868 applicable to this case. In support of this contention certain **[424]** cases have been referred to as showing, in the first place, that s. 316 of the Code of Civil Procedure, the only other provision of law under which the certificate in question could possibly be held, regard being had to s. 19 of Bengal Act VII of 1880, to have been granted, is inapplicable to this case; and as showing further, that certain sections of Act XI of 1859 and of Bengal Act VII of 1868, namely, s. 27 of the former and s. 2 of the latter, have, notwithstanding that they are not in terms applicable to such cases, been held to be applicable to sales under Bengal Act VII of 1880. And it is argued that, if that is so, there is no reason why s. 28 of Act XI of 1859 should not be held applicable to this case, and the certificate of sale in question should not be held to have been granted under that section and to come within the scope of s. 8 of Bengal Act VII of 1868.

With reference to the first branch of this contention, I do not think that there is any good reason for holding that s. 316 of the Code of Civil Procedure is inapplicable to this case, and that the certificate of sale in question could not have been granted under that section.

(1) 21 C. 350.
(2) 21 C. 350, note.
(3) 2 C.W.N. (S.N.) ccli.
(4) (1864) 17 C.B.N.S. 39 (50).

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Section 19 of Bengal Act VII of 1880 says that a certificate of public demand may be enforced and executed by all or any of the ways and means mentioned and provided in and by the Code of Civil Procedure for the enforcement and execution of decrees for money, and all the practice and procedure provided by the said Code of Civil Procedure in respect of sales in execution of decrees and in respect of certain other matters specifically mentioned, shall apply to every execution issued to enforce such certificate. That would make the provisions of the Code of Civil Procedure for the granting of a certificate of sale applicable. But then it is said that that view is opposed to the decision of this Court in the cases of *Sadhu Saran Singh* v. *Panchdeo Lal* (1) and *Ram Logan Ojha* v. *Bhawani Ojha* (2). I do not think that that view is opposed to those two decisions. It is true that, in both those cases s. 312 of the Code of [425] Civil Procedure, in so far as it relates to a suit or an application for setting aside a sale, has been held to be inapplicable to a sale under the Public Demands Recovery Act (Bengal Act VII of 1880), but that does not go to show that the granting of a certificate of sale to the auction-purchaser could not have been under the Code of Civil Procedure. The passage in the judgment in the earlier of the two cases cited upon which reliance was placed is that in which the learned Judges say: "But it seems to us that the words in respect of sales in execution of decrees do not include any proceedings instituted after the sale for setting it aside." Though that may be so, it does not follow that the procedure for a sale in execution, down to its completion by the grant of a sale certificate, would be inapplicable to a sale under Bengal Act VII of 1880. The learned Judges do not say that the words of s. 19 of Bengal Act VII of 1880 do not include "any proceedings instituted after the sale," but they are careful to qualify the words "proceedings instituted after the sale" by the words "for setting it aside." There is, in my opinion, a real distinction between the proceedings leading to the sale and to its completion by the grant of a certificate of sale to the auction-purchaser, and separate and antagonistic, though simultaneous, proceedings instituted by a judgment-debtor or by a decree-holder or by a third party to have the sale set aside; and it was in regard to these latter proceedings that it was held in the case relied upon, that the Code of Civil Procedure was inapplicable to a sale under Bengal Act VII of 1880, and that the proper procedure is to be found in other enactments.

The second case relied upon merely follows the case to which reference has just been made. In my opinion, therefore, there is no real conflict between the view taken in the case of *Pulin Chandra Roy* v. *Akbar Hossein* (3), and the two cases of *Sadhu Saran Singh* v. *Panchdeo Lal* (1), and *Ram Logan Ojha* v. *Bhawani Ojha* (2).

I may add that even if s. 316 of the Code of Civil Procedure was not applicable to the present case, still it would [426] not follow that a certificate granted to an auction-purchaser at a sale held under Bengal Act VII of 1880 comes within the scope of either s. 28 of Act XI of 1859, or s. 11 of Bengal Act VII of 1868, which is the position which the appellant must make out before the irrebuttable presumption under s. 8 of Bengal Act VII of 1868 can be raised in his favour. Now it is conceded, as it must be, that the certificate of sale in question cannot come within the scope of s. 11 of Bengal Act VII of 1868. It must, therefore, be shown

(1) 14 C. 1. (2) 14 C. 9. (3) 21 C. 350.

to come under s. 28 of Act XI of 1859 before the presumption just referred to can arise. 1899 JAN. 30.

This brings me to the consideration of the latter branch of the contention, namely, that as certain other provisions of Act XI of 1859 and Bengal Act VII of 1868 have, by virtue of s. 2 of Bengal Act VII of 1880, been held to be applicable to sales under this last-mentioned enactment, s. 28 of Act XI of 1859 should, for the same reason, be held to be applicable to this latter class of sales. The cases which have been relied upon are the two cases of *Sadhu Saran Singh* v. *Panchdeo Lal* (1), and *Ram Logan Ojha* v. *Bhawani Ojha* (2) just referred to, and the case of *Monindra Nath Mookerji* v. *Saraswati Dasi* (3) in which it was held that s. 27 of Act XI of 1859 was applicable to a sale under the Public Demands Recovery Act of 1880. But because certain sections of the earlier enactments have, by virtue of s. 2 of Bengal Act VII of 1880, been held to be applicable to sales under the latter enactment, it does not follow that the section we are now dealing with, namely, s. 28 of Act XI of 1859, should be held to be similarly applicable. Whether it is so applicable or not would depend upon the language of the section, and its consistency with the tenor of the enactment to which it is sought to be made applicable. Now referring to s. 28 of Act XI of 1859, I find it extremely difficult to hold that the effect of s. 2 of Bengal Act VII of 1880 is to make it applicable to a sale under the latter enactment. Section 28 provides that immediately upon a sale becoming final and conclusive, the Collector or [427] other officer shall give to the purchaser a certificate of title in the form prescribed in sch. A annexed to the Act, and the form given in the schedule shows that it is intended to apply only to a sale for arrears of public revenue, and not to a sale for any other demand recoverable under any other Act.

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Can it, then, be said that merely because Bengal Act VII of 1880 is by s. 2 of that Act to be construed as one with Act XI of 1859, a sale of the kind to which the form of certificate referred to in s. 28 of Act XI of 1859 can have no application, must, nevertheless, be held to be a sale to which that section applies. I think this question must be answered in the negative.

I may observe that s. 2 of Bengal Act VII of 1880 has been held not to have the effect of making ss. 33 and 34 of Act XI of 1859 applicable to sales in execution of certificates for recovery of public demands, and that s. 2 of Bengal Act I of 1895, the present Public Demands Recovery Act, does not embody the rule of construction contained in s. 2 of the former Act. See *Mohibul Huq* v. *Shew Sahay Singh* (4) and *Mahomed Abdul Hye* v. *Gajraj Sahai* (5).

For these reasons and the reason given in the referring order, I think that the contention of the appellant upon the question referred to us must fail, and the case must be remanded to the lower appellate Court for a decision upon the question of fraud.

HILL, J.—I am of the same opinion, and all that I wish to say is that I have heard nothing here to-day to induce me to alter the opinion on either of the points raised, which I expressed in the case of *Pulin Chandra Roy* v. *Akbar Hossein* (6) and that I adhere to it.

S. C. G. *Appeal allowed. Case remanded.*

(1) 14 C. 1. (2) 14 C. 9. (3) 18 C. 125.
(4) 25 C. 85. (5) 25 C. 283. (6) 21 C. 350.

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26 C. 428 (F.B.) = 3 C.W.N. 266.

[428] FULL BENCH.

Before Sir Francis W. Maclean, K.C.I.E., Mr. Justice Prinsep, Mr. Justice O'Kinealy, Mr. Justice Banerjee and Mr. Justice Hill.

DWARKANATH ROY (*Plaintiff*) *v.* RAM CHAND AICH AND OTHERS (*Defendants*).* [31st January, 1899.]

Res Judicata—*Civil Procedure Code* (*Act XIV of* 1882), *s.* 13—*Suit for rent—Suit for establishment of title.*

A decision in a suit for rent brought by a plaintiff against a person who is alleged to have been his tenant in respect of certain land, does not operate as *res judicata* in a subsequent suit brought by the same plaintiff for establishment of his title to the land, not only against the alleged tenant but also against the person whose title as landlord the tenant defendant had set up in the rent suit.

[**F.**, 6 C.W.N. 66 ; **Rel.**, 17 C.L.J. 71 (74) ; 17 C.W.N. 76 = 16 Ind. Cas. 22 (23) ; **R.**, 15 C.L.J. 653 (656) = 13 Ind. Cas. 40 (42) ; 10 C.W.N 820 (823) ; 8 Ind. Cas. 715 ; 9 Ind. Cas. 2 (3) ; 14 C L.J. 220 = 12 Ind. Cas. 9 (10) ; 54 P.R. 1904 ; 21 T.L.R. 127 (129) ; **D.**, 18 C.W.N. 116 = 20 Ind. Cas. 344.]

THIS case was referred to a Full Bench by BANERJEE and RAMPINI, JJ., on the 11th January 1899, with the following opinion :—

This appeal arises out of a suit brought by the plaintiff appellant, to obtain a declaration that the plaintiff had a *mohatran* and *kaimijara* right to the land in suit, and that the defendant No. 1 was a *kursa ryot* under him, and to recover *khas* possession upon ejectment of the defendant No. 1. The plaintiff stated in his plaint that he had previously brought a suit for rent against the defendant No. 1; that the defendant No. 1 in that suit denied the existence of the relationship of landlord and tenant between him and the plaintiff, and alleged that a third party, who was made a defendant in this suit, was his real landlord; and that the rent suit having been dismissed the plaintiff brought the present suit.

The defence raised various points, of which it is necessary to notice only one for the purposes of this appeal, namely, that the suit was barred under s. 13 of the Code of Civil Procedure.

The first Court overruled the objection of the defendant that the suit was barred as *res judicata*, and on the merits found for the plaintiff, and accordingly a decree was made in favour of [429] the plaintiff, declaring his right to the land in dispute. And as the plaintiff did not press for *khas* possession, a further declaration was given in favour of the plaintiff that he was entitled to recover rent from the defendant No. 1 at the rate of Rs. 6 a year.

On appeal by the defendant the decree of the first Court has been reversed and the plaintiff's suit dismissed on the ground that it was barred as *res judicata* by reason of decision in the rent suit brought by the plaintiff against the defendant No. 1.

In second appeal it is contended for the plaintiff appellant, that the decision of the lower appellate Court is wrong, and that the judgment in the rent suit cannot operate as *res judicata* in the present suit for two reasons, *first*, because the question which directly arises in this suit, namely, the question of the plaintiff's title to the land in dispute, was not raised in the former suit, and could arise, if at all, only incidentally in that suit, and *secondly*, because the former suit was not one between the same parties as these in the present suit, the alleged landlord whose title the tenant

* Reference to the Full Bench in Appeal from appellate Decree No. 217 of 1897.

defendant set up in the previous suit being a party to the present suit, but not having been made a defendant in the previous suit. 1899 JAN. 31.

No doubt the case of *Gopal Das* v. *Gopi Nath Sircar* (1), which is referred to in the judgment of the lower appellate Court, is in favour of the defendant. But with all respect for the learned Judges who decided that case we are unable to assent to the view taken by them. We are of opinion that the contention of the learned vakil for the appellant is correct, and that the decision in the rent suit cannot operate as *res judicata* in the present suit. FULL BENCH. 26 C. 428 (F.B.) = 3 C.W.N. 266.

The learned vakil for the respondent argued that quite apart from the case of *Gopal Das* v. *Gopi Nath Sircar* (1) the present suit had been rightly held by the lower appellate Court to be barred as *res judicata*, because the prayer for ejectment having been abandoned by the plaintiff in the first Court, the only question that remained to be decided as between the plaintiff and the defendant No. 1 was whether the plaintiff **[430]** was entitled to claim any rent from the defendant No. 1 as his tenant, and upon that question the decision of the former suit must be held to operate as *res judicata*. We do not, however, consider the argument sound. The only question that arose for determination in the previous rent suit was whether the relation of landlord and tenant subsisted between the parties to that suit during the period for which rent was then claimed, and the question which arises for determination in the present suit, after the abandonment of the claim for ejectment, is whether the land in dispute belongs to the plaintiff, and whether if it is found in the presence of the defendants other than the tenant defendants, who are the only persons whose title was set up by the latter, that the land belongs to the plaintiff, the plaintiff is not entitled to claim rent from the tenant defendants. This question is clearly different from the question which arose in the former suit. If, therefore, the case of *Gopal Das* v. *Gopi Nath Sircar* (1) had not stood in the way, we should not have felt any hesitation in deciding the question of *res judicata* in favour of the plaintiff; but as the case just referred to is in point, and as we are unable to assent to the view taken in that case, we must refer for the decision of a Full Bench the question whether a decision in a suit for rent brought by a plaintiff against a person who is alleged to have been his tenant in respect of certain land, operates as *res judicata* in a subsequent suit brought by the same plaintiff for establishment of his title to the land, not only against the tenant but also against the person whose title as landlord the tenant defendant had set up in the rent suit. And as this question arises in a second appeal the whole case must be referred to a Full Bench.

We may add that this question was on a previous occasion referred to a Full Bench, but it became unnecessary for the Full Bench to decide the question by reason of the action taken by the parties. The case we refer to is that of *Alimuddin Biswas* v. *Kafiluddi* (2).

Babu *Saroda Churn Mitter*, for the appellant.

Dr. *Rash Behary Ghosh* and Babu *Mohendra Kumar Mitter*, for the respondents.

[431] The Full Bench (MACLEAN, C.J., PRINSEP, O'KINEALY, BANERJEE and HILL, JJ.) delivered the following

JUDGMENTS.

MACLEAN, C.J.—The question submitted to us ought to be answered in the negative. The issue determined in the previous suit (a rent-suit)

(1) 12 C.L.R 38. (2) 2 C.W.N. (S.N.) clvii.

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was, whether the relation of landlord and tenant existed at the time when that suit was instituted between the present plaintiff and the then defendant, and whether the then defendant was liable for the amount then claimed as rent for a certain period. That issue was decided against the present plaintiff, and as it is conceded that nothing has occurred in the interval to change the position of the parties, that question must be treated as *res judicata* as against the plaintiff, and in the defendants' favour. But the relief sought in the present suit is absolutely different from the relief sought in the previous suit. The present issue is, whether the land in dispute belongs to the plaintiff, and, if so, whether the plaintiff is entitled to compensation from the tenant defendant for the use of the land. That is put clearly in the reference, and I agree with the view expressed by the referring Judges, that, having regard to the nature of the relief sought in the previous suit, and the relief sought in the present suit, it is impossible to say that the plaintiff is barred in this suit from establishing his title to the land both against the alleged tenant and also against the person whose title as landlord the tenant defendant had set up in the rent-suit.

I do not propose to refer to the case of *Gopal Das* v. *Gopi Nath Sircar* (1), because it has not been relied on by the learned vakil who argued the respondents' case.

The appeal must be allowed, and the case remanded to the lower appellate Court for trial on the merits, and the costs both of the hearing before the Division Bench and of this reference must abide the result.

PRINSEP, J.—The question referred for our decision is, whether the proceedings in the former suit are a bar to the present suit by reason of s. 13 of the Code of Civil Procedure.

In the former suit, the present plaintiff sued the tenant defendant for arrears of rent, claiming that the defendant was his tenant. [432] The defendant pleaded that he was not the plaintiff's tenant, but the tenant of a third party who was entitled to the land. That suit was dismissed. The plaintiff has now again sued the defendant tenant, joining with him the person who was in the former suit set up as the defendant's landlord, and he has asked for a decree declaring his title to the land with consequential relief in somewhat complicated terms. First of all, he has asked for consequential relief by ejectment of the defendant tenant who disputed his title in the former suit, and he has also asked for alternative relief in the shape of rent from the defendant. In the course of the suit it would seem that his legal advisers, on his behalf, withdrew the claim for ejectment, and, therefore, by his suit, as it is now presented to us, the plaintiff is seeking for a declaration of his title to the land and for the recovery of rent from the defendant tenant who had successfully disputed his right to receive rent from him in the former suit.

At first sight, it would seem that this claim is barred, inasmuch as it was made the subject of the previous suit and was adjudicated upon, for it is not stated that at any time since the decision in the former suit fresh relations of landlord and tenant have been created between the parties so as to prevent the findings in that suit being applied to them now. But the suit, so far as the adjudication of the plaintiff's title is concerned, cannot, as I understand the law, be considered as *res judicata* in the present proceedings, inasmuch as the parties are not the same, the plaintiff having, in this case, joined with the tenant defendant who

(1) 12 C.L.R. 38.

disputed his title, the person under whom that tenant professed to hold, and his object in bringing this suit is to remove the cloud which was cast upon his title by the former proceedings, and he could not effectually do so except by making, as his adversary in this suit, the person who professes to hold the title as against him. Ordinarily, he would not be entitled to consequential relief in the form of a decree for rent, because it had already been decided in the former suit between him and the tenant that he was not entitled to such rent. We have, however, to apply the terms of s. 157 of the Bengal Tenancy Act, and, under that section, the plaintiff can, in my opinion, obtain a [433] decree in the form which he seeks. Section 157 enables the plaintiff in a suit for the ejectment of a trespasser, such as the present suit, to ask instead of his ejectment, that the trespasser or the person whom he seeks to eject may be declared liable to pay, for the land in his possession, a fair and equitable rent to be determined by the Court, and that, as I understand, is the form which the suit now before us has assumed.

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It seems to me, therefore, that the present suit is not barred, and that the plaintiff, if he establishes his right, can obtain a decree in this form.

O'KINEALY, J.—I agree with the opinion expressed by the learned Chief Justice. In 1885, the plaintiff brought a suit for rent against the defendant No. 1, and in that suit, it was decided on issue raised, by a Court of competent jurisdiction, that the relation of landlord and tenant did not exist. That, I think, was *res judicata* that the relationship of landlord and tenant did not exist between these parties in 1885, but I agree in considering that that would not dispose of the matter, for on the day after that decree, the plaintiff could have brought an action in ejectment and have succeeded if he could have made out his title to the property and that the cause of action was not barred. He can do the same now, and if the pleadings be read as constituting an action in ejectment, the suit is good, and not barred by *res judicata*. It has been pointed out, that if the plaintiff is entitled to maintain the action, he may, under s. 157 of the Bengal Tenancy Act, claim in the alternative a fair and equitable rent to be determined by the Court. I think, therefore, that the case must be disposed of on these lines.

It seems to me that there has been a misconception in regard to the case of *Gopal Das* v. *Gopi Nath Sircar* (1). In that suit Gopi Nath Sircar brought a suit against the tenant, and lost; he then brought a second suit against the same tenant and another person, who, in the first suit, was said to be the landlord, but he was made only a *pro forma* defendant and no relief was asked for as against him. We held, and held rightly, that when the title of the plaintiff to rent is in issue in both suits that would [434] be *res judicata*, and the effect of the decision is not got rid of by the plaintiff putting on the record as a party a person who is not really one.

BANERJEE, J.—I agree with the learned Chief Justice. I have nothing to add to what he has said in his judgment and to what I have said in the order of reference, except this, that a right to claim rent may arise under s. 157 of the Bengal Tenancy Act upon the establishment of the plaintiff's right to the land in dispute, notwithstanding that his right to receive rent from the first defendant was found to be not established in the previous suit for arrears of rent; and that the judgment in the previous rent-suit cannot therefore operate as *res judicata*, not only as against the claim for

(1) 12 C.L.R. 38.

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establishment of title and recovery of possession, but also as against the claim for rent under present circumstances.

HILL, J.—I also agree with the learned Chief Justice. It appears to me that so far from its being sought in the present suit to re-open an issue already tried and determined by a competent Court, the former finding has been assumed by the plaintiff in this suit to be correct, and has been made the foundation of the relief which he now seeks.

S. C. G. *Appeal allowed. Case remanded.*

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26 C. 434 = 3 C.W.N. 209.

APPELLATE CIVIL.

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, and Mr. Justice Banerjee.

JOY SANKARI GUPTA (*Plaintiff*) *v.* BHARAT CHANDRA BARDHAN AND OTHERS (*Defendants*).* [13th January, 1899.]

Partition—Estates' Partition Act (Bengal Act VIII of 1876), *ss.* 112 *and* 128—*Incumbrance created by a co-sharer before partition—Effect of partition by Collector, where the land so incumbered fell exclusively into the share of another co-sharer.*

[435] On partition by the Collector under the Estates' Partition Act (Bengal Act VIII of 1876) when any land of an undivided joint estate, which was incumbered by any co-sharer, is allotted to any other co-sharer, the latter takes it free from the incumbrance so created.

Khan Ali v. *Pestonji Eduljee* (1), distinguished.

The case of *Nuthoo Lall Chowdhry* v. *Saadat Lal* (2) and *Ahmedoollah* v. *Ashruff Hossein* (3) have been overruled in effect by the decision of the Privy Council in the case of *Byjnath Lall* v. *Ramoodeen Chowdhry* (4).

[F., 18 Ind. Cas. 240 (241); Rel., 9 Ind. Cas. 67 (68); R., 33 M. 429 (435) = 5 Ind. Cas. 92 (95) = 20 M.L.J. 330 (337) = 7 M.L.T. 143; 6 Ind. Cas. 196 (197); 19 C.L.J. 305 = 22 Ind. Cas. 710.]

THIS appeal arose out of an action brought by the plaintiff to recover *khas* possession of a share in certain plots of land after ejectment of defendants Nos. 1 to 5. The allegation of the plaintiff was that the lands in dispute appertained to mehals Nos. 1285 and 402, which were jointly held by him and the defendants Nos. 6 and 7; that the defendant No. 7, the proprietor of mehal No. 402, had an eight annas share, and the plaintiff and defendant No. 6, as proprietor of mehal No. 1285, had a four annas share each, in the disputed lands; that there was a partition of the two estates by the Collector by which the disputed lands were allotted to defendant No. 6 and the plaintiff; and that therefore he (the plaintiff) was entitled to recover possession of the said lands from the defendants. The contending defendants 1 to 5, pleaded *inter alia*, that the disputed lands were held by them as *mirasdars* under the proprietors of both estates, and therefore they were not liable to ejectment; and that the suit was barred by limitation. The Court of first instance decreed the suit holding that inasmuch as by the *butwara* proceeding the disputed lands fell exclusively into the share of the plaintiff, he would be entitled to get them free of all incumbrances. On appeal to the subordinate Judge he reversed the decision of the first Court, and dismissed the

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* Letters Patent Appeal No. 27 of 1897 in Appeal from Appellate Decree No. 715 of 1896, against the decree of Mr. Justice Rampini, one of the Judges of this Court, dated the 13th of April 1897.

(1) 1 C.W.N. 62.
(2) Sp.Vol. W.R. 271.
(3) 13 W.R. 447 = 8 B.L.R. Ap. 73, note.
(4) 1 I.A. 106.

plaintiff's suit. From this decision the plaintiff appealed to the High Court, and Mr. Justice Rampini, sitting alone, confirmed the decision of the lower appellate Court. The material portion of his Lordship's judgment was as follows :—

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"Now, it would seem to me that if the *miras* and *utsargo* titles set [436] up by the defendants 1 to 5 were granted by the plaintiff as well as by defendants 6 and 7, the plaintiff is unquestionably entitled to no relief, and if I were of opinion that she is entitled to relief on the assumption that the title under which the defendants 1 to 5 hold the land was created by the defendant No. 7 alone, I would consider it necessary to remand the case for a clear finding as to who created the grant or grants in favour of the Bardhan defendants.

"But I do not think that the plaintiff is entitled to any such relief as she seeks for in this case, even supposing that the grant or grants in favour of the defendants 1 to 5 were made by the defendant No. 7 alone. In the first place, there is no express provision of the law under which, on allotment of the lands of the estates, the Bardhan defendants' lease of the disputed plots of land, which are specific plots of land, will attach to the share of the estates allotted to the defendant No. 7. If the defendant No. 7 had created in favour of the Bardhan defendants an incumbrance on his share of the estates, the case would have been very different. But in this case the Bardhan defendants hold specific plots of land, and there seems no reason, as far as they are concerned, why they should exchange their plots of land for any others. The learned pleader for the appellant relies on s. 128 of the Estates'Partition Act,and on the case of *Hem Chunder Ghose* v. *Thako Moni Debi* (1). But s. 128 of the Estates' Partition Act, as pointed out by the Munsif, does not expressly apply ; for, as above observed, the defendant No. 7 did not give his share or a portion of 'it in *putni* or other tenure of lease.' The Munsif, therefore, falls back, as he says, on 'the equitable principle underlying it.' But I do not think the Munsif or I can make a law to suit the circumstances of this case, when the Legislature has not seen fit to do so. The case of *Hem Chunder Ghose* v. *Thako Moni Debi* (1) is also not to the point. That is a case in which there was a mortgage of a share of a property, and it was held that on partition the mortgage lien attached to the share allotted to the mortgage. In that case there was no mortgage of specified plots of land, as in the case out of which the present appeal arises.

"A case much more to the point is that of *Khan Ali* v. *Pestcnji Eduljee* (2) in which there was a lease of a particular plot of land, and it was held that 'the mode in which the lands were allotted on partition between the ascertained sharers did not affect the right to any specific property. No doubt in that case the plaintiff was required to pay a small sum of money to his other co-sharers in respect of his having obtained a more valuable property.' But it does not appear that the lease granted by his other co-sharers was taken into consideration in estimating the value of his share of [437] the property, and the decision did not proceed on this ground, but on the ground stated above.

"The cases of *Nuthoo Lall Chowdhry* v. *Saadat Lall* (3), and *Ahmedoolah* v. *Ashruff Hossein* (4) would also appear to be in favour of the respondents.

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(1) 20 C. 533.
(2) 1 C.W. N.62.
(3) Sp. Vol. W.R. 271.
(4) 13 W. R. 447=B.L.R. Ap. 73, Note.

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"It is said there is no provision of the Estates' Partition Act exactly applying to a case like this. However this may be, it is impossible for me now to interfere with the Collector's partition, and I would, I think, be doing so, if I were to grant the plaintiff the relief she asks for in this case."

The plaintiff then appealed to the High Court under cl. 15 of the Letters Patent.

Babu *Lal Mohun Das*, for the appellant.

Babu *Harendro Narayan Mitter*, for the respondents.

The judgment of the High Court (MACLEAN, C. J., and BANERJEE, J.) was as follows:—

JUDGMENT.

This appeal arises out of a suit brought by the plaintiff appellant to recover *khas* or direct possession of a 4 annas share in certain plots of land, after ejectment of the defendants 1 to 5 therefrom, on the allegation that the plaintiff has become entitled to the aforesaid share in the disputed lands free of all incumbrances by reason of the said lands having been allotted to her and to defendant No. 6 under a partition held by the Collector. The defence was a denial of the plaintiff's right to eject the defendants 1 to 5 and 8, who claimed to hold certain of the disputed plots of land as permanent tenure holders and the remaining plots in proprietary right.

The first Court gave the plaintiff a decree. On appeal by the defendants, that decree was set aside and the suit dismissed. Against the decree of the appellate Court dismissing her suit, the plaintiff preferred a second appeal to this Court and her second appeal having been dismissed by Mr. Justice Rampini, she has preferred this appeal under cl. 15 of the Letters Patent.

The facts of the case as found by the lower appellate Court, so far as they are necessary to be referred to for the purposes of this appeal, are as follows:—Plaintiff and defendant [438] No. 6 are proprietors of estate No. 1285, and defendant No. 7 is proprietor of estate No. 402. Certain lands of the two estates, amongst which are included the lands now in dispute, were held jointly, the plaintiff and defendant No. 6 owning a 4 annas share each, and defendant No. 7 the remaining 8 annas share, and the defendants 1 to 5 and 8 holding the share as *mirasdars*; but it is not clear whether they hold under all the co-sharers or under defendant No. 7 alone. On a partition of the lands by the Collector the disputed lands were allotted to the plaintiff and defendant No. 6, so that in addition to a 4 annas share, which each of them held previously, they became entitled to another 4 annas share each; and it is in respect of this additional 4 annas share obtained by the plaintiff that the present suit is brought.

These being the facts of the case, the question for determination in this appeal is, whether, if the *miras* tenure was created by defendant No. 7 alone, the plaintiff obtained the lands in dispute free from the tenure created by the defendant No. 7 in favour of defendants Nos. 1 to 5.

Mr. Justice Rampini has answered this question in the negative and affirmed the lower appellate Court's decree dismissing the suit.

We are of opinion that the question should be answered in the affirmative, and the case sent back to the lower appellate Court to dispose of the appeal after determining the question of fact whether the tenure set up was created by all the co-sharers in the lands or by defendant No. 7 alone.

If the *miras* tenure was created by defendant No. 7 alone, the case might fall within the scope of s. 128 of Bengal Act VIII of 1876 and the tenure would hold good only as regards the land allotted to the share of defendant No. 7. But the point is not quite free from doubt. Mr. Justice Rampini is of opinion that that section does not apply to a case like this. One reason urged in support of this view is that s. 128 applies only to a case in which "a share or a portion of a share," that is an aliquot part of a share, is let out, and that it does not apply to a case like the present in which the share of the lessor in certain definite plots [439] of land is let out. The words "portion of a share" in the section are however wide enough to include a case like the present, a co-owner's share in any definite plots of land included in a joint estate being as much a "portion of a share" as an aliquot part of a share is, though the illustrations to the section no doubt lend support to the opposite view. Another objection to the applicability of s. 128 of Bengal Act VIII of 1876 was that the defendant No. 7 was not "any proprietor of an estate held in common tenancy and brought under partition," he having been the owner of estate No. 402, which had some lands in common with estate No. 1285, which was the only estate brought under partition. But the objection is sufficiently met by s. 112 of Bengal Act VIII of 1876, which makes "all the provisions of the Act in respect of the allotment between the shareholders of one estate" applicable to a case like the present.

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But even if s. 128 of Bengal Act VIII of 1876 be not applicable to this case, still we think that, according to the general principles of equity the *miras* tenure in question, if it was created by defendant No. 7 alone, could not affect the lands allotted to the share of any other co-sharer upon a partition by the Collector, but could hold good only in respect of lands allotted to the lessor's share. For though defendant No. 7 had power to grant a lease of his undivided share in any joint lands, he could not by so doing affect the interest of the other sharers; and those who took the lease, took it subject to the right of those sharers to enforce partition and thereby convert what was an undivided share of the whole into a portion held in severalty charged with the payment of a proportionate amount of revenue. This principle has been recognized and given effect to by the Privy Council in the case of *Byjnath Lall* v. *Ramoodeen Chowdry* (1), which was a case relating to a mortgage by a co-owner of joint property. There their Lordships say:—"It is clear that the mortgagor had power to pledge his own undivided share in these villages. But it is also clear that he could not by so doing affect the interest of the other sharers in them, and that the persons who took the security, took it subject to the right of those sharers to enforce partition [440] and thereby to convert what was an undivided share of the whole into a defined portion held in severalty."

It might be urged that when any lands of an undivided joint estate, which are incumbered by any co-sharer, are allotted to any other co-sharer, the latter should take them subject to, and not free from, the incumbrance, the incumbered condition of such lands being taken into account in the allotment of lands to the different shareholders. That might be so in the case of a private partition. But in a partition by the Collector under Bengal Act VIII of 1876 that cannot be the case, as by ss. 6 and 7 of the Act, the valuation and apportionment of the lands and the assessment of revenue upon the different separate estates created by the partition, must proceed

(1) 1 I. A. 106.

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upon the basis of the rents payable by the actual cultivators and not by any tenureholders, except in cases in which the tenure has been created or recognized by all the co-proprietors.

This distinguishes the case of *Khan Ali* v. *Pestonji Eduljee* (1) relied upon by Mr. Justice Rampini, which related to a partition by the Civil Court, from the present case. As for the cases of *Nuthoo Lall Chowdhry* v. *Saadat Lall* (2), and *Ahmedoollah* v. *Ashruff Hossein* (3), also relied upon in support of the judgment appealed against, they must be taken to have been overruled in effect by the decision of the Privy Council in the case of *Byjnath Lall* v. *Ramoodeen Chowdry*.

We, therefore, reverse the decision appealed against and set aside the decree of the Subordinate Judge, and remand the case to the lower appellate Court for the determination of the question whether the *miras* tenure set up by the defendants 1 to 5 was created by the plaintiff and defendant No. 7, or by the latter alone. If the plaintiff or her predecessor in title is shown to have been a party to the creation of the tenure or to have recognized it subsequently, her suit for *khas* possession must be dismissed. If not, she will be entitled to a decree. Costs will abide the result.

S. C. G. *Appeal allowed. Case remanded.*

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26 C. 441 = 3 C.W.N. 139.

[441] ORIGINAL CIVIL.

Before Mr. Justice Jenkins.

HEMANGINEE DASSEE (*Plaintiff*) *v.* KUMODE CHANDER DASS (*Defendant*).* [4th May, 1898].

Decree—Form of decree—Decree for maintenance—Receiver, Appointment of, in case of default—Transfer of Property Act (*IV of* 1882), *ss.* 67, 99, 100.

To avoid any difficulty in executing a decree for maintenance out of property charged with payment of the allowance and make a fresh suit unnecessary in case of default in payment of the instalments a Receiver should be appointed under the decree itself with directions, in case of default in payment of the maintenance, to take possession of the estate and sell the same, and out of the sale-proceeds to pay the allowance for maintenance.

THIS was a suit for maintenance and suitable accommodation for residence out of the properties in the hands of the defendant belonging to the estate of the plaintiff's husband. A preliminary decree having been made the matter was referred to the Registrar to enquire and report what would be a suitable allowance for her maintenance and suitable accommodation for her residence. On the Registrar making his report thereon the matter again came up on further directions on the report, and a question was then raised as to whether, having regard to ss. 67, 99 and 100 of the Transfer of Property Act, the sale of the property to be charged with the payment of the allowance of maintenance to the plaintiff could, if necessary, be proceeded with under the decree creating the charge without having to institute another suit.

Mr. *R. Mitra*, for the plaintiff.—Directions for payment should be made in the decree. It is necessary to take directions for payment, because it has been held that a decree for maintenance cannot be executed. It is

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* Original Civil Suit No. 791 of 1894.

(1) 1 C.W.N. 62. (2) W.R. Sp. Vol. 271.
(3) 13 W.R. 447=8 B.L.R. 73. note.

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necessary to guard against any difficulty that may arise in case the maintenance be not paid. [JENKINS, J.—I could give you liberty to apply and the matter may be met by the appointment of a Receiver under the liberty to apply.] [442] Let the Receiver be appointed now, but not to take possession until default.

Mr. *Dunne*, for the defendant.—I do not consent to that. There must be a decree directing payment to be made and fixing the dates of payment, and there must be a charge on the property for the payment of the maintenance.

JENKINS, J.—The costs of suit and costs of allotment should be a charge on the estate. There will be an order for payment of the maintenance and arrears in terms of the report; with liberty to apply in case of default of payment of maintenance for two consecutive months.

Subsequently the Registrar was consulted and furnished the following minute as to decrees for maintenance:—

"Where a charge was created on the property of a judgment-debtor by a money decree to secure the amount payable thereunder, the plaintiff afterwards obtained an order in the form of the usual decree for an account and sale in a mortgage suit,—Belchambers' Practice, 336, and the cases there cited. This practice, which obtained prior to the Transfer of Property Act (IV of 1882) was continued, as not affected by that Act, until 1893; *Meherunnessa Bibi* v. *Rohilla Khatun* (1), July 31st, 1890, *per* Wilson, J.—This is an unreported case, and was followed in the following unreported cases, *Saroda Prosad Ghose* v. *Chunder Kant Mukerjee* (2), Dec. 8th, 1891, *per* Trevelyan, J.; *Nundo Lal Roy* v. *Rodrigues* (3), March 17th, 1892, *per* Trevelyan, J.

"It was also followed in the case of *Gouri Sanker Pandey* v. *Abhoyeswari Debi* (4), *per* Sale, J. The decree in this case, dated 29th May 1893, was a consent decree by which it was ordered that 'the defendant do within three months pay to the plaintiff Rs. 20,905, and Rs. 1,500, with interest, and that these sums, with interest if not paid within the time allowed for that purpose, shall immediately become due and realizable by execution.' It was also ordered that 'the defendant do pay to the plaintiff Rs.1,46,717-15 by annual instalments, with interest' as therein provided. And it was further ordered 'that in default of payment of any of the annual instalments, with interest, the plaintiff shall be at liberty to execute the decree in respect only of the annual instalment falling due and remaining unpaid, with interest, and realize the same, with the costs of the execution irrespective of any proceedings for realization of the sums of Rs. 20,905 and Rs. 1,500.' And it was further ordered that [443] 'the properties set forth in a schedule annexed to the decree (*all* being out of Calcutta) shall stand charged with the payment of all the sums payable under the decree.'

"The decree itself does not provide for the sale of the properties.

"Default having been made in payment of the two sums of Rs. 20.905, and Rs. 1,500, which were payable within three months, the plaintiff obtained an order, dated 22nd September 1893, directing that, unless payment be made of these two sums within six months, the properties charged under the decree, or a sufficient portion thereof, be sold.

"That order was reversed on appeal, on the ground of non-jurisdiction. The judgment of the Court [Petberam, C. J., and Norris and Macpherson, JJ.] dated 25th July 1894 is as follows:—'We are of opinion that this

(1) (1890) Suit No. 89 of 1888.
(2) (1891) Suit No. 340 of 1889.
(3) (1892) Suit No. 114 of 1890.
(4) (1893) Suit No. 41 of 1892.

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appeal must be allowed. No portion of the property in question is within the territorial jurisdiction of this Court and this Court has, therefore, no power to sell it.'

"The plaintiff next obtained an order, dated 7th August 1894, for transmission of a copy of the decree to the Judge of the Assam Valley district for execution, some of the properties charged under the decree being within that district. A copy of the decree was accordingly transmitted to the Judge of the Assam Valley district and was by him transferred to the Subordinate Judge of Dhubri to whom the plaintiff applied for execution. The defendant appeared andobjected on the ground that the judgment-debtor was precluded from proceeding against the property charged under the decree, except by a fresh suit under s. 67 of the Transfer of Property Act. The objection was disallowed, and the plaintiff obtained an order for execution. From this order an appeal was preferred to the High Court in its appellate jurisdiction. It was contended, on behalf of the appellant, that the Transfer of Property Act was applicable, and that, under ss. 99 and 100 of that Act, no order for sale could be made until a suit was brought under s. 67. *Contra*, it was contended, that effect should be given to the consent decree as containing an agreement on the part of the defendant for sale of the properties. The Court was of opinion that the provisions of the Transfer of Property Act were applicable to the case. It was also of opinion that the decree could have no higher operation than an agreement between the parties; but *stress* was laid on the fact that the decree did not provide for the sale of the property. The result is thus stated—'As the case stands the plaintiff can realize the instalments by execution by sale and attachment of any property of the defendants, but if he wishes to sell and attach the property charged he must bring a suit. The appeal must be allowed.' *Aubhoyessury Dabee* v. *Gouri Sunkur Panday* (1).

"An application was then made for transmission of a copy of the decree to the Judge of the 24-Pergunahs for execution in respect of properties [444] within that district charged under the decree, and the decision reversing the order of the Subordinate Judge of Dhubri was considered. That decision is referred to in the judgment as follows: 'That seems to me to be a ruling to the effect that no step in execution can be taken for the purpose of realising any portion of the money due under the decree.—That being so, I have no option, but to refuse the present application.—' Sale, J. (2).

"This order, too, was reversed by the High Court in its appellate jurisdiction—Maclean, C. J., and Macpherson and Trevelyan, JJ." (3). The following is quoted from the judgment of the Chief Justice :—'I refrain from expressing any opinion as to whether the plaintiff is a mortgagee within the meaning of s. 99'—Then, referring to the decision reversing the order of the Subordinate Judge, Dhubri—'All that the Judges intended to decide was that, if the plaintiff wished to sell, he must institute a suit: they did not decide that, under the circumstances an order for attachment, as opposed to an order for sale, could not be made.'

"The rulings in this case are, in effect, that, under the circumstances, this Court, in its original jurisdiction, had no power to direct a sale of the properties charged under the decree, *ali* being out of its territorial jurisdiction; that in respect of the two sums payable within three months the

(1) 22 C. 859. (2) Unreported, Nov. 3rd, 1896. (3) Unreported, Dec. 21st, 1896.

property charged might be attached in execution by the Court having jurisdiction, but could not be sold without a fresh suit to be brought under s. 67 of the Transfer of Property Act.

"The following cases were cited in the course of these proceedings :—

"*Shurroop Chunder Gooho* v. *Ameerrunissa Khatoon* (1); *Maseyk* v. *Steel* (2); *Kartick Nath Pandey* v. *Tilukdhari Lall* (3); *Prem Chand Dey* v. *Mokhoda Debi* (4); *Ashutosh Bannerjee* v. *Lukhi Moni Debya* (5); *Vigneswara* v. *Bapayya* (6); *Jadub Lall Shaw Chowdhry* v. *Madhub Lall Shaw Chowdhry* (7); and *Azimullah* v. *Najm-un-nissa* (8).

"It will be seen that these cases, except the first, are subsequent to the Transfer of Property Act, which came into effect on the 1st of July 1882.

[445] "The following are later cases :—

"*Chandra Nath Dey* v. *Burroda Shoondury Ghose* (9). The operative part of the decree of the District Judge of Mymensingh is as follows :—' The suit is decreed *ex parte*. The plaintiff to obtain the amount of his claim and costs of the suit with interest at 6 per cent. per annum until the date of realization, and the mortgaged property to remain liable for the satisfaction of the debt.' On appeal to the High Court it was held, on the objection of the judgment-debtor, ' that s. 99 of the Transfer of Property Act was applicable to the case, and that the mortgaged property could not be sold, unless a suit under s. 67 of the Act be brought, and the procedure prescribed by the Transfer of Property Act followed. The property, however, could be attached, as there is nothing in s. 99 prohibiting such attachment.'

"*Matangini Dassee* v. *Chooney Money Dassee* (10). The head note is : ' Where a decree, after declaring the amount payable to the plaintiff in respect of future maintenance, and that it should be a charge on certain immoveable property which formed a specific item in the general estate of a testator, went on to direct that for the purpose of securing the payment of the future maintenance, a deed should be executed in favour of the plaintiff, charging such immoveable property, on her executing a release of all her rights and interest in the general estate—*Held*, that such a charge was properly enforced by a suit brought on the deed, and that it could not be given effect to by proceedings in execution.'

"These cases are referred to in *Chundra Moni Dassi* v. *Mutty Lal Mullick* (11). In that case it became unnecessary to decide the question whether a decree creating a charge may be enforced according to the practice established prior to the Transfer of Property Act, but that question was treated as still open. Part of the judgment is as follows : ' It seems to me impossible, on the materials at present before me, to decide whether there has been any default in paying the instalments, and, if so, to what extent. If default had been admitted, or not disputed, there would, according to the original practice of this Court, have been two methods open to the plaintiff for the purpose of enforcing payment. She might either have adopted the course referred to at p. 336 of Belchambers' Practice, and applied for an order in the nature of a decree for an account and sale, or else have instituted a suit for the purpose of enforcing the charge. My attention has been drawn to certain cases in I. L. R., 22 Calc., the effect of which is to raise at least a question as to whether the practice referred to at p. 336 of Belchambers' Practice can now be

(1) 8 C. 703. (2) 14 C. 661. (3) 15 C. 667. (4) 17 C. 699.
(5) 19 C. 139. (6) 16 M. 436. (7) 21 C. 34. (8) 16 A. 415.
(9) 22 C. 813. (10) 22 C. 903. (11) 2 C.W.N. 33.

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adopted. No doubt the cases to which I refer are distinguishable in some [446] important respects from the present case, and it may become necessary when the proper occasion arises to consider and determine the effect and bearing of these cases upon the procedure which undoubtedly has been adopted in this Court in respect of charges made by decrees on properties situate within the jurisdiction of the original side of this Court, and which has been followed since the passing of the Transfer of Property Act.'

" A decree for maintenance, may, if necessary, provide for the immediate sale of property and payment into Court of a sum sufficient, when invested in Government securities, to produce an income equal to the allowance payable periodically for maintenance. This course has been sometimes followed in administration suits. But there are instances where the decree has made the payment of maintenance a charge on immoveable property and has reserved liberty to apply. This, having regard to the rulings in the case of *Gouri Sunker Pandey* v. *Abhoyeswari Debi*, is, it would seem, not sufficient. A decree, when it makes the payment of maintenance a charge on immoveable property should, when such property is 'within the territorial jurisdiction of the Court,' proceed to direct that, in default of payment the property charged, or a sufficient part thereof, be sold by the Registrar, or by a Receiver to be appointed of the property charged with, in either case, all necessary directions, and liberty should be reserved to the parties to apply.

"Assuming that a decree is made in this form, with all necessary directions for the sale of the property charged for the purpose of providing for the regular payment of the allowance for maintenance, the question is whether the directions of the decree can be carried out or whether, having regard to ss. 99 and 100 of the Transfer of Property Act, the only course open would be to proceed under s. 67. Section 100 provides that ' where immoveable property of one person is by act of parties or *operation of law*, made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property ; and all the provisions hereinbefore contained as to a mortgagor shall, *so far as may be*, apply to the owner of such property,' etc. Is a charge created by a decree for securing the payment of an allowance for maintenance payable thereunder periodically, such a charge as is contemplated by s. 100? Can it have been intended that a person to whom a monthly or quarterly or annual sum is payable for maintenance under a decree, and to whom no interest is payable, should, because the decree makes such payment a charge on immoveable property be estopped from proceeding under the decree for the sale of such property and be required to bring a *fresh* suit? Such a person would be placed at a disadvantage as compared with a mortgagee who has advanced money for consideration, who may realize his claim by a *single* suit and who, though bound to allow the debtor six months' time to redeem, is fully compensated by having the right to charge interest until realization of his claim.

[447] " The question may also be considered from another point of view. A decree containing directions for the sale of property within the jurisdiction of the Court, would be binding on the parties who, therefore, could not object to its being carried out. It would have the effect of preventing the application of the provisions of the Transfer of Property Act as fully as a contract for the purposes entered into by the parties."

R. BELCHAMBERS.

17th December 1897.

Thereupon, on 7th March 1898, an application was made before JINKINS, J., for a decree in terms of the Registrar's minute. 1898 MAY 4.

Mr. *Mitra*, for the plaintiff.

Mr. *Chakravarti*, for the defendant. ORIGINAL CIVIL.

And the following decree was, on 4th May 1898, accordingly drawn up:— 26 C. 441= 3 C.W.N. 139.

Suit for a declaration that the plaintiff, as the widow of Herumbo Chunder Dass, deceased, is entitled to proper maintenance and suitable accommodation for residence out of the properties in the hands of the defendant belonging to the estate of Herumbo Chunder Dass, deceased, for suitable allowance for such maintenance and suitable accommodation for such residence; for a declaration that such allowance forms a charge on the said properties; for possession of certain *stridhan* ornaments and articles forcibly and wrongfully taken possession of by the defendant; or to receive the value thereof, &c.

This cause coming on, on the 25th day of November last, the 25th day of April last, and on this day for further directions on the report of the Registrar of this Court, dated the 30th day of March last, and filed on the 21st day of April last, before the Hon'ble Lawrence Hugh Jenkins, one of the Judges of this Court, in the presence of Counsel for all the parties, it is declared that the sum of Rs. 35 a month is a fit and proper sum to be allowed to the plaintiff for her maintenance during the term of her natural life. And it is further declared that the eastern portion of the family dwelling house, No. 102, Machooabazar Street, in the plaint in this suit mentioned with the alterations suggested by the said Registrar in his said report at a cost not exceeding Rs. 1,200 woud be a suitable accommodation [448] for the residence of the plaintiff. And it is ordered and decreed that the defendant do out of the estate of Herumbo Chunder Dass, deceased, in the plaint in this suit named, pay to the plaintiff the sum of Rs. 1,345-12-0 for arrears of maintenance up to the 31st day of October last, and do out of the said estate monthly, and every month commencing from the first day of November 1897, pay to the plaintiff the sum of Rs. 35 a month for her maintenance, and do out of the said estate pay the costs of the alterations to be made to the eastern portion of the said family dwelling house within the limit aforesaid, and allow the plaintiff to occupy the said eastern portion of the said family dwelling house as her residence during the term of her natural life. And it is further ordered and decreed that the said monthly sum of Rs. 35, and the arrears of maintenance, and the costs of the alterations to be made to the said eastern portion of the said family dwelling house within the limit aforesaid, and the plaintiff's costs of this suit hereinafter mentioned, form a charge on the properties, belonging to the estate of the said Herumbo Chunder Dass, deceased, incumbered since the institution of this suit, and on the equity of redemption of the properties belonging to the said estate incumbered before the institution of this suit, and also on the sale proceeds of the properties belonging to the said estate sold by the Receiver appointed in suit No. 271 of 1888 (hereinafter referred to as the said properties) subject to any incumbrances which affected the said property before the institution of the suit, and which now attach to the said sale proceeds. And it is further ordered and decreed that the Receiver appointed in the said suit No. 271 of 1888 be appointed Receiver of the said properties, but that he do not take possession of the same or realize the rents thereof, until the further order of this Court. And it is further ordered and decreed that the said Receiver do sell the said properties, or a sufficient portion thereof for the purposes of

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this decree if and when necessary, the necessity for carrying out the directions to be determined by the Court. And it is further ordered and decreed that in the event of the said monthly sum of Rs. 35 being in arrears for two consecutive months, or in default of payment of the said arrears of maintenance, or the costs of the alterations to [449] be made to the said eastern portion of the said family dwelling house within the limit aforesaid, or the plaintiff's costs of this suit, the plaintiff be at liberty to apply to this Court on notice to the other parties, that the said Receiver do take possession of the said properties, and sell the same or a sufficient portion thereof as hereby directed, and do out of the sale proceeds pay all arrears of maintenance payable to the plaintiff and the costs of the said alterations within the limit aforesaid, and the plaintiff's costs of this suit and invest the balance or a sufficient portion thereof in Government Promissory Notes to provide for the payment of the said monthly sum of Rs. 35, payable to the plaintiff, and hold the same and residue, if any, subject to the further order of this Court. And it is further ordered and decreed that it be referred to the Taxing Officer of the Court to certify the amount of Court-fees which would have been paid by the plaintiff, if she had not been permitted to sue as a pauper, and to tax the plaintiff her other costs of this suit on scale No. 2, and it is further ordered and decreed that the defendants do out of the said estate pay the amount to be certified as aforesaid to the Government solicitor and to the plaintiff, her other costs of this suit, to be taxed as aforesaid, with interest thereon at the rate of six per cent. per annum from the date of taxation until realization. And the parties are to be at liberty to apply to this Court from time to time as may be necessary.

Attorney for the plaintiff : Kumar *S. K. Deb.*

Attorneys for the defendant ; Messrs. *Remfry and Rose.*

C. E. G.

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FULL BENCH.

Before Sir Francis W. Maclean, K.C.I.E., Mr. Justice Macpherson, Mr. Justice Ghose, Mr. Justice Hill and Mr. Justice Jenkins.

CHUNDI CHARAN MANDAL (*Decree-holder*) *v.* BANKE BEHARY LAL MANDAL (*Judgment-debtor*).* [3rd February, 1899.]

Civil Procedure Code (Act XIV of 1882), *s.* 310-*A—Civil Procedure Code Amendment Act (V of* 1891)*—Power of a Court to set aside a sale if the deposit provided for in s.* 310-*A be not paid within thirty days.*

[450] *Held*, [by the FULL BENCH].—Where the judgment-debtor has not within thirty days from the date of sale deposited in Court a sum equal to 5 per cent. of the purchase-money and the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered, less any amount which may, since the date of such proclamation of sale, have been received by the decree-holder, but has deposited in Court within the prescribed period a sum calculated by some officer of the Court as the sum to be deposited in respect of such 5 per cent. and of the sum specified in such proclamation of sale, and there is nothing to show that there was any mistake of the Court by which the judgment-debtor was induced to deposit an insufficient amount, the sale ought not to be set aside.

Makbool Ahmed Chowdhry v. *Bazle Sabhan Chowdhry* (1), distinguished.

* Reference to the Full Bench in Appeal from Appellate Order No. 152 of 1898.

(1) 25 C. 609.

[F., 6 C.W.N. 57 (60); Rel., 15 C.L.J. 89=16 C.W.N. 736=13 Ind. Cas. 365 (367); R., 30 M. 507=17 M.L.J. 291=2 M.L.T 347; 13 C.W.N 591 (593); 7 Ind. Cas. 52 (53); 9 Ind. Cas. 528 (529); 21 M.L.J. 631 (635)=9 M.L.T. 259 (260)=(1911) 2 M W.N. 143 (145)=9 Ind. Cas. 937 (938)=22 Ind. Cas. 842; Expl., 29 C. 626 (629, 632); D., 5 C.L.J. 204; 13 C.L.J. 467 (471)=10 Ind. Cas. 51 (54); 11 C.W.N. 116.]

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THIS appeal arose out of an application to set aside a sale. Within thirty days from the date of the sale, the judgment-debtor, under s. 310 A of the Code of Civil Procedure, deposited a sum less than the due amount required under the sale proclamation: the said amount was calculated to be due by the officer of the Court. But after the expiry of the limitation prescribed by s. 310 A, he deposited also the balance to the credit of the decree-holder. This amount the judgment-debtor contended, being the sum equal to 5 per cent. on the purchase-money he was not bound to deposit, inasmuch as the decree-holder was the purchaser, and as such he was not entitled to get that amount. On behalf of the decree-holder it was contended that the sale could not be set aside as the entire amount specified in the sale proclamation had not been deposited within the prescribed period of limitation. The Court of First Instance held that the payment of a sum equal to 5 per cent. on the purchase-money was a condition precedent to the reversal of a judicial sale, and the fact that in the present case the decree-holder himself was the purchaser would not take the case out of the operation of the section; and as it appeared on the face of the proceeding that the judgment-debtor did not pay the amount specified on the proclamation within the statutory period of limitation, it rejected the application and confirmed the sale. On appeal the District Judge reversed the decision of the lower Court and set aside the sale. **[451]** The material portion of his judgments was as follows:—

"On the first point, by s. 306 of the Code of Civil Procedure, the purchaser, whether decree-holder or other person, is required to pay down in cash ¼ of his bid, and there is a note to that effect in O'Kinealy's Code under this section, Title 'Decree-holder.' But s. 294 rather seems to lay down that a decree-holder selling off is not required to deposit any part of the purchase-money, and it is learnt from the Nazir that it is the practice. So it is somewhat in appellant's favour that he could not deposit 5 per cent. on purchase-money which was never paid.

"On the second point it is found that the amount stated in the sale proclamation was a sum which was calculated to the advertized date of sale with costs and interest to that date. But as a fact the sale did not take place till 12th November, some four or five days after; therefore it may have been necessary to make a further calculation. This Court has always held that it is inequitable to visit the laches of the Court itself or its officers on the parties and that is the view of the High Court in the unreported case No. 1467 of 1897, a copy of which is filed in the record.

"This Court has considered the rulings quoted by other side, and does not find they are against the appellant's contention. Hence it seems to this Court that under the last paragraph of s. 310 A, Civil Procedure Code, as a matter of equity and good conscience, the mistake was one of the Court itself, through its officer, and ought not to be visited on the appellant, and the order is, therefore, set aside, and the sale set aside but without costs, as it was appellant's mistake."

From this decision the decree-holder appealed to the High Court. On the appeal coming on for hearing the case was referred to a Full Bench by

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MACLEAN, C. J., and BANERJEE, J., on the 14th December 1898, with the following opinion:—

MACLEAN, C. J.—There are two points raised on this appeal: (1) Whether, if the decree-holder be the purchaser under a sale in execution, he is entitled to the 5 per cent. on the purchase money provided for in sub-section (*a*) of s. 310 A. (2) Whether if the deposit provided for by that section be not paid in within the thirty days as provided in the same section, the Court can set aside the sale.

On the first point I am of opinion that the decree-holder, if the purchaser, is entitled to the 5 per cent. on the purchase-money. Although he happens to be the decree-holder he is none the less the purchaser; and I can see no intention to exclude such a purchaser from the 5 per cent. benefit under the section. The 5 per cent. is undoubtedly given partly, I do not [452] say entirely, as some *solatium* to the purchaser for the loss of that which is, perhaps, a good bargain; and I fail to see why the decree-holder, if the purchaser, is not as much entitled to that *solatium* as an outside purchaser. If we were to accede to the respondent's contention we should have to read into the section after the word "purchaser" the words "if such purchaser be not the decree-holder." I can see no justification for such a construction.

As regards the second point the lower appellate Court finds as a matter of fact—the Judge says it was admitted—that the present respondent deposited some 48 rupees less than the amount required under the sale proclamation under s. 310A. It has been contended before us that the deficit was only 11 rupees or so, and not 48, but in the view I take, whether it were the larger or the smaller sum is quite immaterial. The judgment-debtor has to deposit (1) a sum equal to 5 per cent. of the purchase-money; (2) the amount specified in the proclamation of sale. The calculation of the 5 per cent. on the purchase-money (in this case 1,000 rupees) was a matter of the simplest arithmetic; the amount specified in the proclamation of sale was patent. Admittedly the judgment-debtor did not make the deposit within the prescribed period (the 30 days); if he did not, has the Court any jurisdiction to set aside the sale? Section 310A affords a special indulgence to the judgment-debtor; it gives him, if I may say so, yet one more chance of saving his property. But he can only avail himself of that special indulgence if as a condition precedent he make the deposit within the thirty days. If he do not do so, what power is there in the Court to extend the period and to deprive the purchaser of the rights he has acquired under his purchase? I can see none; nor have we been referred to any, either under any statute or as inherent in the Court itself. If he may extend the period for three days, why not for thirty, and so on? The Legislature has not thought fit to vest any discretion in the Court to extend the time, and if not, how can the Court arrogate to itself the power to do so?

If then the matter were *res integra* I should have felt no hesitation in saying that, unless the requisite deposit were made within the thirty days, the Court had no power to set aside the sale. But [453] it is said this view conflicts with certain decisions of this Court, and we are referred, in the first instance, to the case of *Ugrah Lall* v. *Radha Pershad Singh* (1). The first comment upon that case is that it is one under s. 174 of the Bengal Tenancy Act, the language of which differs materially from s. 310A of the Civil Procedure Code. In the former section the words are

(1) 18 C. 255.

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"the amount recoverable under the decree with costs," whilst in the latter the words are "the amount specified in the proclamation of sale." The former words are not, *qua* the amount, nearly so precise as the latter, and rather suggest that some enquiry may be necessary to ascertain the actual amount; and apparently the case of *Ugrah Lall* v. *Radha Pershad Singh* (1) proceeded upon the footing that, as s. 174 provides no machinery for ascertaining the amount but that in practice the amount was calculated in what is called "the office," (I presume that means by the Court,) the amount so calculated was to be taken as the amount payable under the section. That may or may not be so, but, at any rate, that case can be no authority for the present, in which the judgment-debtor has only to look at the proclamation of sale to ascertain the amount due to the decree-holder. In the case of *Ugrah Lall* v. *Radha Pershad Singh* (1) there would appear to have been an order of some sort made by the Munsif.

In the case of *Kabilaso Koer* v. *Raghu Nath Sukan Singh* (2), the Court would appear to think that before a sale can be set aside the provisions of s. 174 must be strictly complied with. I am not prepared to say that a decision upon the construction of s. 174 of the Bengal Tenancy Act can be regarded as a safe guide to enable us to ascertain the meaning of s. 310A of the Civil Procedure Code. Great reliance, however, is placed upon the case of *Makbool Ahmed Chowdhry* v. *Bazle Sabhan Chowdhry* (3). In that case, apparently, it was held that although the judgment-debtor had not deposited the 5 per cent. on the purchase-money, as he had deposited the amount calculated by the Court as the amount to be deposited, the sale ought to be set [454] aside. Speaking with the utmost respect for that decision, I am unfortunately unable to appreciate the principle upon which it is based. So far as the report shows, there is nothing to indicate that the decree-holder or the auction-purchaser had any thing to do with the ascertainment of the amount by the Munsif or what power the Munsif or any of his officers had to fix the amount; and if the amount were fixed behind the back of the decree-holder and auction-purchaser, the result would be that the amount fixed, perhaps by some absolutely irresponsible person in the Munsif's Court, is to be treated as the amount to be deposited instead of the amount stated with every distinctness by the act of the Legislature. This seems to me to be legislating not construing what the Legislature has said.

Now what is the finding in the present case? The District Judge says "the appellant deposited the amount calculated to be due by the officer of the Court." What officer? Who is the officer of the Court? The expression "the officer" would appear to indicate that there is some special officer whose duty it is to make these calculations. Where is then anything in the section which says the amount is to be calculated by any officer of any Court, or that any officer of any Court has any power to calculate the amount and decide what is the amount to be deposited? If a judgment-debtor instead of calculating the amount himself chooses to go to some irresponsible officer of the Court and that officer makes a wrong calculation, I fail to see why that circumstance should be regarded as a ground for extending the time for making the deposit under s. 310A. I can appreciate that different considerations might arise if the Court in the presence of the parties had by an order fixed the amount, but that is not the present case. It is conceded that the judgment-debtor in this case

(1) 18 C. 255. (2) 18 C. 481. (3) 25 C. 609.

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did not pay in the 5 per cent. on the purchase-money and the amount specified in the proclamation of sale within the thirty days, and that being so, the Court, in my opinion, ought not to have set the sale aside. The appeal consequently must be decreed with costs.

As, however, this view clashes with that expressed in the case of *Makbool Ahmed Chowdhry* v. *Bazle Sabhan Chowdhry* (1) [455] the case must be referred to a Full Bench. The question for the decision of which this case is submitted to a Full Bench is, whether if a judgment-debtor do not within thirty days from the date of sale deposit in Court (*a*) a sum equal to 5 per cent. of the purchase-money, and (*b*) the amount specified in the proclamation of sale, as that for the recovery of which the sale was ordered less any amount which may, since the date of such proclamation of sale, have been received by the decree-holder, but has deposited in Court within the prescribed period a sum calculated by some officer of the Court as the sum to be deposited in respect of such 5 per cent. and of the amount specified in such proclamation of sale, the Court can pass an order setting aside the sale under s. 310A of the Code of Civil Procedure.

Mr. J. T. Woodroffe, Babu *Srinath Dass*, and Babu *Purno Chunder Shome*, for the appellant.

Sir *Griffith Evans*, Dr. *Rash Behary Ghosh*, and Babu *Dwarka Nath Chuckerbutty*, for the respondent.

Mr. *J. T. Woodroffe*.—Section 310A of the Civil Procedure Code is different in its language from s. 174 of the Bengal Tenancy Act; the former section speaks of "amount specified in the sale proclamation," whereas the latter speaks of "amount recoverable under the decree with costs." Now the question is, whether miscalculation by an officer of Court will entitle the judgment-debtor to pay in the money so calculated, under s. 310A after thirty days, and to ask to set aside the sale. I submit not. Under s. 310A, the judgment-debtor is bound to pay the amount specified in the sale proclamation; and unless he deposits that amount he is not entitled to get a sale set aside, even if there be a miscalculation by an officer of Court. The words in s. 310A of the Code being more precise than in s. 174 of the Bengal Tenancy Act that section must be strictly construed. An Act must be construed according to the natural meaning of the language used, and not on the presumption that it was intended to leave the existing law unaltered. See *Norendra Nath Sircar* v. *Kamalbasini Dasi* (2), and also the cases of *Girish Chundra* [456] *Basu* v. *Apurba Krishna Dass* (3); and *Deb Narain Dutt* v. *Narendra Krishna* (4).

The cases of *Ugrah Lall* v. *Radha Persad Singh* (5), *Abdool Latif Moonshi* v. *Jadub Chandra Mitter* (6) have no application to the present case, as they are under s. 174 of the Bengal Tenancy Act. The case of *Makbool Ahmed Chowdhry* v. *Bazle Sabhan Chowdhry* (1) has a direct bearing, although that was decided upon the principle laid down in s. 174 of the Bengal Tenancy Act. Under s. 310A of the Code the judgment-debtor is to look into the sale proclamation, and he is to deposit the amount therein specified. He is not to go to an officer of the Court for any calculation.

It makes no difference if the decree-holder is the purchaser. The judgment-debtor is bound to pay 5 per cent. on the purchase-money. The amount is the *solatium* or compensation for a possibly good bargain.

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(1) 25 C. 609. (2) 23 C. 563 = 23 I.A. 18. (3) 21 C. 940.
(4) 16 C. 267 (270). (5) 18 C. 255. (6) 25 C. 216.

1899 FEB. 3. — FULL BENCH. — 26 C. 449 (F.B.) = 3 C.W.N. 283.

Sir *Griffith Evans* for the respondent.—The judgment-debtor has substantially complied with the terms of the Statute. The question really is what is the underlying principle of s. 310A of the Code of Civil Procedure, and what is the effect of an act of a ministerial officer of the Court. As to the effect of an act of a ministerial officer of the Court, see the case of *Abdool Latif Moonshi* v. *Jadub Chandra Mitter* (1). The practice has always been, whether right or wrong, to go to the execution clerk and ask of him the amount which the judgment-debtor is to pay. The judgment-creditor does not dispute the existence of this practice, and no evidence has been taken on this point. A party ought not to suffer for an act of Court. See the case of *Rodger* v. *Comptoir D'Escompte De Paris* (2). A man, if he does all that he can do, will be taken to have done all, if by mistake of the Court something is left **[457]** undone: see *Waterton* v. *Baker* (3). The sale proclamation is not given to the judgment-debtor, so he has to go to an officer of the Court to make a calculation. One must construe an Act intelligently and not as a grammarian. The object of s. 310 A is to give the judgment-debtor a chance to recover back his property. What does an act of Court mean? It ought not to be limited to the act of the presiding officer only. The case of *Makbool Ahmed Chowdhry* v. *Bazel Sabhan Chowdhry* (4) is in my favour, and the principle laid down in that case is correct.

Mr. *Woodroffe*, in reply.

The following opinions were delivered by the Full Bench (MACLEAN C. J., and MACPHERSON, GHOSE, HILL and JENKNIS, JJ.)

OPINIONS.

MACLEAN, C. J.—This appeal must succeed. I stated my reasons so fully when the matter was before me as a member of the referring Bench, that, on the present occasion, I only propose to add one or two very brief observations. I do not wish it to be understood, from the terms, of my previous judgment, nor do I think my language is susceptible of that construction, that I intended to lay down, as an absolutely hard and fast rule that, if the 5 per cent. on the purchase-money and the amount specified in the proclamation of sale were not paid within the thirty days, the Court was powerless to set aside the sale. There may be circumstances in a particular case which would render such a rule quite inequitable. Nor am I prepared to say that, if the judgment-debtor has been misled by a mistake of the Court, the consequences of that mistake ought to fall upon him. I do not propose to lay down what constitutes a mistake of the Court. I confine myself to saying that there was certainly none in the present case. The question submitted must be answered in the negative.

We are now asked, at this late stage of the proceedings, to remand the case, in order that what actually took place when the judgment-debtor deposited the money, may be ascertained. We ought to be very careful in acceding to such a request, and **[458]** thus re-opening the whole matter and re-starting the whole litigation.

The respondent never suggested this course either before the Subordinate Judge or before the District Judge or before the Division Bench. But, even if the respondent could prove what he suggests, that some information was given him as to the amount of the purchase money, and of the sum mentioned in the sale proclamation by some officer of the Court, and that

(1) 25 C. 216 (219).
(2) (1871) L.R. 3 P.C. 475.
(3) (1868) L. R. 3 Q. B. 173.
(4) 25 C. 609.

1899 FEB. 3. — FULL BENCH. — 26 C. 449 (F.B.) = 3 C.W.N. 283.

he relied on this information, it would not avail him. He must show, at the least, that it was the duty and within the province of the Court officer to give the information, and that it was incorrect. It is not suggested that any information was supplied in accordance with the rules which govern applications for information, and which are to be found in chap. IV of the General Rules and Circular Orders. It is only in compliance with these rules that information can, or ought to, be given.

I may perhaps add, that, as regards the case of *Makbool Ahmed Chowdhry* v. *Bazle Sabhan Chowdhry* (1) it now transpires that the amount was fixed by an order of the Munsif himself, in the presence of and with the assent of the pleaders of both parties. That makes a very material difference.

As to the 5 per cent. on the purchase-money that point has not been argued, and I adhere to what I have previously said.

The appeal must be allowed with costs.

MACPHERSON, J.—I am of the same opinion. No evidence was taken in the case, but accepting as correct all the facts as stated in the respondent's petitions of the 13th and 17th December, respectively, the Court would not, in my opinion, be justified, on those facts, in setting aside the sale. Those facts certainly do not show that the appellant did all that he possibly could in order to comply with the requirements of s. 310A, and that it was due to the mistake of the Court that an insufficient amount was deposited. It is not necessary to consider in the present case, whether the case of *Abdool Latif Moonshi* v. *Jadub Chandra Mitter* (2), to which I was a party, was correctly [459] decided. That was a case under s. 174 of the Bengal Tenancy Act, and it will be time enough to consider whether that case was correctly decided when the question directly arises.

GHOSE, J.—I agree in thinking, having regard to the facts of this case, that the question referred to the Full Bench must be answered in the negative. The principle upon which the case of *Makbool Ahmed Chowdhry* v. *Bazle Sabhan Chowdhry* (1) was decided is this; that if the Court which has to deal with an application under s. 310A, declares, though incorrectly, what is the amount that ought to be paid in by the judgment-debtor, and the judgment-debtor in accordance therewith deposits that amount, it would be manifestly unjust to hold that by reason of the shortness of the deposit, the judgment-debtor has lost the remedy given to him by that section, the mistake being a mistake of the Court. I still adhere to that principle. The facts of this case are, however, different. Here, the Munsif did not in any way declare what the amount was that should be paid; nor does it appear that the officer of the Court from whom the applicant is said to have received certain information in regard to the amount to be deposited, was the officer who was charged by the Court with the duty of supplying that information. And I think that in this case no facts have been proved, or found, upon which the Court should be justified in giving the applicant relief under s. 310A.

HILL, J.—I also think that the questions referred to the Full Bench must be answered in the negative, and as I quite agree with what has fallen from the learned Chief Justice now, as well as generally with the reasoning on which the order of reference proceeds, I do not think it necessary to add anything.

(1) 25 C. 609. (2) 25 C. 216.

JENKINS, J.—I too agree as to the terms in which the questions referred to the Full Bench should be answered. In my opinion it is essential to the respondent's success that it should be established that he has been prejudiced by the act of the Court and that the mistake that has been made is attributable to that act. What constitutes an act of the Court must depend on the circumstances of each case. It is clear, I [460] think, that a mere casual act by an officer of the Court cannot be treated as the Court's act. For an act to be clothed with that character it appears to me, generally speaking, that it must be the act of the prescribed officer acting in accordance with the prescribed rules of the Court. The scope of possible proof put forward by Sir Griffith Evans on the part of the respondent, to my mind, falls far short of that. On that ground I think that no remand should be granted, while if we deal with the case exclusively on the materials before the Court, then we can in my opinion only come to the same conclusion as that which has been expressed by the Division Bench. As the point is raised on sub-s. (*a*) of s. 310A of the Code of Civil Procedure, it appears to me that a man is no less a purchaser, and the money paid by him is no less the purchase-money because he also chances to the decree-holder purchasing with the leave of the Court, and for this reason I am of opinion that the judgment-debtor was bound to deposit the 5 per cent. mentioned in s. 310A, sub-s. (*a*).

1899 FEB. 3. — FULL BENCH. — 26 C. 449 (F.B.) = 3 C.W.N. 283.

S. C. G. *Appeal allowed.*

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26 C. 460.

APPELLATE CIVIL.

Before Mr. Justice Banerjee and Mr. Justice Rampini.

GOBINDA NATH SHAHA CHOWDHRY AND ANOTHER (*Plaintiffs*) v. SURJA KANTA LAHIRI AND OTHERS (*Defendants*).*
[4th January, 1899.]

Limitation (Act II *of* 1877), *sch.* (*ii*), *art.* 144—Putnidar *and* darputnidar, *dispossession of—Adverse possession—Relinquishment by the* putnidar, *effect of.*

The land in dispute along with other lands were let out in *putni* and *darputni* by the predecessor in interest of the plaintiffs. During the continuance of the said leases the land in dispute was taken possession of and held adversely by the defendants or their predecessor. The *putni* and *darputni* were relinquished by the *putnidar* and *darputnidar* in favour of the plaintiffs on the 29th June 1891, and they, on the 24th June 1893, [461] brought a suit for recovery of possession of the disputed land from the defendants. The defence was that the suit was barred by limitation.

Held, that art. 144, sch. II of the Limitation Act, applied to the case, and that the suit was barred by limitation, inasmuch as it was not brought within twelve years from the date when the possession of the defendants became adverse to the plaintiffs.

Nuffer Chandra Pal Chowdhry v. *Rajendra Lal Goswami* (1); *Gunga Kumar Mitter* v. *Asutosh Goswani* (2); *Sharat Sundari Dabia* v. *Bhobo Pershad Khan Chowdhuri* (3); and *Chinto* v. *Janki* (4), distinguished.

[N.F., 29 A. 593 = 4 A.L.J. 726 = A.W N. (1907) 185; F., 23 T.L.R. 92 (99); R., 5 Ind. Cas. 264 (265); 15 Ind. Cas. 146 (154) = (1912) M.W.N. 669 (680).]

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* Appeal from Appellate Decree No. 1889 of 1896, against the decree of B. C. Mitter, Esq., District Judge of Faridpur, dated the 24th of July 1896, affirming the decree of Babu Chandra Kumar Roy, Officiating Subordinate Judge of that district, dated the 24th of January 1895.

(1) 25 C. 167. (2) 23 C. 863. (3) 13 C. 101. (4) 18 B. 51.

1899 JAN. 4. — APPELLATE CIVIL. — 26 C. 460.

THIS appeal arose out of an action brought by the plaintiffs on the 28th June 1893 for recovery of possession of certain lands. The plaintiffs' allegation was that they were the purchasers of a moiety share of a pergunnah, certain *mouzahs* of which had previously been recorded as *putni* and *durputni taluqs* in the name of one William Sheriff. At a sale in execution of a decree for arrears of rent, the said *taluqs* were purchased by Ram Gopal, defendant No. 9, free from all incumbrances. After continuing in possession till 29th June 1891 the said Ram Gopal surrendered the *putni* and *darputni* to the plaintiffs by registered deeds of relinquishment. Thereupon the plaintiffs went to take possession of the lands in dispute, but were opposed by the principal defendants. The defence *inter alia* was that the plaintiffs' claim was barred by limitation, the *putnidars* and *darputnidars* not having been in possession of the said lands within twelve years before suit. The Court of first instance dismissed the plaintiffs' suit. On appeal the District Judge upheld the decision of the first Court on the ground that the suit was barred by limitation, inasmuch as the possession of the defendants had extended over more than twelve years before the date of the institution of the suit, notwithstanding that the date on which the relinquishment took effect was within twelve years. Against this decision the plaintiff appealed to the High Court.

Babu *Sreenath Das* and Babu *Kishory Lal Sarkar*, for the appellants.

[462] Babu *Mohiny Mohun Chuckerbutty*, for the respondents.

The judgment of the High Court (BANERJEE and RAMPINI, JJ.) was as follows :—

JUDGMENT.

This appeal arises out of a suit brought by the plaintiff appellants to recover possession of a certain land.

The defence raised various points, of which it is necessary to notice only one, namely, limitation.

The first Court dismissed the suit, and the decree of the first Court has been affirmed by the lower appellate Court, which has based its judgment only upon the ground of limitation.

In second appeal it is contended for the plaintiffs that the lower appellate Court is wrong in law in holding that the case is barred by limitation. The facts of the case as found by the lower appellate Court are shortly these : The land in dispute, along with other lands, had been let out in *putni* and *darputni* by the plaintiffs' predecessor in title, but whilst the *putni* and *darputni* were in existence, the defendants or their predecessors took possession of the land in dispute adversely to the *putnidar* and *darputnidar*, and they have continued in possession.

Subsequently, that is on the 29th June 1881, the *putni* and *darputni* were relinquished by the *putnidar* and *darputnidar* in favour of the plaintiffs, and the plaintiffs brought the suit on the 28th June 1893 to recover *khas* possession of the land in dispute. Upon these facts the lower appellate Court has held that, as the possession of the defendant had extended over more than twelve years before the date of the institution of the suit, it is barred by limitation, notwithstanding that the date on which the relinquishment took effect was within twelve years before suit.

In second appeal it is contended that this view is wrong, and that the plaintiffs are entitled to reckon time from the date when the relinquishment took effect, that being the date on which the possession of the defendant

became adverse to the plaintiff within the meaning of art. 144 of the second schedule of the Limitation Act, which governs this case.

In support of this contention *Nuffer Chandra Pal Chowdhry* [463] v. *Rajendra Lal Goswami* (1); *Gunga Kumar Mitter* v. *Asutosh Goswami* (2); *Sarat Sundari Dabia* v. *Bhobo Pershad Khan Chowdhuri* (3); and *Chinto* v. *Janki* (4) have been relied upon.

We are of opinion that the contention urged on behalf of the appellants is not sound, and that the cases cited are all distinguishable from the present. As the *putni* and *darputni* here came to an end not by reason of any sale for arrears of rent but by voluntary relinquishment by the *putnidar* and *darputnidar* in favour of the zemindar, the case cannot come under art. 121 of the second schedule of the Limitation Act. The article of the Limitation Act under which the case properly comes is, no doubt, art. 144, and the period of limitation is twelve years, running from the date when the possession of the defendants became adverse to the plaintiffs.

The question then is when did the possession of the defendants become adverse to the plaintiffs.

It is contended that it must be on the date when the relinquishment in favour of the plaintiffs took effect. The term "plaintiff," according to s. 3 of the Limitation Act, includes any person from or through whom the plaintiff derives his right to sue; and the present plaintiffs derive their right to sue for *khas* possession through the *putnidars* and *darputnidars* who were entitled to such possession, and who have relinquished their rights in favour of the plaintiffs. That such reliquishment operates only as a transfer of the tenure is clear, not only upon general principles, but also from the express terms of s. 12 of Reg. VIII of 1819.

That being so, the time from which limitation runs must be the date when the possession of the defendants became adverse to the *putnidars* and *darputnidars*, who were dispossessed by them, and that the date has been found by the lower appellate Court to be more than twelve years before the institution of the suit.

[464] It remains now to consider the cases cited. The first case, *Nuffer Chunder Pal Chowdhry* v. *Rajendra Lal Goswami* (1), was clearly one under art. 121 of the second schedule of the Limitation Act, and can have no bearing on the present case. In the second case cited, *viz.*, *Gunga Kumar Mitter* v. *Asutosh Goswami* (2) the landlord had become entitled to possession not by virtue of relinquishment by the tenants, but by reason of the sale of the under-tenure for arrears of rent; and so that case also is distinguishable from the present.

In the case of *Sharat Sundari Dabia* v. *Bhobo Pershad Khan Chowdhuri* (3) it was held that limitation did not run in favour of a trespasser, and as against the zemindar, so long as the zemindari was in the possession of an *ijaradar*, because the zemindar upon the expiry of the *ijara* became entitled to possession in his own right, and not through the *ijaradar*. The same thing cannot be said in this case.

It cannot be said that the zemindar became entitled to *khas* possession by reason of the *putni* having come to an end otherwise than by the voluntary act of the putnidar. The case of *Chinto* v. *Janki* (4) was one of a mortgagor suing for redemption. The plea of limitation was there urged by a person who had taken adverse possession as against the mortgagee whilst the mortgaged property was in the possession of the mortgagee; and it was held that such adverse possession could not affect

(1) 25 C. 167. (2) 23 C. 863. (3) 13 C. 101. (4) 18 B. 51.

1899 JAN. 4. — APPELLATE CIVIL. — 26 C. 460.

the right of the mortgagor to redeem, he not claiming through the mortgagee.

In the present case, as we have said above, the plaintiffs became entitled to *khas* possession by the relinquishment of the *putnidars* and *darputnidars*, and so they must be held to be affected by the adverse possession that was taken against the *putnidars* and *dar-putnidars*, whose rights they had acquired through their voluntary relinquishment.

It was argued that if the view taken by the lower appellate Court be correct, it would prejudicially affect the rights of the [465] landlord, because he would be affected by adverse possession before he became entitled to possession himself.

The answer to this argument is this, that the zemindar is not bound to accept any relinquishment by the *putnidar*. That was held in the case of *Heera Lall Pal* v. *Nil Monee Pal* (1) and in *Judoo Nath Ghose* v. *Schoene Kilburn & Co.* (2).

Where a zemindar finds that the *putnidar* or other permanent tenant, after having allowed a trespasser to hold adverse possession of any land included in the permanent tenure for more than twelve years, offers to relinquish it, the zemindar can always refuse to accept the relinquishment; and if rent remains unpaid, he can bring the tenure to sale for arrears of rent, and the purchaser at such sale would be entitled to avoid any incumbrance created by the defaulting *putnidar*, and would not be bound by any adverse possession held against the latter.

For all these reasons we are of opinion that the Court of Appeal below was right in holding that the suit was barred by limitation; and the appeal must consequently be dismissed with costs.

This judgment admittedly governs the analogous appeals, which will accordingly be dismissed with costs.

S. C. G. *Appeal dismissed.*

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26 C. 465 = 2 C.W.N. 609 = 3 C.W.N. 781.

APPEAL FROM ORIGINAL CIVIL.

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, Mr. Justice Prinsep and Mr. Justice Ameer Ali.

THE EAST INDIAN RAILWAY COMPANY (*Defendants*) v. KALLY DASS MOOKERJEE (*Plaintiff*).*

[15th, 16th, 19th and 20th December, 1898, and 17th February, 1899.]

Railway Company—Duty to carry passengers safely—Explosion in carriage—Negligence—Onus of proof—Ignorance or knowledge of law as a defence—Its limitation—Damages, measure of—Costs.

[466] *Held* by the appellate Court (affirming the decision of the Court below):—In providing for the safety of their passengers it is the duty of a railway company to exercise such a degree of care, at the very least, as may reasonably be required from them under all the circumstances of the case; and where an accident happens they must show that it was not preventible by any care or skill.

If a railway-carriage be rendered dangerous to the passengers travelling therein by reason of the fact that there are fireworks in it, and if the carrying of the fireworks could have been prevented by the exercise of due care on the part of the railway company, they are liable for damages for negligence should an explosion of the fireworks occur.

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* Appeal from Original Decree No. 20 of 1898, from the decision of Mr. Justice P. O'Kinealy in Suit No. 723 of 1896.

(1) 20 W. R. 383. (2) 9 C. 671.

Where loss of life and damage have resulted from the explosion of fireworks in a passenger carriage, the *onus* is on the railway company to show that they took due care to prevent the conveyance of fireworks in that manner, and not on the plaintiff to show that they did not. **1899 FEB. 17.**

Scott v. *London Dock Co.* (1), *Kearney* v. *London, Brighton and South Coast Railway Co.* (2), *Byrne* v. *Boadle* (3), *Cotton* v. *Wood* (4), *Foulkes* v. *Metropolitan Railway Co.* (5), *Welfare* v. *London and Brighton Railway Co.* (6) and *Daniel* v. *Metropolitan Railway Co.* (7), referred to. APPEAL FROM ORIGINAL CIVIL.

Costs, in a case like the present, should be allowed as between attorney and client, so as not to exhaust the damages or the larger portion thereof.

Narayan Jetha v. *Municipal Commissioners of Bombay* (8), *Sorabji Ratanji* v. *Great Indian Peninsula Railway Co.* (9), and *Ratanbai* v. *Great Indian Peninsula Railway Co.* (10), followed. **26 C. 465 = 2 C.W.N. 609 = 3 C.W.N. 781.**

Per O'KINEALY, J. (in the Court below) :—In the absence of evidence that the defendants had taken steps to prevent passengers from taking fireworks into the carriage, the Court cannot presume that the fireworks were taken clandestinely into the compartment, notwithstanding the fact that such carriage of fireworks is an offence, and that every one is presumed to know the law.

[467] The maxim that every man is presumed to know the law is limited to the determination of the civil or criminal liability of the person whose knowledge is in question. It cannot legitimately be made use of where (as in the present case) the parties are different and distinct from him.

[R., 112 P.R. 1913 = 284 P.L.R. 1913 = 188 P.W.R. 1913 = 20 Ind. Cas. 425 ; U. B. R. (1897—1901), 337.]

THIS was an action for damages by the plaintiff as the father and administrator to the estate of his son who died from injuries sustained in an accident that occurred on the defendants' railway on the 27th April 1896. The plaintiff alleged that the defendants had contracted to carry the deceased safely by their railway ; but that they had acted so negligently and improperly that while the deceased was travelling in a third-class carriage belonging to the defendants, it took fire ; and that the deceased, being severely burnt, fell through the floor of the said carriage, and ultimately died of the injuries received.

The plaintiff also alleged upon information and belief that the said fire was caused by the explosion of a number of fireworks which, through the negligence and improper conduct of the railway company's servants, and in violation of the rules of the defendants in that behalf, had been allowed to be carried by certain other persons in the said carriage. The plaintiff charged that the death of his said son was caused by the wrongful act or neglect of the defendants or their servants; and, as administrator to the estate of his said son, he claimed Rs. 8,000 damages, whilst, as damages for the loss to himself from the death of his said son, he claimed Rs. 7,000, alleging that the said son at the time of his death was of the age of twenty years only and was in Government employment at a monthly salary of Rs. 25.

In the lower Court,

Mr. *A. Chowdhury* and Mr. *K.S. Bonnerjee*, appeared for the plaintiff.

Mr. *Hyde* and *J. G. Woodroffe*, appeared for the defendants.

The judgment appealed from was as follows :—

O'KINEALY, J.—In this case the plaintiff is the father and the administrator of the estate of one Atindra Nath Mookerjee, who was fatally

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(1) (1865) 3 H. & C. 596.
(2) (1870) L.R. 5 Q.B. 411 ; and on appeal (1871) L.R. 6 Q.B. 759.
(3) (1863) 2 H. & C. 722.
(4) (1860) 8 C.B.N.S. 568.
(5) (1880) L.R. 5 C.P.D. 157.
(6) (1869) L.R. 4 Q.B. 693.
(7) (1868) L.R. 3 C.P. 593 ; and on appeal (1871) L.R. 5 E. & I. Ap. 45.
(8) 16 B. 254.
(9) 7 B.H.C.R. (O.C.) 119, note.
(10) 7 B.H.C. (O.C.) 120, note = (1871) 8 B. H.C.R. (O.C.) 130.

1899 FEB. 17. — APPEAL FROM ORIGINAL CIVIL. — 26 C. 465 = 2 C.W.N. 609 = 3 C.W.N. 781.

injured on the 27th of April 1896 while travelling as a passenger on the East Indian Railway between the [468] stations of Secundrabad and Dadri. Atindra Nath Mookerjee died on the 5th of May 1896 of the injuries sustained by him, and the plaintiff charges that his death was caused by the neglect of the defendants. The relief claimed is of a two-fold character. The sum of Rs. 7,000 is claimed as damages for the loss resulting to the plaintiff from the death of his son, and a further sum of Rs. 8,000 is claimed by the plaintiff as damages for loss to the estate of Atindra Nath Mookerjee, such loss also having been occasioned by the neglect of the defendants. As to this latter portion of the relief claimed by the plaintiff I may say at once that no evidence has been given to show that any pecuniary loss or damage was caused to the estate of Atindra Nath Mookerjee by the neglect complained of, and I therefore dismiss this portion of the claim.

The case for the plaintiff is that on the 25th of April 1896 Atindra Nath Mookerjee purchased from the defendants a 3rd class ticket from Bally in the District of Hooghly to Rawalpindi and proceeded on his journey: that on the 27th of April while on that journey the 3rd class carriage in which Atindra Nath Mookerjee was being carried caught fire owing to the negligence of the defendants and he was severely burnt in different parts of his body; that he was further injured by falling through the burning floor of the carriage, and in consequence of these injuries he died on the 5th May 1896.

Specific charges of the negligence and improper conduct, which the plaintiff brings against the defendants are set forth in the 2nd and 3rd paragraphs of the plaint. They are, first, that the fire was caused by a number of fire-works, namely, bombs, which through the negligence and improper conduct of the servants of the defendants and in violation of the rules in that behalf had been allowed to be carried in the carriage by certain persons other than Atindra Nath Mookerjee; *secondly*, that at the time the fire took place the doors of the carriage were locked owing to the negligence and improper conduct of the defendants, and that thereby Atindra Nath Mookerjee was prevented from escaping from the burning carriage; and *thirdly*, that owing to defective [469] arrangements in the connection cord and other appliances of the train to which the carriage was attached (such defective arrangements being the result of negligence and improper conduct on the part of the defendants) there was great delay in bringing the train to a stand and by reason thereof the escape of Atindra Nath Mookerjee from the burning carriage was prevented. Finally there is a general charge that the death of Atindra Nath Mookerjee was caused by the wrongful act, neglect or default of the defendant Company and their servants.

The defendants do not admit the plaintiff's right to institute this suit, or that they entered into any contract of carriage with Atindra Nath Mookerjee. They deny that they or their servants were guilty of any negligence, or unskilful or improper conduct regarding him. They deny that the doors on both sides of the carriage were locked at the time the fire took place, and they also deny that the arrangements in reference to the connection cord or any other appliances of the train were in any way defective. The second paragraph of the written statement is as follows:—" The defendants admit that on the 27th of April 1896 certain fire-works or bombs exploded in a 3rd class carriage forming part of the train known as the No. 5 up Bombay mail at mile No. 926¼ on their Railway between Secundrabad and Dadri stations, and several passengers

in the said train were injured by the said explosion, but they deny that the said explosion was due to any negligence or improper conduct on the part of themselves and their servants or that their servants allowed or permitted the fire-works and bombs to be carried by any person in the said train as alleged in the second paragraph of the plaint."

From the evidence given at the hearing it appears that Atindra Nath Mookerjee, who was the son of the plaintiff, was a clerk in Government service in the Arsenal at Rawalpindi. He was on leave of absence in the month of April 1896 during which time he lived with his father at Agarparah in the District of the 24-Pergunnahs. On the 24th of April 1896 he proceeded to join his appointment at Rawalpindi. On that day he went to [470] Bally from Agarparah and stayed the night in the house of Sarut Chunder Chatterjee, the husband of the plaintiff's sister. On the next day Atindra Nath Mookerjee left for Rawalpindi by the train leaving Bally at about 2 o'clock in the afternoon. He obtained a 3rd class ticket for the journey which was purchased for him by Sarut Chunder Chatterjee. This afternoon train is called the No. 5 passenger train, and it preserves that name all the way from Calcutta to Tundla near Agra where the Indian Midland Railway joins the East Indian Railway. At that place the No. 5 passenger train becomes the No. 5 up Bombay mail, which name it retains from Tundla on to Ghaziabad if not during the whole of the journey on to Kalka. At Tundla there are extensive changes made in the No. 5 up passenger train. The changes that were made in the train by which Atindra Nath Mookerjee was travelling appear to have been as follows :—The engine which had taken the train from Calcutta to Tundla was taken off and another engine known as No. 96 class F was attached to the train. Two carriages, one belonging to the Great Indian Peninsular Railway and another to the Indian Midland Railway, were attached to rear of the train; a brake-van belonging to the Indian Midland Railway, which was found to be defective at Tundla, was taken off and another brake-van substituted and the train was furnished with a communication cord. One end of this cord was attached to a steam whistle on the engine and the other to a wheel in the guard's van at the rear of the train. When the train was finally made up at Tundla it consisted of the engine No. 96 with its tender, both of which were fitted with hand brakes, a brake-van also fitted with a hand brake, fourteen carriages of different classes belonging to the East Indian Railway Company, two carriages belonging to the other lines which I have mentioned above and the guard's van at the end of the train. Before this train left Tundla the communication cord was tested and found to be in good working order, and so far as I can gather from the evidence the train, when it left Tundla, was in a fit condition for the journey before it. On the 27th of April 1896 the train arrived at Aligarh about noon ; there it stopped 10 minutes, after which it proceeded on its journey to Secundrabad where it arrived shortly before [471] 2 o'clock in the afternoon. It then proceeded on towards Dadri, and it was on the way between these two stations when the fire broke out which caused the deaths of Atindra Nath Mookerjee and eleven other persons. At this time the train was running on a down grade of one in five hundred at a speed of 33 miles an hour.

Leaving aside for the moment the documents which have been put in evidence as throwing light upon the occurrence of the fire, three witnesses have been examined with reference to it on behalf of the defendants:

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These are William Henry Derry, a permanent way inspector in the employment of the defendants, who was travelling as a passenger in the train, William Gibson, the driver of the engine, and Carapiet John Hyrapiet, the guard of the train. There are also in evidence the statements of these witnesses made upon an officer's joint inquiry into the cause of the accident which was held at Ghaziabad on the 1st of May 1896, and there is also the statement of Noor Ally, the brakesman of the forward brake-van who was also examined upon that inquiry. Derry seems to have been the first person who noticed the fire. He was in a second class composite carriage which was the fourth vehicle from the rear of the train. Two carriages belonging to the Indian Midland Railway and the Indian Peninsular Railway were the only carriages between him and the guard's van. He says that the first thing he noticed was a smell of oily burning jute; that upon perceiving this he looked out of the carriage on both sides along the axle boxes thinking an axle box was running hot, but he saw nothing. About two minutes afterwards a volume of smoke passed the carriage in which he was sitting. He jumped up, and as he did so there was a loud explosion. He looked out and saw a ball of fire drop opposite the carriage in which he was on the right-hand side. He then goes on to say :—" I immediately opened the carriage door seeing there was something seriously wrong. With my face in the direction of the engine I stooped and caught the cord and pulled it towards me. I pulled the cord into the carriage with me as much as I could with the object of sounding the whistle. I pulled in eight or ten feet. I then released the cord as it was useless my hanging on to it, having done all I could. I [472] then looked to the guard's brake and saw him exhibit a red flag. I pulled in the cord that the slack might be on the brake-van side. I did not hear the whistle. When pulling in the cord I heard the noises of the passengers. When I saw the red flag I metioned to the guard to apply his brake and wind up the cord. He motioned back to me that he had done so. Seeing the confused state of the passengers I got out and walked to the rear brake-van on the foot-board telling the passengers not to be alarmed as the train was coming to a stand. I noticed the speed slackening when I got out of the carriage to go back. I saw the ball of fire at mile 925, telegraph post 16, gate No. 36. I went along the foot-boards back to the rear part of the brake. As soon as the train slackened speed sufficiently to allow me to run faster than it was moving, both I and the guard jumped out and ran ahead so that by the time the train had come to a stand we were practically opposite the burning vehicles. Before the train stopped the passengers were tumbling or jumping from the train. They were either tumbling or jumping I cannot say which it was. I cannot say exactly where the first person fell out of the train. I can say where he was picked up, about 925, telegraph post 20. The train came to a standstill at 926, telegraph post 15, nearly a mile from where I saw the fire."

Hyrapiet, the guard, says :—" A loud report sounding from the front part of the train first attracted my attention. * * * As soon as I heard the report, I looked out and saw smoke issuing from the centre part of the train. I at once applied my brake and then pulled the communication cord. Then I took my red signal flag and waved it towards the driver. I opened the lobby door and put out the flag on the right side. I observed the permanent way inspector Mr. Derry beckoning me to put on my brake. He was in the third or fourth carriage from the rear brake. I observed men jumping out of the train. When I saw

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the men jumping out, I knew there was a serious accident, something radically wrong. I also then noticed men on the foot-boards. In the meantime the train slackened speed and came to a stand. It was just a few posts past mile 926. Before the train came to a standstill I jumped from the brake-van, ran towards the front part of the train, and saw the postal van and [473] a third class carriage on fire. I immediately detached the third class carriage from the rear part of train and signalled to the driver to pull up the train. Before uncoupling the rear part I had seen Mr. Derry. He was standing by. I saw the driver coming from the engine. He said something to Derry and then went back to the engine. Then I told the brakesman to detach the two burning carriages from the front portion of the train. He did so, and I signalled to the driver to pull up ahead."

The account of the accident given by William Gibson, the driver, is as follows:—

"The whistle was opened wide. That was the first thing I noticed. I looked back without altering my position and saw the brakesman in the front brake showing the red signal. I immediately shut off steam and put the tender brake on, at the same time telling my second native fireman to put the engine brake on. When I had tightened up the tender brake I looked back upon that side of the train. I saw a number of people on the foot-boards of some carriages. I stepped to the left-hand side of the engine, reversed the lever, opened steam to the cylinders and steam to the steam-standing gear. I then looked down on the left-hand side of the train and saw flames issuing from some of the carriages. As the engine slackened speed I jumped off and went back. Where I saw people standing on the foot-boards was towards the centre of the train. The brakesman was showing the red flag. I looked back on both sides of the train. I do not remember seeing the guard when I looked back. The place where I jumped off was on mile 926 near a culvert. I cannot tell exactly where by reference to the telegraph posts. After I got down, the train may have gone about ten yards. It was about 500 yards from the place where the whistle sounded to the place where the train stopped. I did not notice at the time what mile we were on when the whistle was sounded. I ascertained that afterwards, when we got to Ghaziabad, I enquired and got information from some one else. When I jumped off the engine and went back, I met the permanent way inspector Mr. Derry. I told him to detach the burning vehicles and I would draw the train up. He said he knew what to do and told me to go back to the engine and he would give me the signal. I met him seven or eight [474] carriages from the engine. I went back to the engine and having received the signal from both Derry and the guard, and seeing that the passengers were clear of the vehicles, I drew the front part of the train for about fifty yards when I got the signal to stop. The burning vehicles were then detached from the front part of the train. I received signals and drew that portion of the train another fifty yards when I again received signals to stop."

According to the evidence of Mr. Derry, the explosion occurred on mile 925 at telegraph post No. 16, gate No. 36, and the train stopped with the burning vehicles at mile No. 926, telegraph post 15, nearly a mile from the place where he saw the ball of fire. According to the evidence of Gibson, the train was drawn up to a standstill within 500 yards of the place where the whistle sounded. Assuming that he means 500 yards from the place where his brakes came into full action, even then the train must have proceeded about a thousand yards after the

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explosion occurred before the driver's attention was attracted, and this delay has not been clearly explained. I am inclined to think that neither Derry nor the guard acted with the promptitude their evidence would seem to show, but it must be remembered that from the explosion to the stopping of the train was hardly 2½ minutes. Allowance must be made for the surprise of the moment, and a very slight delay in taking action would account for a good deal of the time during which the connecting cord remained unused and the whistle silent. This delay may have been partly due to the fact that the guard stopped to apply the brake to his own van before pulling the communication cord, or it may have been partly due to interference with the communication cord by Derry and the other passengers in the train, when the accident occurred. Indeed the connecting cord itself may have become defective owing to the explosion, for though the whistle was undoubtedly sounded, it is not clear by whom the cord was pulled at the time or from what part of the train that was done. I can find nothing to blame in the action of the train officials from the time the explosion took place till the train came to a standstill. I think they did the best they could under the circumstances.

[475] What happened after the train stopped and the burning carriages were detached was as follows: The front part of the train was taken by the driver Gibson to Dadri Station. He says it was ten or twelve minutes past two in the afternoon when the train was brought to a standstill; that about twenty minutes after that he left for Dadri and reached there at about quarter to three. From there he sent two telegrams to Ghaziabad for additional carriages to convey the wounded passengers and for medical assistance. Having done this, he proceeded back to Dadri with a bhistee and some porters, arriving there at about a quarter to four. In the meantime what happened at the scene of the accident was this: The guard and some of the European passengers went back on the line towards Secundrabad for the purpose of picking up the wounded, but finding it impossible to carry them back to the train the guard and Derry with the assistance of the European passengers and some coolies shunted the guard's van back to gate No. 36 which Derry fixes as the place at which the explosion occurred. What took place with reference to assisting the injured persons is told by the guard Hyrapiet and by Derry. Hyrapiet says:—" After the first portion of the train left for Dadri I went with some military officers who were passengers in the train to search for the persons who had fallen out of the train. I found a man very badly burnt. He was lying near the fencing wires. This was about 150 yards from the brake-van and about 30 or 40 yards further from the burning carriages which were the 7th and 8th carriages from the rear of the train at the time of the accident." Hyrapiet then goes on to say:—" There was an officer with me, I think Captain Maclean, when I found out the first man. There was a Major Grant also there. This officer Maclean went with me when I went to search for the men. There were three coolies, but no other Europeans. I volunteered to carry the wounded man to the brake-van. The officer picked up the man and put him on my back and I carried him to the brake-van. I don't know the name of this wounded man. Captain Maclean accompanied me to the van. We got hold of a blanket, put the man into the blanket, and lifted him by holding the four corners of the blanket into the van. I was completely done up with the heat and the picking up of the man. I consulted the military **[476]** officers and decided that it was advisable to detach the van and push it along the line. I did this with the assistance of the coolies and

the military officers. There was another man carried by a military officer in his arms. This other man was found over the fencing wires about 50 yards from the man I picked up. He too was carried to the brake-van. We hand-shunted the brake-van down the line and picked up the men who were lying on both sides of the line, and put them into the van. I picked up about 14 or 15 altogether. We shunted the brake-van down to gate No. 36; that was where I originally heard the report. I say that because there was a third class carriage door lying there. The report which I heard was the bursting of a third class carriage door. The doors and some of the splinters were lying there then. I cannot say if it was a door belonging to a third class carriage or to the combined postal and third class van. I cannot say if I found more than one door. There was a door and a lot of broken pieces. They were on one side of the line almost opposite the gate on the right facing Dadri; that would be on the east side of the line. There was a passenger completely charred and burnt almost shapeless just about a few yards from there. He was dead. I thought it best to leave the body there with a man in charge." Then he says:—" I forgot to say that I found four bamboo bombs which I locked up in my box and gave to the police. These were four pieces of bamboo about six or seven inches long, hollowed in the centre and the bamboos were burnt. They were slips of bamboo. From what I picked up I could say that the diameter of the bamboo was about 2½ inches. At that time I did not know what they were, but the military officer told me to look after them and lock them up in my box. I could not swear to the exact length of the pieces of bamboo. I should say it was between six and eight inches. I subsequently made them over to the police. These were picked up almost where the dead man was, a little past the gate almost close to where the carriage door was found." Then he says:—" An English-speaking Bengali clerk was picked up half way between the gate house and where the train stopped. I can't say if there were more Bengalis than one amongst those I picked up. I noticed a few **[477]** Marwaries were there. The Bengali lad was picked up clear of the rails. I cannot say exactly the particular spot. At that point the fencing would be about 18 or 20 yards from the rails." Having got all the wounded passengers into the van the guard tried to relieve the sufferings of the wounded, and with the aid of some coolies the van was shunted back to the rear portion of the train. By that time the driver had returned with the front portion of the train from Dadri, and oil was obtained from him for the purpose of putting upon the wounds of the injured persons.

Derry's account of the picking up of the wounded and dying is this: After he had sent the driver to Dadri he noticed that one of the passengers who had jumped out was being picked up by another passenger. He says:—" I went to his assistance. The guard was there too. The wounded man was brought into a second class carriage and I attended to him. One of the gentlemen passengers and myself then walked back to attend to the burnt people that were lying on the road. The brake-van was uncoupled and shunted back. This gentleman and myself went on ahead and the brake-van followed us. We walked back to gate No. 36 and gave water to the wounded and shade to those lying in the sun. My gangmen, line men, they were working close by, they came running up, they had blankets and we tied them to trees to give shade from the sun. I saw all the injured passengers; amongst them I saw one young Bengali Babu. I cannot say what his name was. There was only the one

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Bengali injured. He was about 40 or 50 yards from the gate No. 36 on the Ghaziabad side. He was lying on the left-hand side in what we call the three-foot way. That would be about 6 feet from the rail on the left-hand side of the line. He was conscious. I spoke to him, he spoke to me. I gave him some water and he said I had saved his life. I noticed all his body from above his neck down to his waist all was burnt. He was put in to the brake-van along with the others." Before all the wounded were picked up, Derry went back and got oil from the driver which he sent back to the brake-van where the wounded were lying. He then attended to the line.

Atindra Nath Mookerjee himself made two statements with regard to the accident, one on the 28th of April, and the other [478] on the 30th. They were taken down by Inspector Fitzpatrick of the Government Railway Police, and these statements are to the effect that he was in the carriage where the explosion occurred; that it was an explosion of fire-works which were being carried in the compartment in which he was, and the effect of the explosion was that the seats and planks underneath the carriage gave way and he was thrown down senseless. He says that he did not see the fire-works in the compartment, and was not aware of their presence until the explosion took place. There were some 12 or 14 passengers in the compartment with him. The two statements do not agree in respect to the place in which Atindra Nath Mookerjee was at the time of the accident, and when we consider his condition at the time they were made and the extreme suddenness of the accident, very little definite information can be expected from them. In the first statement he says that he was in a compartment in the front of the post office van, in the second statement he says that the compartment in which he was travelling was behind the post office, and I am satisfied that the second statement is true. None of the witnesses who were examined at the trial can speak to the compartment where the explosion took place, but it is quite clear that when the train came to a standstill, the post-office van and the carriage to the rear of it were in flames. The front part of the post-office van, though filled with smoke, was not in a blaze at the time the train came to a standstill, nor was the rear of the 3rd class carriage immediately behind, although the front part was. We have the additional fact that there was a strong nearly head wind against the train, the effect of which would be to drive the fire to the rear instead of the front. Taking the whole evidence into consideration, I am of opinion that the explosion took place in the 3rd class compartment in the rear of the post office van.

As to the cause of the explosion I have no doubt that it was caused by the fire-works which were carried by one or two of the passengers in the compartment. It was suggested for the plaintiff that the gas cylinder which was carried in the postal-van, was defective, and that it was the gas in the cylinder which exploded and caused the accident; but I believe that the explosion [479] of the gas cylinder took place after the train came to a standstill and not before.

It was contended for the plaintiff that the evidence showed that the communication cord was defective and had failed to sound the whistle when pulled, and that in any case steps had not been taken in proper time to bring the train to a standstill. Now as I have already said I believe that there was a considerable delay in attracting the driver's attention, but I do not believe the cord was defective before the explosion. It was as I have said tested and found in good order at Tundla, and there is nothing to show it did not continue in good order till the explosion

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occurred. That the whistle was sounded by the communication cord being pulled Mr. Gibson swears to and I believe him. He impressed me as being on the whole a careful and accurate witness. Who was pulling on the cord when the whistle was sounded is not clear. If the communication cord was not defective before the explosion, which was the cause of the accident, no defect which could be attributed to the explosion would, I think, be sufficient to support this part of the plaintiff's case; but even if I am wrong on that view it does not seem to me that the plaintiff's case would be advanced in the least. Assuming the explosion to have taken place at gate No. 36, I think it is clear that Atindra Nath Mookerjee either fell out of or tumbled out of the train within half the distance from that gate to where the train came to a standstill, so that even if the train had been brought to a stand within half the distance in which it was, the effect so far as Atindra Nath Mookerjee is concerned would have been the same. There is no evidence before me to show that his death was due in any respect to injuries caused by his falling out of the train. It was solely due, as I gather from the evidence of the doctor, to the injuries which he received from the burning, that is to say, it was due to the injuries which he received while in the carriage at and after the explosion occurred, and so far as I can see no quickness in stopping the train could have prevented those injuries.

It was also said that the brake power upon the train was insufficient. As regards this, the evidence satisfies me that the brake [480] power was ample for the train, and that even had the train been fitted with the steam brakes, as it was contended for the plaintiff it should have been, there would not be more than 5 or 6 seconds gain in stopping the train, and I do not think that that additional gain would have in any respect saved Atindra Nath Mookerjee from the injuries he received and which were the cause of his death. It is true that the Agent of the East Indian Railway seems to have considered it a matter of regret that the engine had not been fitted with steam brakes, and that was relied on before me as an admission that the brake power was insufficient, but I am inclined to place more reliance on the evidence of the practical men who were called at the trial than to the remarks on this subject contained in the report to the Directors. It was also said that the engine itself was of an obsolete type and was insufficient, but I do not think the plaintiff has made out a case for relief on this ground. Neither do I think that the plaintiff has made out a case on the ground that the doors on both sides of the train were locked at the time of the accident. That, I believe, was not the case. It is true the evidence shows the carriage doors were provided with catches at the bottom to prevent the doors from flying open and these catches would in the ordinary course of things be fastened, but I cannot hold that the use of these catches which were provided for the safety of the passengers is evidence of neglect or default on the part of the Railway Company, merely because they may have been the cause of retarding the escape of the passengers from the burning train.

It was also contended by the plaintiff that great delay took place after the accident in helping the wounded and in providing the medical assistance, and it was suggested that this delay had contributed to the death of the plaintiff's son. I do not think the suggestion is well-founded. Besides, it forms no part of the case made by the plaintiff in his plaint, and I cannot, therefore, take it into consideration.

One important matter still remains, and that is as to the causes which led to the explosion. I gather from the evidence that the

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fire-works were taken on the train at Aligarh (which station was reached at noon on the 27th) by two passengers, father and [481] son, named Abed Ally and Golam Hussain. It appears that between Aligarh and the scene of the accident the passengers smoked in the compartment. That seems to be in accordance with the rules of the Company, and the evidence seems to point to this that smoking was in some way the cause of the explosion. Golam Hussain appears to have been killed on the spot, and upon him was found a piece of paper. This piece of paper when taken from the body of Golam Hussain was given to the guard Hyrapiet and by him handed over to the Police. The Railway Police Inspector, who made the investigation into the cause of the accident, arrived at the place where it occurred in the morning of the 28th. He says in cross-examination that he found a ticket and an order from a zemindar of Sonepet ordering the fire-works. He ascertained, he does not say how, that they were what are called Sangolas, that is bombs tied up with rope, and catherine wheels. He then says : I don't remember if there was anything else.

Q.—Was a list prepared of what you ascertained were the fire-works carried at the time?

A.—I don't recollect. I say a list of fire-works was obtained. I think I saw that list.

Q.— When did you see it. How did you see it?

A.—I think it was found in the possession of the maker of the fire-works who was thrown out dead, and who still held this list and a bag and this order. I did not see the dead bodies. They were disposed of before I came.

And he goes on to say that he got his information from his Subordinate Police officers, Railway Police, and, he thinks, from Hyrapiet, the guard of the train. In answer to further questions on this point he said that catherine wheels vary from a foot in diameter to 6 inches, but he did not try to ascertain what the catherine wheels carried in the compartment were like, nor did he personally make any inquiries at Aligarh respecting them. He said inquiries were made under his orders but by whom he does not remember. Then he is asked :—

Q.—Did you make any inquiries as to how these fire-works were alleged to have been carried?

A.— Yes.

[482] *Q.*—How were they carried?

A.—They could not be noticed ; they were concealed.

Q.—Did you inquire as to in what they were carried?

A.—The men were dead.

Question repeated.

A.—No. I could not find out whether they were in baskets or in cloths. As far as I can remember I could get no information as to this.

Q.—You said that they were being carried concealed. Do you say so because you could not ascertain from any body if they had seen these fire-works?

A.—I say so because even those who were in the compartment did not see the fire-works, including Atindra Nath."

Further on he is again cross-examined on this point.

" Did you read the list of fire-works which you say was found?

A.—I had it read if it was found. It was in vernacular.

(*To the Court*)—I can't read that vernacular in which it was written. I don't remember to have had it read to me.

Q.—Did you report that a lot of fire-works was being carried? 1899 FEB. 17.

A.—I may have done so.

Q.—Did you report that the order giving quantity and so forth had been found? APPEAL FROM ORIGINAL CIVIL.

A.—I may have done so.

Q.—What is your belief?

A.—I can't remember at this distance of time what I wrote.

Q.—What is your belief as to the quantities sent?

A.—The first idea was all the fire-works mentioned in the list found were being carried, but it was afterwards found that a part of them were carried by road and those in the train were samples. I said a lot, my idea was—(stopped) that means a large quantity." 26 C. 465 = 2 C.W.N. 609 = 3 C.W.N. 781.

In re-examination he says:—

"I said one of these men was the maker of the fire-works. It was from his shops the fire-works were going. The man we found on inquiry was ordered to supply them."

Then this is put to him.

"*Q.*—There were no traces of fire-works after the accident.

A.—The guard, I think, picked up the bits."

[483] I think that this witness and guard Hyrapiet were inclined when they gave their evidence to minimise the quantity of fire-works which were carried in the passenger compartment on the 27th of April. In the report which Fitzpatrick made on the 28th of April he states that it is uncertain where and how the fire commenced; that the injured persons who were then alive in hospital were too far gone in pain to give clear depositions as to where and how the fire originated. He then goes on to say:—"It is possible the post-office van was first set on fire by a naked light, carelessly thrown match, or a chilam. On the other hand the compartment in rear of the post-office van contained a lot of fire-works being carried from Aligarh to Sonepet against rule and regulation by two persons and whose names are Ahed Hussain, the son of Faizbux, and Golam Hussain, the son of Ahed Hussain, fire-work makers of Jalali, Aligarh. The order on Ahed Hussain for fire-works was given by one Kedar Ally Khan of Chikari, Sonepet and the"—(the report is here torn but I take the word to be 'list' or 'order')—"giving quantity and so forth has been found, but both Ahed Hussain and his son are dead, so no prosecution against them can ensue. But whether the fire in the post-office set fire to the fire-works or *vice versa* remains to be proved by inquiry. This important point will be cleared up by the 30th when an officer's joint inquiry will be held."

Now it is clear from the evidence of this witness, and his report, that the first impression of those inquiring into the accident, was that there was a large quantity of fire-works being carried in the train that day, and that impression is supported by the extent of the damage caused by the explosion. The carriage panels were iron lined with wood, and the force of the explosion was sufficient to blow out the doors of the compartment to a distance of 10 feet from both sides of the line. The compartment was completely wrecked, and Hyrapiet in his evidence gives the state of the burning carriages at the time the train came to a standstill. He says in cross-examination:—" At the time when the train came to a stand no attempt was made to save the mail. We could not do anything. The fire had taken such a command over the things that we could not do anything, but the **[484]** whole thing was not ablaze. You could approach the two carriages

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at the ends—the post-office at the front end and the 3rd class at the Secundrabad end." And Derry in his evidence also says that the two carriages were in flames at the time when the train came to a stand.

Now it seems to me that to do such amount of damage in so short a time there must have been a considerable quantity of these fire-works in that compartment, and the hearsay evidence, for it seems to be nothing more, upon which Fitzpatrick relies now as his reason for supposing that a part of the goods mentioned in the list had been sent by road, and that only a portion had been carried in the train is not satisfactory. He suggests that they must have been concealed, because Atindra Nath Mookerjee says he did not know whether the fire-works were in the carriage until he heard the explosion. But there was probably nothing to turn the attention of Atindra Nath Mookerjee to the luggage carried by any other passenger into the compartment.

The evidence as to the remains of the fire-works which were found after the accident also tends in my opinion to show that the quantity of fire-works carried in the compartment was considerable. Hyrapiet, the guard, says that he picked up four bamboo bombs which he locked up in his box, "slips of bamboos which were 6 to 8 inches long, the diameter of the bamboo would be about 2½ inches." He picked these up on the 27th and locked them up in his box. In his evidence before the joint inquiry given on the 1st of May 1896, when nothing had arisen to cause a desire to minimise the quantity, he stated this—"I picked up on the side of the line three bamboos with holes in the centre called bombs, about 14 inches long, which had exploded, and other bamboos used as torches for illuminating marriage processions, all burnt. Derry in his evidence says that he picked up two or three fire-work bamboos, about 8 inches long and 1 inch in diameter, wrapped round with a peculiar twine, which had exploded. He says he picked up two or three on that day and more were picked up the next morning. And in his statement before the officers' joint inquiry he said he saw several exploded bombs picked up near the gate-house No. 36, [485] he also picked up some himself the next morning. Further it is extremely probable that besides the exploded bombs, which were picked up on the line on the 27th and the 28th, assuming that all those on or near the line were picked up [which is not clear, as no search seems to have been made for them], other bombs and fire-works may have exploded and been consumed within the carriage.

On the whole the evidence leads me to the conclusion that a considerable quantity of fire-works was in the carriage at the time of the explosion. An expert witness, who is a pyrotechnist, was called for the purpose of showing that a small quantity of bombs would be capable of doing the damage which was done. I do not think this expert's evidence is very satisfactory. But even if a small quantity of bombs would be sufficient to do the damage that was done that does not necessarily give any reliable indication of the quantity of fire-works which was carried in addition to the bombs.

The question then is whether the defendants are responsible for the fire-works having been taken into and carried in the compartment of the passenger carriage as they were on that day—a carriage in which it was the practice for the passengers to smoke and therefore to have fire of some kind or another.

There can be no doubt that from the moment those fire-works were introduced into that carriage the lives of the passengers were in danger. The result of the explosion shows that from that moment the compartment

became practically a powder magazine. It, therefore, ceased to be from that moment a vehicle fit or proper to be used for the purpose of carrying passengers. The question is, are the defendants responsible for that, and to determine this question it is necessary to inquire, in the first instance, what is the duty of the Railway Company with respect to providing for the safety of their passengers. 1899 FEB. 17. — APPEAL FROM ORIGINAL CIVIL. — 26 C. 465 = 2 C.W.N. 609 = 3 C.W.N. 781.

In the case of *Christie* v. *Griggs* (1) the facts were these. The plaintiff was travelling to London as a passenger on a stage coach belonging to the defendant when it broke down and he was greatly bruised. The first Court imputed the accident to the [486] negligence of the driver, the second to the insufficiency of the carriage. The accident was caused by the axle-tree of the coach having snapped asunder, and Sir James Mansfield, in directing the jury upon the question as to the sufficiency of the coach, stated that the defendant "did not warrant the safety of the passengers. His undertaking as to them went no further than this that, as far as human care and foresight could go, he would provide for their safe conveyance." In *Readhead* v. *Midland Railway Company* (2), which was a similar case, the Court, while of opinion that a carrier does not warrant the safety of his passengers, laid down that the obligation to take due care should be attached to the contract between them; and they went on to say—"'Due care,' however, undoubtedly means, having reference to the nature of the contract to carry, a high decree of care, and casts on carriers the duty of exercising all vigilance to see that whatever is required for the safe conveyance of their passengers is in fit and proper order." In the case of *Ford* v. *London and South-Western Railway Company* (3) the plaintiff was injured by the tender of the train being thrown off the line, and one of the causes was alleged to be the defective tyre of one of the wheels of the tender. Erle, C. J., in his direction told the jury: "The action is grounded on negligence. Negligence is not to be defined, because it involves some inquiry as to the degree of care required, and that is the degree which the jury think is reasonably to be required from the parties, considering all the circumstances. The Railway Company is bound to take reasonable care to use the best precautions in known practical use, for securing the safety of their passengers." In the case of *Burns* v. *Cork and Bandon Railway Company* (4) the Court laid down the principle that "it is the duty of a carrier to provide for his passengers a vehicle which shall be free from defects as far as human care and foresight can provide, and perfectly road-worthy." In the case of *Hyman* v. *Nye* (5) the defendant was a jobmaster from [487] whom the plaintiff hired a landau for a drive from Brighton to Shoreham and back. After having driven some way, and whilst the carriage was going down hill and slowly over a newly-mended part of the road, a bolt in the underpart of the carriage broke. The splinter-bar became displaced; the horses started off; the carriage was upset; the plaintiff was thrown out and injured, and he brought an action for compensation. No fault could be imputed to the horses or to the driver. The learned Judge at the trial told the jury in substance that the plaintiff was bound to prove that the injury which he had sustained was caused by the negligence of the defendant, and if in their opinion the defendant took all reasonable care to provide a fit and proper carriage [which opinion I may point out is to be

(1) (1809) 2 Camp. 79.
(2) (1867) L. R. 2 Q. B. 413; and on appeal (1869) L.R. 4 Q.B. 379.
(3) (1862) 2 F. & F. 730.
(4) (1863) 13 Ir. Law Rep. 543.
(5) (1881) L.R. 6 Q.B.D. 685.

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arrived at on evidence given before them, because the jury can only deal with the facts which are proved at the trial] their verdict ought to be for him. Being thus directed, the jury found a verdict for the defendant; and in particular they found that the carriage was reasonably fit for the purpose for which it was hired, and that the defect in the bolt could not have been discovered by the defendant by ordinary care and attention. The plaintiff obtained a rule calling upon the defendant to shew cause why there should not be a new trial on the ground of misdirection, and that the verdict was against the weight of evidence, and the rule was made absolute. Mr. Justice Lindley in his judgment, after referring to a number of authorities says: "A careful study of these authorities leads me to the conclusion that the learned Judge at the trial put the duty of the defendant too low. A person who lets out carriages is not, in my opinion, responsible for all defects discoverable or not; he is not an insurer against all defects; nor is he bound to take more care than coach proprietors or railway companies who provide carriages for the public to travel in; but in my opinion, he is bound to take as much care as they; and although not an insurer against all defects he is an insurer against all defects which care and skill can guard against. His duty appears to me to be to supply a carriage as fit for the purpose for which it is hired as care and skill can render it; and if whilst the carriage is being properly used for such purpose it breaks down, it becomes incumbent on the person who has let it out to shew that the break-down was [488] in the proper sense of the word an accident not preventible by any care or skill. If he can prove this, as the defendant did in *Christie* v. *Griggs* (1), and as the Railway Company did in *Readhead* v. *Midland Railway Co.*(2), he will not be liable; but no proof short of this will exonerate him. Nor does it appear to me to be at all unreasonable to exact such vigilance from a person who makes it his business to let out carriages for hire. As between him and the hirer the risk of defects in the carriage, so far as care and skill can avoid them, ought to be thrown on the owner of the carriage. The hirer trusts him to supply a fit and proper carriage; the lender has it in his power not only to see that it is in a proper state, and to keep it so, and thus protect himself from risk; but also to charge his customers enough to cover his expenses."

The cases which I have cited are cases in which the dangerous condition of the vehicle was owing to a defect in some part of the vehicle itself; but it seems to me that the principles laid down in those cases are applicable to the case before me and are those by which I must be governed. A vehicle may become insecure and dangerous as well from having dangerous substances placed therein as from a defective wheel or axle or bolt, and may cease to be road-worthy from the one cause as well as from the other, and if the causes owing to which in the case before me the carriage in which Atindra Nath Mookerjee was being carried by the defendants became insecure and dangerous and unfit for the conveyance of passengers, were causes which could have been prevented from becoming effective by care and skill on the part of the defendants, then that care and that skill the defendants were bound to exercise.

It was stated on behalf of the defendants that they could not prevent the introduction of the fire-works into the train, and the case was likened to a person entering a carriage with a box of matches or a piece of dynamite in his waist-coat pocket. But there is no evidence to show that the

(1) (1809) 2 Camp. 79.
(2) (1867) L. R. 2 Q. B. 413; and on appeal (1869) L. R. 4 Q. B. 379.

defendants had taken any steps to prevent passengers from taking fire-works with them into the passenger trains, and I cannot take the case before me **[489]** as analogous to the case put in argument, the very statement of which shows how the explosives were concealed. There is nothing before me to show how the fire-works were taken into the train or that they were in fact concealed. The expressions found in some of the reports that the fire-works were carried against rule and regulation, or surreptitiously or clandestinely, are of no value as evidence in this case of the manner in which they were taken into the compartment, nor are the reasons given by Fitzpatrick for saying that the fire-works were concealed there. These expressions are at the most expressions to the effect that they were being carried without the knowledge of the railway officials.

Even where it is shown that the explosives have been well concealed as in the illustration put in argument, I think it may fairly be said that, quite apart from the individual case, due care should have been taken by the defendants to impress upon their staff the necessity of being vigilant in preventing the carriage of fire-works, and also to bring home to their passengers that such an act would be severely punished, because the very fact of that having been done would, I have no doubt, tend to prevent even the secret carrying of explosives. It is not, however, necessary to pursue this hypothetical case. In the case before me I am asked to presume that the defendants took due care to prevent the carrying of these fire-works and that the person who carried them concealed them in such a way that they could not be discovered by the railway servants at Aligarh. I cannot presume these matters in favour of the defendants where the circumstances are such as to call upon them to show what care and caution they in fact did take.

I was told that every man must be presumed to know the law, that it must therefore be presumed that the man who took the fire-works into the train, especially as he was a maker of fire-works, knew he was committing a penal offence, that therefore it must be presumed he took every means to conceal his possession of these fire-works from the railway officials, and that in fact he was successful in doing so. I cannot rest the decision of a pure question of fact upon a supposition of this character. No doubt every man must be supposed to know the law, and if **[490]** Golam Hussain were being sued or prosecuted for introducing these fire-works into the carriage, his plea of ignorance of the law would be no excuse for his conduct. But I think the maxim is limited to the determination of the civil or criminal liability of the person whose knowledge is in question and cannot be legitimately made use of in a case, such as the present, where the parties are entirely different and distinct from him. Even if he did know the law and knew he was committing a penal offence, there is no reason why I should assume further that he knew he must carefully conceal these fire-works from the railway officials. He may have acted on the belief (rightly or wrongly entertained) that the railway officials would not interfere with him, and that there was no necessity to conceal the fire-works.

That the introduction of a considerable quantity of fire-works into a railway carriage is not a thing which may not be prevented by the exercise of that due care which, according to the principles laid down in *Readhead* v. *Midland Railway Co.* (1) and *Hyman* v. *Nye* (2) the defendants are

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(1) (1867) L.R. 2 Q.B. 413; and on appeal (1869) L.R. 4 Q.B. 379.
(2) (1881) L.R. 6 Q.B.D. 685.

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bound to take, is shown by the course taken by the defendants themselves after the accident. In the seventh paragraph of Mr. Dring's report to the Agent to the East Indian Railway Company, dated the 6th of May 1896, respecting the accident and the finding of the officers' joint inquiry, he says this :—" A notice has since been issued to the staff to exercise great care in passing the luggage of passengers, and I have already received advice that in two instances passengers have been detected carrying fire-works ; one case at Mogul Serai in which a Native Deputy Magistrate is said to be the offender, and a second case at Burhan." The fact that within one week two cases of the carrying of fire-works were detected after the notice was issued to the staff to exercise great care, shows that the carrying of fire-works by passengers into the compartment in which they travel is a thing which may be prevented by the exercise of that high degree of care which the Railway Company are bound to exercise for the safety of their passengers ; and if that be so, I am of opinion that where loss of life and damage has [491] resulted from the explosion of fire-works in the compartment of a passenger carriage it should be shewn that due care was taken by the Railway Company to prevent the fire-works being carried in that manner.

The question at issue then resolves itself into this : Was there due care within the meaning of those words as defined in *Readhead* v. *Midland Railway Co.* (1) and *Hyman* v. *Nye* (2) taken by the defendants for the purpose of preventing these two persons, Abed Hussain and Golam Hussain, from taking these fire-works into the compartment with them at Aligarh on the 27th of April 1896? Not a particle of evidence, upon this part of the case, has been given by the defendants. Their contention is that they are not bound to give any such evidence and they say that it lies upon the plaintiff to shew that they had not taken that due care and caution which they were bound to do to prevent the carrying of these explosives in the passengers' compartment. I do not think this contention is sound. If they had, previous to this accident, issued instructions to the staff to take care and prevent the carrying of fire-works, especially during the marriage season, or if as a matter of fact any precautions were in the habit of being taken in the Aligarh Station to prevent the carrying of fire-works in the passenger compartment, these are matters peculiarly within the knowledge of the defendants themselves, who have the sole control of the traffic and alone know the methods by which that traffic is regulated. It is, therefore, in my opinion, the duty of the defendants to produce the evidence on these matters to show that they had exercised due care and caution, and that it is not for the plaintiff to show that they did not. In the case of *Christie* v. *Griggs* (3) the plaintiff having proved that the axle-tree snapped asunder at a place where there is a slight descent, from the kennel crossing the road, that he was in consequence precipitated from the top of the coach, and that the bruises he received confined him several weeks to his bed—there rested his case. Best, Sergeant, contended strenuously that the plaintiff was bound [492] to proceed further and give evidence either of the driver being unskilful, or of the coach being insufficient. But it was held by Sir James Mansfield that the plaintiff had made a *prima facie* case by proving his going on the coach, the accident, and the damage he had suffered. That was the course taken in *Readhead* v. *Midland Railway Co.*, as I read

(1) (1867) L.R. 2 Q.B. 413 ; and on appeal (1869) L. R. 4 Q. B. 379.
(2) (1881) L. R. 6 Q.B.D. 685. (3) (1809) 2 Cam. 79.

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the report in L. R., 2 Q. B. 413; and it is the course directed by that class of cases of which *Scott* v. *London Dock Company* (1) is one of the best known examples. It appears that the train was a crowded train, but it had no more than its proper complement of passengers according to the guard, and it has not been suggested that there was any crowding or confusion at Aligarh Station under cover of which the fire-works might have been introduced into the carriage notwithstanding the vigilance of the railway officials. In fact, so far as the evidence before me goes, there is nothing to show that during the ten minutes' stay at Aligarh any passengers left the train, or that any entered the train except the two who carried the fire-works. There is no evidence before me to show that the defendants took any precautions whatever which might have resulted in preventing the introduction of these fire-works into the passenger compartment at Aligarh Station on the 27th April. Mr. Dring; the Traffic Manager, who was called as a witness, and who wrote the report I have above referred to as to the precautions taken *after* the accident occurred, was not asked a single question on this subject. I must therefore come to the conclusion that the defendants did not exercise that high degree of care in providing for the safety of their passenger Atindra Nath Mookerjee which the law imposes upon them, and that therefore they are liable to the plaintiff in this suit for the damages which he has sustained by the loss of his son.

With regard to the amount of damages I take the rule to be laid down in *Narayan Jetha* v. *Municipal Commissioners of Bombay* (2). There the Court says:—"As regards damages, in cases of this nature, distinct evidence of the loss sustained or benefit expected is not necessary. The jury may look **[493]** at all the circumstances of the case and especially at the position of the parents and age of the child, and call in aid their own experience in arriving at their conclusions."

Now in this case the father has no settled income. He is about 48 years of age and suffering from paralysis. He was a schoolmaster, but owing to the disease from which he is suffering he had to give up his appointment. He also seems to have made some money by writing books, but at present he derives no income from that source, and his illness has involved him in debt. He has two other children living, but they are both infants, and it was to his eldest son Atindra Nath Mookerjee that he seems to have looked for his main support in future. That that son would be so to the best of his ability no one knowing the customs of this country can doubt. As for Atindra Nath himself, he entered Government service in 1894. He was in temporary employment till the beginning of 1896, when he was appointed permanently as a clerk in the Arsenal at Rawalpindi, on a salary of Rs. 25 a month. From this time onward one may, I think, consider that his future career was fairly assured. He appears to have lived at Rawalpindi in the house of his uncle who is employed in the Commissariat Department there, and to have taken sick leave for two months in February 1896. He was on his way to rejoin his appointment when he met with the accident which resulted in his death. In examination-in-chief the plaintiff said that his son used to send him Rs. 20 or Rs. 22 a month. In cross-examination he said "from 1894 he went on remitting me Rs. 10, 15, or 20 at a time, but after being permanent he sent me money once or twice. He sent me last Rs. 20 or Rs. 22. I cannot say when it was." Now I am satisfied that if Atindra Nath had lived he

(1) (1865) 3 H. & C. 596.

(2) 16 B. 254.

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would have been a substantial support to the plaintiff, and looking at all the circumstances I think Rs. 1,500 would be a fair sum which the plaintiff should receive as damages in this case. I say which the plaintiff should receive because in dealing with the costs of this suit I think I am bound to see that he shall receive that sum. If I give the costs of this suit to the plaintiff merely as between party and party, his attorney and client costs of this protracted trial would, in all probability, exhaust the larger portion of it. In similar cases where larger damages [494] were given than I feel disposed to give in this case, Westropp, C. J. ordered the defendants to pay the costs of the suit as between attorney and client. See *Sorabji Ratanji* v. *G.I.P.Ry. Co.* (1), and *Ratanbai* v. *G. I. P. Railway Co.* (2). I shall follow those precedents in this case.

There will be a decree for the plaintiff for the sum of Rs. 1,500 with costs on scale 2 asbetween attorney and client.

From this decision the defendant Company appealed.

The Advocate-General (Sir *Charles Paul*), Mr. *Hill*, and Mr. *Hyde*, appeared for the appellants.

Mr. *Pugh* and Mr. *A. Chowdhry*, for the respondents.

The *Advocate-General*.—Even on the findings of the learned Judge, the appellants are entitled to judgment; but they do not admit that the findings are properly arrived at.

Railway Companies are not insurers of their passengers; so that the facts alleged in the plaint do not constitute a breach of duty on the part of the appellants. Unless the plaintiff can put his case so high as to say that the defendants should search every passenger entering a carriage, he cannot succeed in this action. In order to make the defendants liable, there must be a neglect on their part to take some reasonable precaution; and the breach of duty alleged should be specifically stated. There must be also a *scienter* on the part of the defendants; but in both these respects the plaint is demurrable.

It is not for the defendants to disprove negligence on their part, it is for the plaintiff to prove it; and although a high degree of care is required of a railway company in the carriage of its passengers, that cannot mean an impracticable degree of caution. The fact that after the accident some precaution was taken which was not taken before it is no evidence, by itself, of negligence before the accident—*Hart* v. *Lancashire and Yorkshire Railway Company* (3); and in order to make the [495] defendants liable, it must be shown what precaution they omitted which they ought to have taken.—*Daniel* v. *Metropolitan Railway Company* (4). The plaintiff must prove the neglect of some duty by the defendants, or want of due care, or knowledge on their part that something dangerous was being carried.

It was not possible for the Company's servants to examine the luggage of every passenger. Section 58 of the Indian Railways Act, 1890, provides that every passenger shall, on request, deliver to the railway servants an account in writing containing such a description of the goods he is carrying as may be sufficient to determine what freight he may be charged for them. There is no power to search the luggage; and it is only in cases where there are grounds for suspicion, that a package may be opened. It was a criminal offence to take dangerous goods into a

(1) 7 B. H. C. (O. C.), 119 note.
(2) 7 B.H.C. (O. C.), 120 note; and on appeal 8 B. H. C. (O.C.) 130.
(3) (1869) 21 L.T. Exch. 261.
(4) (1871) L. R. 5 E. & I. Ap. 45.

passsnger compartment and in no case can the wrongful act of a third party make the Railway Company liable. 1899 FEB. 17.

Mr. *Hill*, on the same side.—The appellants did not contract to carry the deceased safely or securely, but only safely so far as reasonable care and foresight could avail. That does not mean the utmost possible foresight that a human being could exert. It means all that is reasonably and practically possible—See *Nugent* v. *Smith* (1), and that was a case of the carriage of goods, which were completely under the carrier's control. The expression "utmost possible care" must be construed as the "utmost practicable care"—*Moss* v. *Smith* (2).

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As to the legal obligation on the appellants apart from contract:—The plaint alleges that they *allowed* fire-works to be carried: but the *scienter* is wanting. That being so, the legal obligation of the Company must be based on their knowledge or on reasonable grounds of suspicion. There is no guarantee to one passenger that another passenger carries no dangerous goods. Even if the law had cast that guarantee on the Company, it [496] would keep it within the bounds of justice, so as not to impose impracticable duties.—*Readhead* v. *Midland Railway Co.* (3). In order to constitute negligence, there must be a legal duty to exercise control, and a breach of that duty. But in all cases reasonable conduct is the ultimate test. The degree of control is the paramount factor in determining what is or is not negligence. That factor is not merely determinant as to the proof, but it even changes the nature of the obligation. The reason why the liability of a carrier is so much stricter as regards goods than as regards passengers is because of his greater control over goods. The fallacy in the reasoning of the learned Judge in the Court below lies in the expression "*allowed* fire-works to be carried," which must be taken to mean that the carriage of fire-works was preventible by the exercise of reasonable and practicable precautions.

A Railway Company must assume that passengers are not infringing the law. A passenger is entitled to take into the compartment anything except articles forbidden by law; and the Company cannot interfere except to prevent, under s. 59 of the Railways Act, a fraud on itself. No power to inspect luggage is given unless the Company has reason to suspect the presence of dangerous goods; and no reason is suggested as against the Company in this case. It cannot be alleged that the Company were bound to know the real state of things. For they could only know it by doing an act which they were not entitled to do, *viz.*, opening the passenger's luggage.

Whether the occurrence of an accident is *per se* evidence of negligence depends on the degree of control exercisable, and on the knowledge not merely of the danger, but the knowledge—derived from experience—as to the probability of an accident occurring if due care be not taken; mere knowledge of the danger is not enough—*Scott* v. *London Dock Co.* (4). Unless both these elements co-exist, the plaintiff must fail. It is not enough to show that the accident may have occurred through the negligence of the defendants' servants; the plaintiff must also show [497] something that the defendants might have done but omitted to do—*Smith* v. *Great Eastern Railway Co.* (5).

If this case had been tried by a jury, the question for them would have been whether negligence could be predicated, and if so whether it

(1) (1876) L. R. 1 C. P. D. 423 (437). (2) (1850) 9 C.B. 94 (103).
(3) (1867) L. R. 2 Q. B. 413; and on appeal (1869) L. R. 4 Q. B. 379.
(4) (1865) 3 H. & C. 596. (5) (1866) L.R. 2 C. P. 4 (10).

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ought to be—*Metropolitan Railway Company* v. *Jackson* (1). If the facts proved are equally consistent with negligence or the absence of negligence, the Judge must withdraw the case from the Jury— *Cotton* v. *Wood* (2), *Briggs* v. *Oliver* (3). In order to render the defendants liable, the plaintiff must show facts more consistent with negligence than with the absence of it—*Toomey* v. *London, Brighton and South Coast Railway Co.* (4). The plaintiff must prove that the death of the deceased was attributable to some negligent act or omission of the defendants —*Wakelin* v. *London and South Western Railway Co.* (5).

Again : the plaintiff must prove that the accident was one which the defendants ought to have foreseen—*Cornman* v. *The Eastern Counties Railway Co.* (6). No previous accident of this kind has been proved; therefore there was nothing to show that the defendants could reasonably have foreseen this accident. The onus of proving knowledge on the part of the defendants is also on the plaintiff—*Welfare* v. *London, and Brighton Railway Co.* (7), where the knowledge in question was the knowledge of the condition of the defendants' own premises.

If, however, the Court should think that the accident itself is evidence of negligence, then the plaintiff did away with his rights, because it follows that he must have known that the fire-works were taken into the carriage. All the reports admitted in evidence in the Court below are not evidence at all, and were inadmissible even though not objected to by the defendants' Counsel. All that they show is that a certain **[498]** person made certain statements to a public official in the course of his duty; he was not a servant of the Company, but a Government servant; and therefore his admissions (if any) do not bind the defendants. But if the reports are to be taken as admissions, they must be taken as a whole; and if so, they show that the fire-works were carried *surreptitiously* by a passenger. Carrying fire-works is a criminal offence; and we are entitled to assume that the person who took them knew the law, because he was in a trade governed by special regulations. The probabilities, therefore, are that he would be extremely careful to carry them concealed. So that, even if there be a *prima facie* presumption in this case against the defendants, that presumption is rebutted by the evidence and by the probabilities of the case. Everybody has a right to suppose that a crime will not be committed and to act on that belief—*Baxendale* v. *Bennet* (8); and even apart from any question of crime, it is surely reasonable for every man to assume that his neighbour will not do an illegal act, and to act on that assumption.

Further, there is no statutory obligation on the Railway Company to put up notices warning passengers of the penalties for carrying dangerous goods; and, at the time of this accident, the Company were not working under rules framed under the Railway Act of 1890, but under the Act of 1879, as there had not been time to supply copies in the vernacular of the regulations for which the Company, without being obliged to do so, had applied to the Government.

In *Cliff* v. *Midland Railway Co.* (9) the accident was preventible, for there the defendants had powers the exercise of which would have prevented the possibility of accident; and those powers were exercised

(1) (1877) L.R. 3 App. Cas. 193 (197).
(2) (1860) 8 C.B. (N.S.) 568.
(3) (1866) 4 H. & C. 403.
(4) (1857) 3 C.B. (N.S.) 146.
(5) (1886) L.R., 12 App. Cas. 41.
(6) (1859) 4 H. & N. 781.
(7) (1869) L.R. 4 Q.B. 693.
(8) (1878) L.R. 3 Q.B.D. 525 (530).
(9) (1870) L.R. 5 Q.B. 258.

after complaints had been made, and after a fatal accident had occurred. The jury found negligence; but the defendants moved for and obtained a new trial.

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It makes no difference whether the legal obligation on the passenger is by law or by contract. In this case there was an obligation on the passenger not to take fire-works into the [499] compartment; and the defendants were entitled to rely on his performing that obligation—*Daniel* v. *Metropolitan Railway Co.* (1). A passenger cannot impose on the Company any obligation not laid upon them by law; nor can the wrong-doing of one passenger impose any greater obligation on them—*Degg* v. *Midland Railway Co.* (2).

If the inspection of luggage is not reasonably possible, the Company are not to be expected to examine all the luggage—*Richardson* v. *Great Eastern Railway Co.*(3). And in India the duty of examination would be infinitely more difficult than in England, by reason of the numerous religious and caste prejudices. Notice of the presence of dangerous goods is not to be imputed to the Company—*see* Bevan on Negligence, 2nd edition, p. 1059, and the cases there collected.

In *Baldwin* v. *London, Chatham and Dover Railway Co.* (4) the defendants were held liable because they admitted a breach of duty in misdelivering the goods; otherwise, it was the duty of the plaintiff to inform them that the goods were such as to require special care.

Mr. *Pugh* for the respondent:—The issue substantially is whether there was or was not such negligence as contributed to this accident. In the carriage of passengers, Railway Companies are bound to use the utmost care, and to do everything that human foresight can suggest to secure the safety of persons using their lines—Story on Bailments, 8th edition, s. 601. There is both a common law and a statutory duty cast on them. Their duty as to explosives would be incumbent on them apart from any statute; and how can it be said that they acted consistently with their duty when they allowed gunpowder to be carried in a compartment where they allowed smoking?

Section 47 of the Indian Railways Act, 1890, empowers the Company to make rules, and that power is given for the very purpose of meeting cases of this kind; but the defendants have [500] not shown that they took any steps to fulfil their duties in this behalf. Indeed, the section says that they *shall* make rules; but from the passing of the Act until 1895 they made no rules whatever. Their suspicion is enough for the exercise of the power of inspecting luggage; and a package of this kind cannot be looked upon as the ordinary luggage of a passenger.

True, want of knowledge of law will not excuse any man charged with a crime; but that is a very different thing from saying that every man is presumed to know the law—*Martindale* v. *Falkner* (5), approved in *The Queen* v. *Mayor and Corporation of Tewkesbury* (6). And even if people are to be taken to know the law they cannot be expected to know the bye-laws. But the defendants ask the Court to presume still further that, if anything is done contrary to the law or to their bye-laws, it is done in a secret manner.

The evidence shows that the defendants took no precautions whatsoever at Aligarh with regard to the examination of passengers' luggage.

(1) (1871) L.R. 5 E. & I. Ap. 45 (60). (2) (1857) 1 H. & N. 773 (781).
(3) (1876) L.R. 1 C.P.D. 342 (344). (4) (1882) L.R. 9 Q.B.D. 582.
(5) (1846) 2 C.B. 706 (719); 15 L.J.Q.B. 91 (94).
(6) (1868) L.R. 3 Q.B. 629 (635).

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When they did issue notices on the subject, the result was that two prosecutions followed. They suggest that no precautions were possible, so that they clearly acknowledge that none were taken.

Different considerations apply to cases where a duty is imposed—whether by common law, or by statute or contract—and cases where there is no duty—see the authorities collected and considered in Pollock on Contracts (5th ed.), pp. 416 *et seq*. The doctrine as to *scienter* has no application to the present case. The luggage of passengers was under the control of the defendants, so were the carriage into which it was taken, and the stations on the line; therefore the presumption of negligence arises. Even where the Company's trains run on another line, they are bound to make provision for the safety of a passenger who starts on their line—*Foulkes* v. *Metropolitan District Railway Co.* (1). The case of *Wakelin* v. *London and South* **[501]** *Western Railway Co.* (2) is distinguishable, because there there was no breach of any duty, inasmuch as the premises on which the accident occurred were not under their control at the time.

Mr. *Chowdhry* on the same side :—The defendants' own evidence proves them guilty of negligence. All that the plaintiff had to prove was that the carriage took fire, that there were fire-works, and that the line and the train belonged to the defendants ; and there is no question about any of these facts.

The reports made by the railway officials would be evidence against the defendants ; they are reports made by the railway servants to their superior officers, and in them there was no suggestion of the surreptitious carriage of the fire-works until the Agent made his report after receiving all the other reports.

The unusual nature of the occurrence is an element in determining on whom the onus should fall, and it is unreasonable to throw the onus on the plaintiff. Not only was no evidence produced to contradict the railway inspector's report, but the Company even based their subsequent report on it, and, therefore, it ought to be taken as evidence against them, especially as they did not object to its going in.

Section 54 of the Indian Railways Act, 1890, imposes a statutory obligation to exhibit the conditions for the carriage of goods ; no evidence has been given that such a notice was exhibited.

The exception in s. 72 of the Act applies only to the carriage of goods ; therefore the common law as regards the carriage of passengers would be applicable to the Company.

Mr. *Hill* in reply :—The passage cited from Story on Bailments, s. 601, lays down the law as it exists in the United States ; but it is not English law and goes very much beyond the point at which English law stops, so far as the acts of a third person are concerned. A Railway Company is not liable for the acts of even its own servants, if those acts are not done in the course and scope of the servants' duty—*Cobb* v. *Great Western Railway Co.* (3).

[502] The following judgments were delivered by the Court (MACLEAN, C. J., and PRINSEP and AMEER ALI, JJ.).

JUDGMENTS.

MACLEAN, C. J.—This is an appeal by the East Indian Railway Company from a decision of Mr. Justice P. O'Kinealy, dated the 8th of

(1) (1880) L. R. 5 C. P. D. 157.
(2) (1886) L.R. 12 App. Cas. 41.
(3) (1894 L. R. App. Cas. 419.

June 1898, by which he awarded a sum of Rs. 1,500 by way of damages to the plaintiff with the costs of the suit. 1899 FEB. 17.

The plaintiff is the father and administrator of the estate of one Atindra Nath Mookerjee, who was injured, on the 27th April 1896, while travelling as a passenger on the appellants' line between the stations of Secundrabad and Dadri. Atindra Nath Mookerjee was so badly injured that he died on the 5th of May following. In the Court below, the plaintiff charged the defendants with negligence, on the ground that the communication cord was defective, that proper steps had not been taken in time to bring the train to a standstill, that the brake power of the train was insufficient, and, in that sense, defective, and that the carriage doors were improperly locked. All these issues, however, have been found in favour of the appellant Company; they have not been urged before us by the respondent, and it is unnecessary further to allude to them.

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The evidence establishes that Atindra Nath Mookerjee, on the 25th of April 1896, took a third class ticket from Bally to Rawalpindi; that on the 27th April, while on his journey, the carriage in which he was travelling caught fire, that he was badly burnt, and injured by falling through the floor of the carriage, and subsequently died of those injuries.

There can be no reasonable doubt, upon the evidence, that the fire resulted from an explosion of fire-works carried by some fellow-passengers of the injured man in the compartment in question, and the plaintiff's case is that it was through the negligence and want of due care on the part of the servants of the appellant Company, and in violation of their rules, that the fire-works found their way into the carriage. This is denied by the appellant Company.

There has been much discussion, in the course of the argument, as to the actual quantity of fire-works in the carriage when the explosion took place, though it is common ground, that [503] any way, a certain quantity of fire-works or bombs did explode in the carriage, and that several passengers in the train were severely injured by that explosion. Both the passengers who were carrying the fire-works were killed, and any direct evidence as to the quantity is not forthcoming, though much light would, probably, have been thrown upon this particular point, if that which has been styled the "list" of fire-works, or "the order from the Zemindar of Sonepet," and which, with their railway tickets, was found upon the body of one of the men who were conveying the fire-works, had been produced. At one time it was in the hands of the guard, Hyrapiet, a servant of the Company, and was by him apparently handed over to the Police; but it has since disappeared. This is, at least, very unfortunate. Fitzpatrick, the inspector of the railway police at Tundla, speaks of the quantity of fire-works as a large quantity, and though that statement must be regarded as a matter of inference rather than of direct and positive knowledge on his part, upon the whole of the materials before us his conclusion strikes me as well-founded, and I am satisfied, that, when the explosion took place, there was a large quantity of fire-works in the carriage.

It is contended for the Company that, if the quantity had been large, the fire-works must have been observed by the passengers in the carriage, and reliance is placed upon the two statements of Atindra Nath Mookerjee, to the effect that he did not see any fire-works. This is a matter of surmise and probability only, and is met by the counter suggestion that, whether the fire-works were carried in a basket or in bundles they would probably be placed under the seat, and a passenger,

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perhaps at the other end of the carriage, might not have observed them. But having regard to the condition of Atindra Nath Mookerjee when he made these statements, too much reliance cannot safely be placed upon them. The question of the actual quantity of fire-works is only material upon that of whether or not they were likely to escape observation, for whether the quantity were large or small, the fire clearly arose from their explosion.

It is proved then that Atindra Nath Mookerjee had paid for his ticket and was a third-class passenger by the defendants' [504] train, that he was travelling as such passenger in the train, that when so travelling a fire resulting from the explosion of a considerable quantity of fire-works carried in the carriage, in which he was travelling, broke out in that carriage, that he was severely injured, and that he died of those injuries ; and the plaintiff contends, upon that state of facts, that he has made out a *prima facie* case of negligence against the appellant Company, and that, having made out such *prima facie* case, the onus is cast upon the defendants of showing that they had taken every reasonable care and precaution to prevent such dangerous goods being carried in a passenger's compartment of their train, a compartment in which, admittedly, smoking is permissible. In other words the plaintiff's contention is that the facts proved or admitted by the Company raise a presumption of negligence, which the Company are bound to rebut.

We have been referred by the appellants to a very large number of cases ranging over a somewhat diversified field of inquiry, many of which appear to me to refer to questions of negligence of a class widely different from that under consideration, and in that view I do not think it would be very profitable to discuss them. The authorities establish that, in providing for the safety of their passengers, it is the duty of a Railway Company to show, at the very least, such a degree of care, as may reasonably be required from them, considering all the circumstances of the case. The care has sometimes been spoken of as "a high degree of care," and it has been said that the Company must show that the accident was one not preventible by any care or skill.

The present case appears to me to range itself under that class of cases where such a *prima facie* case has been established as to necessitate an answer on the part of the defendants, to satisfy the Court that they have taken all reasonable care and precaution in the matter. A fire in a train is not an ordinary circumstance ; a fire in a train resulting from an explosion of a large quantity of fire-works is an extraordinary occurrence, one which raises, at least, a presumption of possible negligence on the part of the Company.

[505] Upon this class of case, which I may designate as the *res ipsa loquitur* class, there are many authorities, and the one very generally referred to, by reason of the principle formulated by Chief Justice Erle, is that of *Scott* v. *London Dock Co.* (1). Of these cases the strongest in favour of the plaintiff is that of *Kearney* v. *London, Brighton and South Coast Railway Co.* (2), whilst the appellants rely upon (amongst other cases) *Welfare* v. *London and Brighton Railway Co.* (3), and equally upon *Daniel* v. *Metropolitan Railway Co.* (4), to which I will refer more particularly in a moment. The latest case in these Courts on this head is that of *Choutmull Doogur* v. *Rivers Steam Navigation Co.* (5), which

(1) (1865) 3 H. & C. 596.
(2) (1871) L.R. 6 Q.B. 759.
(3) (1869) L.R. 4 Q.B. 693.
(4) (1771) L.R. 5 E. & I. Ap. 45.
(5) 24 C. 786.

has recently been affirmed by the Judicial Committee of the Privy Council (1).

That, however, was a case of damage to goods not of injury to a passenger.

The appellants, however, contend that this class of case has no application to the present, inasmuch as the fire-works were not under their control, but under the control of one of their passengers.

This leads us to consider to what extent the Company has control over luggage carried by their passengers.

The men who were taking the fire-works—there is nothing to show whether they were being carried in baskets or in bundles or how they were being carried—took their tickets and, inferentially, entered the train at Aligarh Station, and there is no evidence to show that any care or precaution whatever was taken at that station to prevent passengers, who might be suspected of carrying dangerous goods, from taking them into a passenger compartment. The Company urge that they have no power to search a passenger's luggage, and that if they have to search every parcel **[506]** carried by every passenger it would become impracticable to work the passenger traffic of their line.

It is a strange thing to say that a substantial or indeed any quantity of fire-works can be properly described as passenger's luggage, but be that as it may, it would be difficult to say that fire-works are not dangerous goods within the meaning of s. 59 of the Railways Act (IX of 1890), and under that section no passenger is entitled to take such goods with him, and any railway servant may refuse to receive such goods for carriage; and if any railway servant has reason to believe that such goods are contained in a package, with respect to which no notice of their nature has been given to the station master or other railway servant in charge of the place, such servant may cause the package to be opened for the purpose of ascertaining its contents. There is, therefore, under certain conditions, a power of search in the officers of the Company. There is not a particle of evidence adduced by the appellant Company to show that they took any precaution at Aligarh to prevent the men from taking the fire-works into the carriage. It is not suggested that there was any crowd at Aligarh station; the train stopped there for ten minutes; and from the evidence of the guard the men would have to pass through a gate where their tickets were checked. For aught, we know these fire-works may have been carried in an open basket, and the servant of the Company—the man at the barrier—may have allowed the men to pass through with the goods so exposed. If that were so, and there is no evidence to show whether it was so or not, it is admitted that the Company would be liable. This was the Hindu marriage season—a time at which, notoriously, fire-works were in demand for marriage festivities, and a time consequently when the Company might not unreasonably be expected to have been specially on the alert. The circumstances under which the men were enabled to pass the barrier were facts peculiarly within the knowledge of the Company. They might have called the man at the gate who, if it were the fact, would have been able to say that there was nothing in the appearance of the baskets or bundles carried by the men calculated to lead him to suspect that they were carrying such dangerous goods; or they might have called others **[507]** of their servants at Aligarh to show that

(1) 26 C. 398.

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reasonable precautions against the carriage by passengers in the compartment of such goods were taken. But they call no one to show this. On the contrary, they contend that it is for the plaintiff to call these witnesses and make out his case of negligence.

When a similar argument was advanced in the case of *Byrne* v. *Boadle* (1) it was characterized by the late Chief Baron Pollock as "preposterous." It must be remembered that the railway station at Aligarh, the arrangements at the station, the line, the train and the carriages, are each and all under the control of the defendants, and I cannot bring my mind to think that, when the plaintiff had proved what he did, it was not incumbent on the Company to show that they exercised every reasonable care and precaution to prevent the fire-works being taken into the carriage. I am not prepared to accept the contention of the Company that they have no control over the luggage carried by their passengers.

With respect to the case of *Daniel* v. *Metropolitan Railway Co.* there the accident arose under circumstances, and from a cause, quite outside the control of the Company, and it was consequently held that the latter were not liable. The reasoning of the various judgments in that case shows that that was the real *ratio decidendi*; but it would be materially extending the principle of that case if it were held to apply to the present.

It is however not so much upon the decision itself in that case that the appellants rely, as upon the observations of the late Mr. Justice Willes, when the case was in the Court of Common Pleas (2). That learned and distinguished Judge says: "It is necessary for the plaintiff to establish by evidence circumstances from which it may be fairly inferred that there is reasonable probability that the accident resulted from the want of some precaution which the defendant might and ought to have resorted to." To my mind the plaintiff in this case has brought himself within this definition; he has established such circumstances as fairly warrant such an inference as is referred to. It is a fair [508] inference from the circumstances that there is reasonable probability that the accident resulted from the want of some precaution which might have been taken by the defendants at Aligarh Station, and which, if taken, might have resulted in preventing these fire-works being carried by a passenger into a passenger compartment. The defendants might have shown, what, if any, precautions were taken, but they have not condescended to do so.

For these reasons the judgment of the Court below must be affirmed and the appeal dismissed, and having regard to the length of time which the argument has occupied—I am not suggesting that it was too long—and upon grounds similar to those given by Mr. Justice O'Kinealy, with costs as between attorney and client.

Prinsep, J.—I am of the same opinion.

Ameer Ali, J.—Before dealing with the main and substantive question in this case, I desire to make a passing observation on the the appellants ' contention that the plaint does not disclose, with sufficient precision, the character of the negligence charged against the defendant Company. On this point it is enough to observe that if the allegation in the plaint was considered by the defendants as not reasonably explicit, it was open to them to require the plaintiff to supply the defect. No step, however, appears to have been taken, and the parties went to

(1) (1863) 2 H. & C. 722 (728). (2) (1868) L.R. 3 C. P. 593.

trial on the single issue of fact, *viz.*, whether the defendants were or were not guilty of negligence so as to make them liable on the action. 1899 FEB. 17.

Now, it may be regarded as settled law that in the case of carriers of passengers under statutory powers, there exists an express duty, independently of any implied contract, to carry them safely. This duty imposes on the carrier the obligation of exercising the utmost care and caution consistent with human foresight and diligence. I need only refer to the following cases among others in support of the proposition which I have enunciated—*Collett* v. *London and North Western Railway Co.* (1) ; *Marshall* v. *York, Newcastle and Berwick Railway Co.* (2) ; *Austin* v. *Great Western Railway Co.* (3).

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[509] In *Foulkes* v. *Metropolitan District Railway Co.* (4), to which I shall have presently to refer in detail, Thesiger, L. J., pointed out in the clearest terms that the benefit which a carrying company derived, directly or indirectly, from the carriage of passengers imposed upon it the corresponding obligation of taking due and reasonable care for their safety. A violation of the duty thus imposed on a carrying company, an omission on their part to take such due and reasonable care to insure the safety of their passengers whom they invite to travel by their carriages, is considered as negligence. Proceeding on this principle the learned Judge in the Court below has held in this case that the defendants had omitted in fact to take the care which was incumbent on them to prevent the introduction into the carriage in which the plaintiff's son was travelling of the dangerous articles, the explosion of which caused the accident. And it is with this finding that we are now concerned. It has been urged on behalf of the appellants that the learned Judge in the Court below has wrongly thrown the onus on the defendants whereas it lay upon the plaintiff to prove negligence, that he has imposed an obligation on them not warranted by law, and that in considering the question of omission on their part he has overlooked the fact that it is the amount of control possessed by the Company over the act or acts complained of that determines their liability.

These, in substance, represent the principal objections urged against the lower Court's judgment. If I understand the matter aright there is no fixed rule as to onus ; each case must depend on its own special facts ; in some instances the situation of the parties and the nature of the accident, or the circumstances leading to it, may give rise to a legal presumption of negligence against the defendants ; in others it may be necessary for the plaintiff to establish affirmatively actual negligence before the Company can be made liable.—*Byrne* v. *Boadle* (5), *Cotton* v. *Wood* (6), *Scott* v. *London Dock Co.* (7), and [510] *Kearney* v. *London and Brighton Railway Co.* (8) furnish examples of the first class of cases. In *Scott* v. *London Dock Co.* (7) the majority of the Judges held that where the thing is shown to be under the management of the defendant or his servant, and the accident is such as in the ordinary course of things does not happen, if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care. In *Kearney* v. *London, Brighton and South Coast Railway Co.* (8) the plaintiff was injured by the fall of a

(1) (1851) 16 Q.B. 984.
(2) (1857) 11 C. B. 655.
(3) (1867) L. R. 2 Q. B. 442.
(4) (1880) L.R. 5 C. P. D. 157.
(5) (1863) 2 H. & C. 722.
(6) (1860) 8 C.B.N.S. 568.
(7) (1865) 3 H. & C. 596.
(8) (1870) L.R. 5 Q. B. 411.

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brick, while passing under a Railway bridge extending over the highway. The bridge rested on perpendicular brick walls, having pilasters, and from the top of one of these pilasters the brick fell, shortly after the passing of a train. It was held that these facts raised a presumption of negligence against the defendants. In this case, Cockburn, C. J., after stating the principle applicable to the case, said as follows :—

"The Company who have constructed this bridge were bound to construct it in a proper manner (there was no evidence, however, that it was not so constructed) and to use all reasonable care and diligence in keeping it in such a state of repair that no damage from its defective condition should occur to those who passed under it, the public having a right to pass under it. Now, we have the fact that a brick falls out of this structure and injures the plaintiff. The proximate cause appears to have been the looseness of the brick, and the vibration of a train passing over the bridge acting upon the defective condition of the brick. It is clear, therefore, that the structure in reference to this brick was out of repair. It is clear that it was incumbent on the defendants to use reasonable care and diligence, and I think the brick being too loose affords *prima facie* a presumption that they had not used reasonable care and diligence. It is true that it is possible that, from changes in the temperature, a brick might get into the condition in which this brick work appears to have been from causes operating [511] so speedily as to prevent the possibility of any diligence and care applied to such a purpose, intervening in due time, so as to prevent an accident. But inasmuch as our experience of these things is that bricks do not fall out when brick work is kept in a proper state of repair, I think, where an accident of this sort happens, the presumption is that it is not the frost of a single night or of many nights, that would cause such a change in the state of this brick work as that a a brick work would fall out in this way, and it must be presumed that there was not that inspection and that care on the part of the defendants, which it was their duty to apply." The case was carried to the Exchequer Chamber where the judgment of the majority below was unanimously affirmed (1).

Before I refer to the decisions relied upon by the appellants, I desire to call attention to the facts of the present case. The plaintiff's son was proceeding to Rawalpindi in the Panjab, by the defendants' line, with a ticket purchased by or for him at Bally. At Aligarh two passengers entered his compartment with some bombs and catherine wheels. Between Secundrabad and Dadri further up the line the fire-works exploded with such fearful effect that the doors of the compartment were blown out, the carriage was set on fire, eleven out of the fourteen passengers in the compartment were so seriously injured that they died within a short time, and considerable damage was done to the rolling stock of the company. The facts are abundantly clear upon the official reports of the Company's servants to their superior officers which have been put in evidence on behalf of the plaintiff with the consent of the defendants' counsel. They would probably be evidence as to the actual facts stated in them under s. 35 of the Evidence Act. It was contended that as in some of these letters phrases like "surreptitiously carried" or "clandestinely carried" occurred, they ought to be taken as evidence against the plaintiff, to disestablish the case of negligence. No fact is given which would justify the officer using the expression in

(1) (1871) L. R. 6 Q. B. 759.

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saying that the bombs were carried clandestinely. So far as we can judge it was a mere hypothesis or opinion absolutely of no [512] evidential value. Besides, it is noteworthy that the expression does not occur in the earlier reports or letters, but only in the later ones when presumably the officers of the Company had awakened to a sense of the gravity of the situation and of the liability involved in the dispute. These facts which are more fully set forth in the lucid and exhaustive judgment of the learned Judge in the Court below, raise in my mind a strong presumption of gross carelessness on the part of the Company's servants, and cast upon the defendants the onus of showing that there was no neglect of reasonable precautions on their side, and that the explosives were really carried in a manner that avoided detection. These matters were within the cognizance of the defendants, but no attempt was made to discharge that onus. On the contrary it has been strenuously argued either that no precaution was possible, or that they do not know what precaution could be taken, which comes to the same thing.

Ex post facto evidence has no bearing on the question whether due or reasonable care was or was not taken, but when a contention of the character just referred to is vigorously pressed by a learned counsel, the fact that subsequent to the accident steps have been taken which have in a great measure obviated the risk, becomes highly relevant. It is in evidence upon the reports that a special watch placed by the Company has succeeded in stopping in several instances the carriage of fire-works and in the conviction of offenders. In this connection I may observe that the suggestion of counsel that these fire-works were, in order to avoid detection, carried tied up in a bundle, is not only not founded on any data but is also improbable. It appears from the depositions of the witness, that the bombs had bamboos eight to ten inches long stuck into them; we know what catherine wheels are like. To suppose that these things would be carried tied up in a bundle, which would simply spoil the things, is absurd. However that may be, it is enough to say that the defendants have given no evidence as to how they were carried, or that they were in fact carried so concealed as to escape the notice of the Company's servants.

[513] Much stress was laid on *Daniel* v. *Metropolitan Railway Co.*(1) and *Welfare* v. *London and Brighton Railway Co.* (2), as furnishing the guiding principle in cases relating to the liability of Railway Companies. In *Daniel* v. *Metropolitan Railway Co.* (1) it appears that the Corporation of London was authorised to execute certain works over the line of the Metropolitan Railway Company. These works consisted partly in placing heavy iron girders upon the walls running along the line of railway, and were, therefore, works in the execution of which some danger was involved. The Railway Company had no control over these works, which were executed by contractors, engaged by the Corporation. By the negligence of the contractors one of the girders fell on a passing train and injured the plaintiff. It was held that it was not the duty of the Railway Company to assume that the contractors would be negligent or to take precautions against their possible negligence, and that the occurrence of the accident did not raise any presumption of negligence on the part of the Company.

In *Welfare* v. *London and Brighton Railway Company* (2) the plaintiff who was standing under a portico looking at a time table was injured by the fall of a timber and a roll of zinc from the roof which was undergoing

(1) (1871) L.R. 5 E. & I. Ap. 45.

(2) (1869) L.R. 4 Q. B. 693.

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repair. There was nothing to show that the defendants knew or had the means of knowing that the roof needed repairing, or that there was any obligation on their part to *take steps to know the condition* of the roof. It was held therefore that the plaintiff had failed to make out a case of negligence against the Company. The facts of these two cases differentiate them altogether from the case before us. In *Wakelin* v. *London and South-Western Railway Co.* (1), negligence was established against the Company, but inasmuch as the plaintiff failed to show the connection between the negligence, and the cause of her husband's death, her action was dismissed. Lord Watson stated his view in that case in the following words: "It appears to me that in all such cases the liability of the defendant Company must rest upon these facts, in the first place [514] that there was some negligent act or omission on the part of the Company or their servants, which materially contributed to the injury or death complained of, and in the second place, that there was no contributory negligence on the part of the injured or deceased person. But it does not, in my opinion, necessarily follow that the whole burden of proof is cast upon the plaintiff. That it lies upon the plaintiff to prove the first of these propositions does not admit of dispute. Mere allegation or proof that the Company were guilty of negligence is altogether irrelevant; they might be guilty of many negligent acts or omissions, which might possibly have occasioned injury to somebody, but had no connection whatever with the injury for which redress is sought, and, therefore, the plaintiff must allege and prove, not merely that they were negligent, but that their negligence caused or materially contributed to the injury." And Lord Fitzgerald said as follows: "There was evidence also intended to establish negligence on the part of the defendants in the absence of due and proper precautions for the safety of the public using that footpath. It seems to me that there was evidence of negligence, but it did not go so far as to establish that such negligence led to the death of Wakelin."

In the present case there can be no question that the negligence of the defendants, assuming that there was any, was the *causa causans* of the accident. It was urged on the authority of *Daniel* v. *Metropolitan Railway Co.* (2) that, as the defendants have no control over the passengers or over what they introduced into the carriages as their personal luggage, the Company could not be liable for negligence. I have already pointed out that in *Daniel* v. *Metropolitan Railway Co.* (2), the Railway Company had no authority over the contractors. Is it correct to say that the defendants had no control over their passengers? Does not the whole argument proceed on a pure assumption of fact? *Foulkes* v. *Metropolitan District Railway Co.* (3) has more analogy to the present case. There the plaintiff, as it appeared in the Court of appeal, had taken a return ticket at the railway station at Richmond, which belonged to the South-Western Company, for Hammersmith belonging [515] to the District Railway Company. The latter had running powers on the South-Western Company's line; and the plaintiff on his return journey from Hammersmith to Richmond in a carriage of the defendant Company was injured whilst alighting from the train. In the action brought by him it was contended on behalf of the District Railway Company that the contract with the plaintiff having been made by the South-Western Railway that Company were liable and not the defendants; and, *secondly*, that as

(1) (1886) L.R. 12 App. Cas. 41. (2) (1871) L.R. 5 E. & I. App. 45.
(3) (1880) L.R. 5 C. P.D. 157.

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the accident arose from the improper construction of the platform at Richmond, which was under the sole control of the South-Western, the District Railway Company were not liable. Both these points are thus dealt with by Baggallay, L. J.: "The train by which the plaintiff travelled was in every sense their own; the locomotive and carriages belonged to them, the drivers, guards and other servants in charge of it were in their employment, and in their pay, the line over which it ran was in part their own, and over the other part they had running powers, and in respect of that portion of the line over which they had, and were exercising, running powers, they had the same duties and were under the same obligations relatively to their passengers, and to the public generally, as they had and were under in respect of the portion of the line which was their own. The plaintiff was admittedly properly travelling by their line; he had, in the sense in which the word is ordinarily used, been invited to travel by it." And he went on to add: "I should not have adverted to this subject [the question relating to the platform] had it not been suggested in argument that the accident was occasioned to the plaintiff, not by reason of any improper construction of the carriage in which the plaintiff travelled, but by reason of the improper construction of the platform, and that the construction and maintenance of the platform was under the sole control of the South-Western Company; but admitting the fact to be so, as it possibly is, it was the duty of the defendants either to adopt the foot board or step of their carriage to the platform it would have to approach or to arrange for an alteration being made in the platform itself. To carry their passengers in carriages which were in any respect or for any purpose dangerous was, in my opinion, a misfeasance rather than a nonfeasance."

[516] Now, what was the position of the Company in the present case? The carriage in which the plaintiff's son was travelling was theirs, it was entirely in the charge and under the control of their servants; the platform at Aligarh was under their control, the gate or barrier through which the passengers had to pass to get on to the platform was held, it would appear from the evidence, by one of their servants; the law had vested them with the fullest powers to make rules against the introduction of combustibles and explosives into the trains. And if, in spite of these powers and facilities, they omit or fail to take sufficient precautions, as in the absence of any rebutting evidence we must assume they did, their liability cannot be questioned. The learned Judge in the Court below has not, in my opinion, cast a higher obligation than the law imposes, the duty of taking due and reasonable care for the safety of passengers whom they invite to travel by their line.

For these reasons I agree in dismissing the appeal.

Appeal dismissed.

Attorneys for the appellants: Messrs. *Morgan & Co.*
Attorney for the respondent: Babu *A. K. Mitter.*

H. W.

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JAN. 16.

APPELLATE CIVIL.

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APPELLATE CIVIL.

Before Mr. Justice Banerjee and Mr. Justice Rampini.

KADAMBINI DEBI (*Plaintiff*) *v.* KALI KUMAR HALDAR (*Defendant*).*
[16th January, 1899.]

Easement—Light and air—Partition of a joint-family house—Effect of partition by a consent decree where the decree does not reserve any right to the use of light and air—Implied grant of easement upon severance of tenement.

On partition of a family dwelling house by a consent decree, the plaintiff claimed a right to the passage of light and air necessary for the enjoyment of his share of the building in the way in which it was enjoyed at the time [517] of the partition, though no such right was expressly reserved in the decree. The defence was that the principle of an implied grant of easement upon severance of the tenement should not be applied to the case, but that the rights of the parties should be determined solely with reference to the decree made in the partition suit.

Held, that the principles of justice, equity and good conscience should be applied to the case, and that the plaintiff was entitled to the right claimed, even in the absence of any express provision in the decree reserving such right.

Quære: Whether the principle of an implied grant of easement in severance of tenements would apply in a case where the partition was effected by a decree of the Court in a contested suit and not by consent of parties.

THE facts of the case were shortly these: One Mani Lal Banerjee and the plaintiff were in joint possession of a plot of land with a building thereon. Mani Lal brought a suit for partition of the said plot of land which ended in a consent decree, and a partition was effected. Mani Lal got the northern portion, and the plaintiff got the southern portion of the building. On the southern portion there was a one-storied building with some doors and windows opening to the north. Mani Lal's share was purchased by the defendant. Prior to the purchase by the defendant, Mani Lal began erecting a new building on the northern portion of the block. The defendant after his purchase took up the work of the building where Mani Lal had left it and completed the construction of the southern wall as a new building, and a verandah was being put up projecting towards the plaintiff's house, which the plaintiff alleged would probably be an obstruction to the free access of light and air through the doors and windows of her house. Under these circumstances she brought a suit for a declaration of her right to the passage of light and air through the doors and windows of her house, for removal of the verandah and for a perpetual injunction restraining the defendant from extending a certain roof close to the said doors and windows.

The defence (*inter alia*) was that the plaintiff was not entitled to the right claimed, no such right having been reserved in her favour in the partition decree.

The Munsif found in favour of the plaintiff and granted the [518] injunction prayed for. On appeal the lower appellate Court reversed the decree of the Munsif and dismissed the plaintiff's suit on the ground that the rights of the parties must be determined with reference to the decree in the partition suit, and as that decree did not reserve any right to the passage of light and air, such as the plaintiff claimed, she was not entitled to it.

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* Appeal from Appellate Decree No. 1103 of 1897, against the decree of Babu Rajendra Kumar Bose, Subordinate Judge of 24-Pergunnahs, dated the 21st of May 1897, reversing the decree of Babu Sasi Kumar Ghose, Munsif of Alipur, dated the 7th of December 1896.

From this decision the plaintiff appealed to the High Court. 1899

Mr. *J. T. Woodroffe*, Babu *Basanta Kumar Bose* and Babu *Horendra Nath Mookerjee*, for the appellant. JAN. 16.

Sir *Griffith Evans* and Babu *Jogesh Chundra De*, for the respondent. APPEL-LATE CIVIL.

Mr. *Woodroffe* for the appellant.—The effect of the consent decree was that the plaintiff was entitled to enjoy the building with the easements which were attached to the same at the time of the partition: See the cases of *Ratanji Hormasji* v. *Edalji Hormasji* (1), *Amutool Russool* v. *Joomuck Singh* (2), *Charu Surnokar* v. *Dokuri Chunder Thakoor* (3), and *Bolye Chunder Sen* v. *Lalmoni Dasi*(4). The plaintiff would be entitled to the easement claimed, as it was apparent and continuous, and necessary for enjoying the share as it was enjoyed when the partition took effect: see *Purshotam Sakharam* v. *Durgoji Tukaram* (5). The following cases were also cited in the course of the argument. *Whaley* v. *Dawson* (6), *Wheeldon* v. *Burrows*(7), *Allen* v. *Taylor*(8), *Phillips* v. *Low* (9), *Barnes* v. *Loach* (10), *Compton* v. *Richards* (11), *Swansborough* v. *Coventry* (12), and *Pearson Spencer* (13). 26 C. 516= 3 C.W.N. 409.

[519] Sir *Griffith Evans*, for the respondent.—In this case the plaintiff could not go behind the decree, and she is not entitled to the right claimed, inasmuch as the decree did not provide for such right—*Gopal Chunder Roy* v. *Brojendro Coomar Roy* (14) and *Thomas* v. *Owen* (15).

Mr. *Woodroffe* in reply.

The judgment of the High Court (BANERJEE and RAMPINI, JJ.) was as follows :—

JUDGMENT.

This appeal arises out of a suit brought by the plaintiff appellant for a declaration of her right to the passage of light and air through certain doors and windows, for the removal of certain obstructions to the same, and for a perpetual injunction restraining the defendant from extending a certain roof close to some of those doors and windows referred to in the plaint.

The defence was that the plaintiff was not entitled to the right claimed, there being no such right reserved in her favour in the decree for partition by which the building, to which the right to passage of light and air is said to appertain, was allotted to the plaintiff's share.

The first Court found for the plaintiff to this extent, namely, that the plaintiff was entitled to an injunction restraining the defendant from extending the roof or hanging verandah, and it gave the plaintiff a decree accordingly.

On appeal the lower appellate Court has reversed the first Court's decree and dismissed the plaintiff's suit, holding that the rights of the parties must be determined with reference to the decree in the partition suit, and as that decree does not reserve any right to light and air, such as the plaintiff claims in her favour, she is not entitled to a decree.

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(1) 8 B.H.C.O.C. 181.
(2) 24 W.R. 345.
(3) 8 C. 956
(4) 14 C. 797.
(5) 14 B. 452.
(6) (1805) 2 Sch. & Lef. 367 (372).
(7) (1879) L.R. 12 Ch.D. 31.
(8) (1880) L.R. 16 Ch. D. 355.
(9) (1892) 1 L.R. Ch.D. 47.
(10) (1879) L.R. 4 Q.B.D. 494.
(11) (1814) 1 Price, 27.
(12) (1832) 9 Bing. 305 (309).
(13) (1863) 3 B. & S. 761.
(14) 5 C.L.R. 338.
(15) (1887) L.R. 20 Q.B.D. 225.

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In second appeal it is contended for the plaintiff that the lower appellate Court is wrong in holding upon the facts found that the plaintiff is not entitled to the right claimed.

It is argued for the plaintiff that the effect of the partition decree, which was a decree by consent, was to entitle the plaintiff [520] to enjoy the building in question with those apparent and continuous *quasi*-easements which were attached to the same and which were necessary for the enjoyment of the building in the way in which it was enjoyed at the time of the partition.

In support of this contention several cases have been cited, of which it is necessary only to refer to the following, namely, *Ratanji Hormasji* v. *Edalji Hormasji* (1), *Amutool Russool* v. *Jhoomuck Singh* (2), *Charu Surnokar* v. *Dokouri Chunder Thakoor* (3), and *Bolye Chunder Sen* v. *Lalmoni Dasi* (4).

On the other hand it is contended for the respondent that the rule of English law which implies a grant of an easement upon severance of tenements is one that does not apply to this country, that even if such a rule could apply to a case of severance by the act of parties it can have no application to a case like this, where severance is effected by a decree of Court, and that, in a case like the present, the rights of the parties should be determined solely with reference to the decree made in the partition suit.

No doubt the rights of the parties must be primarily determined with reference to the terms of the decree in the partition suit. If the decree had contained any express provision one way or another bearing on the present point, such provision would have to be given effect to quite irrespective of any rule of law with regard to an implied grant of an easement upon severance of tenements. But there is no express provision in the decree bearing upon the present question.

One thing, however, is clear, from the terms of the decree in the partition suit, that the decree was made by consent of parties; that what was divided was not merely the land, but the land with the building standing on it; and that a certain portion of the land with the buildings, as indicated in the plaint referred to in the decree, is allotted to the plaintiff and a certain other portion to the defendant.

[521] That being so, the question is whether the appellant who had allotted to her a portion of the house, that is the land with the building standing thereon, had that portion alloted to her with these apparent and continuous *quasi*-easements, which are necessary for the enjoyment of the building as a building, or whether she got simply the land allotted to her with the building then standing thereon, which might any day by the action of her co-sharer be converted into an uninhabitable building.

There being no enactment of the Legislature applicable to a case like this, the question we have stated will have to be answered with reference to the principles of justice, equity and good conscience; and the Courts in this country have considered the rule of English law known as the doctrine of implied grant of easements upon severance of tenements, as being in accordance with justice, equity and good conscience. This will appear from the cases to which we have referred above.

It was urged that the question, whether the rule applied to a case in which severance is effected by a decree of Court, was raised in the case of

(1) 8 B.H.C.O.C. 181. (2) 24 W. R. 345. (3) 8 C. 956. (4) 14 C. 797.

Bolye Chunder Sen v. *Lalmoni Dasi* (1), but was considered by the learned Judges who tried that case to be one of considerable difficulty and was left undetermined; and that the rule of implied grant of easement ought not to apply to such cases because that rule is based either upon the principle that no man can derogate from his own grant or upon a presumption as to the intention of the parties by whom severance is effected; and neither of these two can apply to a case where severance is made by a decree of Court.

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No doubt there is considerable force in this argument, but it is unnecessary to decide the broad question in this particular case, the partition here being effected, not by the Court as in a contested suit, but by consent of parties, the Court merely recording that consent.

That being so, we are not precluded from applying to this case the principle of presumed grant of easements upon severance of tenements.

It was further contended that we should not apply to a [522] case where parties come to a partition the rules applicable to a case where the owner of an entire tenement alienates a portion, or simultaneously alienates different portions of the whole to different persons; and that in a case where a partition is effected by parties the dominant consideration in their minds is that each should acquire a portion which he could enjoy without interference by his co-sharer. But there is another and a more important matter to consider, and that is this: In dividing property, the value of each divided portion ordinarily is assessed with reference to its existing condition, and in the present case there is nothing to show that any other consideration guided the parties.

On a full consideration of these matters we think that it would accord best with the rules of justice, equity and good conscience to hold that the plaintiff by the partition in question got the portion allotted to her, with the passages for light and air which are found by the first Court to be necessary for the enjoyment of that portion in the way in which it used to be enjoyed, and that the absence of any express provision in the decree does not stand in the way of the plaintiff's claiming the right to those passages for light and air.

It was urged that if the decree of the Court of appeal below is set aside, the case ought to go back. We have considered the grounds of appeal urged before the lower appellate Court by the defendant, and we do not think that any question of fact was raised in the appeal for the decision of which a remand would be necessary.

The questions raised were all in substance questions of law which have been disposed of by the observations made above.

The result then is that the decree of the lower appellate Court will be set aside, and that of the first Court restored with costs in this and the lower appellate Court.

S. C. G. *Appeal allowed.*

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(1) 14 C. 797.

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[523] PRIVY COUNCIL.

PRESENT:

Lords Ashbourne, Hobhouse, Macnaghten, and Morris and Sir R. Couch.

[On appeal from the Court of the Judicial Commissioner of Oudh.]

MUHAMMAD MEHNDI ALI KHAN (*Representative of Plaintiff*) *v.* MUHAMMAD YASIN KHAN AND OTHERS (*Defendants*). [17th November and 10th December, 1898.]

Oudh Land Revenue Act (XVII of 1876), ss. 121, 123—Transfer of shares of under-proprietors in arrears of rent—Right to interest on rent from transferee—Oudh Rent Act (XXII of 1886), s. 141.

Under the Oudh Land Revenue Act, 1876, ss. 121, 123, the shares of defaulting under-proprietors were transferred to three of them who offered to pay. The present suit was brought by the superior proprietor, the talukhdar, in whose estate the mehal was comprised, against the whole body of under-proprietors, for arrears of rent accrued, while the term of the above transfer was running.

Held, that the provision in s. 123 of the Oudh Land Revenue Act 1876, to the effect that such transfer shall not affect the joint liability of the co-sharers of the mehal, had not the effect of charging the co-sharers other than the three transferees with any liability for rent accrued during the term of the transfer.

Interest was also claimed, but as to this it was *held*, that under-proprietors were not tenants within the meaning of the Oudh Rent Act, 1886, s. 141, providing for payment of interest on rents due from tenants.

[**R.**, 26 A. 299 (**P C.**) = 6 Bom. L.R. 505 = 8 C.W.N. 521 = 31 I.A. 116 = 14 M.L.J. 190 = 7 O.C. 118 = 8 Sar. P.C.J. 628.]

APPEAL from a decree (1st November 1894) of the Judicial Commissioner's Court, affirming a decree (14th October 1890) of the Deputy Commissioner of Sultanpur.

This suit was brought on the 4th June 1890 under the provisions of cl. 2, s. 108, of the Oudh Rent Act, XXII of 1886, in the Court of the Deputy Commissioner, by the father of the present appellant, the talukhdar of Hasampur, as superior proprietor of mehal Sewar, within the talukh, against the under-proprietors of that mehal for the recovery of Rs. 10,761, arrears of rent, with interest thereon, for the years 1294, 1297, Fasli, alleged to be due from the defendants as a joint body, numbering forty-four.

[524] Under ss. 121 and 123 of Act XVII of 1876, the Oudh Land Revenue Act, the shares of all but three of the under-proprietors had been transferred to those three named Hubdar Khan, father of Yasin, the first respondent, to Gujadhar Singh, the second, and to Roghubar Singh, the third, for a term of ten years. That was effected on the 10th September 1881.

The question raised and decided on this appeal related to the liability of the original co-sharers of the mehal to be charged with rent due to the superior proprietor, that liability being now alleged on the default of the above three to pay rent accrued due on the whole mehal since the transfer.

The facts are stated in their Lordships' judgment.

For the defence it was answered that only the three, to whom the ten years' transfer had been made, were liable for the rent claimed; all the others being out of possession and having no management of the property. It was also contended, on the issue of their liability, that upon this question there had been already an adjudication by a former Deputy

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Commissioner on a claim for rent, which was decreed against the three transferees only down to 1291 Fasli. That had been decided between the parties, or those whom the present litigants represented, on the 10th March 1884.

The Court of first instance decided this suit in favour of the under-proprietors, deprived for the above stated period, holding them not liable in consequence of the transfer. But, on concluding his judgment, the Deputy Commissioner observed that it was premature to decide whether the saleable interest of the three defendants, by whom he decreed the rent to be payable, as the result of their having possession of the whole mehal, was limited to their own rights as three under-proprietors, or extended to the rights of the other under-proprietors as well.

The judgment of the Judicial Commissioner and of the Additional Judicial Commissioner, forming the Court, was that the question of the liability of the respondents, other than the three transferees, was a matter already adjudged in the former decision above referred to (s. 13 of the Civil Procedure Code).

On the plaintiff's appeal,—

[525] Mr. *C. W. Arathoon*, for the appellant, argued that there was error in the judgments of the Courts below. The transfer had been made with liability continuing on the village; and the question should have been held to be whether the Deputy Commissioner had not made a transfer of only the temporary possession of the village, with the right, title, and interest remaining in the village community of under-proprietors. There was no dispute as to the proceeding that had been taken under the Rent Act XIX of 1868, and the Land Revenue Act XVII of 1876. The question had not been fully contested in 1884; and the appellate Court should have disposed of the question arising on the merits, and on the construction of s. 123. The argument was that the transfer for ten years had not operated to deprive the landlord of his right over the sub-settlement tenure, mehal Sewar, as his security, and as a tenure upon which he held a lien for the rent due to him. Independently of the express reservation of liability in s. 123, the joint liability of the co-sharers in the mehal rested upon general principle, and could only be taken away by some definite enactment. The question had been really raised whether the saleable interest of the under-proprietors was limited, after a general default by the village community, to the interests of three judgment-debtors to whom the tenure had been transferred for ten years; in other words, whether the charge for the rent on the village extended to the interests of the other under-proprietors, or did not so extend. It was submitted that it should have been decided that the under-proprietary title of the respondents as a body was liable to attachment and sale in satisfaction of the claim of the superior proprietor for rent in arrear. It was a further question whether interest was not payable on the arrears of rent for which decrees had been made. Reference was made to the Oudh Rent Act, XXII of 1886, s. 141.

The respondents did not appear.

Afterwards, on the 10th December, their Lordships' judgment was delivered by—

JUDGMENT.

LORD HOBHOUSE.—The plaintiff in this suit is the talukhdar of Hasampur. The first three defendants were at the institution [526] of the suit transferees of the mehal Sewar, part of the talukh, for the remainder

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of a term of 10 years. The other 44 defendants were entitled to sub-proprietary rights within the same mehal, subject to the transfer. The plaintiff is entitled to rent in respect of the entire mehal amounting to about Rs. 2,670 per annum. His suit is brought for arrears of rent which accrued while the term was running. The transferees have no defence to the suit. The other 44 defendants assert that they are not liable, and so it has been held first by the Deputy Commissioner and afterwards by the Court of the Judicial Commissioner. No one has appeared to oppose the talukhdar's appeal to Her Majesty in Council.

The transfer was effected in the year 1881 by the Deputy Commissioner acting under powers given by the Oudh Rent Act of 1868, s. 125, and the Oudh Land Revenue Act of 1876, s. 121. It seems that for some years the under-proprietors had failed to pay rent, that the Deputy Commissioner had entered into management under the Rent Act without any beneficial result, and after a while had recourse to the powers given by the Revenue Act to transfer the shares of the defaulters to the three defendants, who were also defaulting shareholders, but were backed up by a mahajun, who found the requisite funds. From the date of the transfer the other co-sharers were no longer in legal possession, except that a certain quantity of nyjote or sir land was reserved to some of them at rents stated in the Deputy Commissioner's order.

Each of the parties has contended that the point in issue has been previously decided in his favour and cannot be re-opened. In 1884 the plaintiff brought a similar suit in which the defendants other than the transferees denied their liability, and the then Deputy Commissioner Mr. Harrington gave the plaintiff a decree against the three transferees only. In 1885 the plaintiff again brought a similar suit, which being for a smaller amount was brought in the Court of an inferior range of jurisdiction, that of the Extra Assistant Commissioner, which would not be competent to entertain the present suit. The learned Judge decided in favour of the talukhdar on a ground which will be mentioned presently.

[527] The Deputy Commissioner in this suit held that he ought to decide it on its own merits, and he held that, however the decree might work out in execution against the transferees, which it was premature to decide, the plaintiff could not have a decree against anybody else. The Judicial Commissioners took the view that the judgment of 1884, being made by a Court competent to decide the present case, is binding now, whereas that of 1885, being made by a Court not so competent, is not. Therefore they do not decide the suit on its merits. Without at all intimating that the Judicial Commissioners have erred, their Lordships doubt whether the judgment of 1884, which is the only evidence before them of that suit, sufficiently discloses what was really contested and decided there, so that they can confidently hold the present issue to be *res judicata*. In that judgment it appears that the plaintiff admitted the plea of the defendants consequently upon the admission of the three transferees that they were liable. It may possibly have been that the plaintiff was satisfied with the security of the transferees for the smaller amount then in dispute, and did not choose to contest the disputed point. It is safer to pass by this point without expressing any opinion upon it.

As to the merits Mr. Arathoon has not succeeded in impressing their Lordships with any substantial doubts. It is a startling thing to be told that under-proprietors, whose beneficial interest has been transferred by an official act to persons who thereby become possessors of the whole mehal, still remain liable to pay rent to the talukhdar. To produce that

result the appellant relies on s. 123 of the Land Revenue Act, which provides that the procedure of transfer shall not affect the joint liability of the co-sharers of the mehal. That provision was the basis of the judgment 1885, in which the learned Judge observed with much truth that "apparently the principle would seem to be entailing hardship on the excluded proprietors, for these are not in possession of their shares; on the other hand the transferees are in possession and they alone should be held liable for the talukhdar's demand." Fortunately the language of the Act is not calculated to work such a glaring injustice. Such liability as the co-sharers incur, whether to the Government or [528] to the talukdhar, is to remain joint as before; but there is no provision for charging them with any liability at all when they have been deprived of the property in respect of which liability arises. In fact they have ceased for the time to be co-sharers, and during that time they have no liability, joint or other, directly to the talukhdar.

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Then Mr. Arathoon relies on the fact that sir land is reserved for a number, by no means all, of the defendants. The answer is that no claim in respect of that land has been raised in this suit. Probably no such claim exists, but it is sufficient to say now that, if there is any, it must rest on quite different grounds to the claim for rent issuing out of the whole talukh, and must raise quite different issues which have never been tried.

A minor point in the appeal relates to the talukhdar's claim for interest upon arrears of rent due from the three transferees. It is stated by the Deputy Commissioner that interest on arrears of revenue is not chargeable against talukhdars, and he holds that arrears of rent due from sub-proprietors should be subject to the same incident. The rent Act of 1886, s. 141, provides for interest on rents due from tenants, but Mr. Arathoon does not contend that these sub-proprietors are tenants, and he cannot adduce any other law by which such arrears are made to carry interest.

The appeal fails on all grounds. Their Lordships will humbly advise Her Majesty to dismiss it.

Appeal dismissed.

Solicitors for the appellant: Messrs. *T. L. Wilson & Co.*

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26 C. 529 = 3 C.W.N. 374.

[529] APPELLATE CIVIL.

Before Mr. Justice Ghose and Mr. Justice Stevens.

BUJHA ROY (*Judgment-debtor*) v. RAM KUMAR PERSHAD (*Auction-purchaser*).* [16th February, 1899.]

Appeal—Order amending sale-certificate—Order granting application for review of order—Civil Procedure Code (Act XIV of 1882), s. 244—Question relating to execution of decree.

No appeal lies from an order granting an application for the amendment of a sale-certificate.

Bhimal Das v. *Ganesha Koer* (1) approved.

[F., 23 A. 476 = 21 A.W.N. 156; Rel., 23 Ind. Cas. 811 = 19 C.L.J. 209; Appl., 7 C.L.J. 436; R., 6 C.L.J. 749; 14 C.L.J. 489 (493) = 12 Ind. Cas. 745 (747).]

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* Appeal from Original Order No. 408 of 1897, against the order of Babu Hare Kristna Chatterjee, Subordinate Judge of Shahabad, dated the 2nd of September 1897.

(1) 1 C.W.N. 658.

1899 FEB. 16.

APPELLATE CIVIL.

26 C 529 = 3 C.W.N. 374.

THE facts of this case, so far as they are necessary for the purposes of this report, are as follows :—

The auction-purchaser, who was also the decree-holder, made an application on the 26th of October 1895, in the Court of the First Subordinate Judge at Arrah, for delivery of possession of two plots of land purchased ; but the application was rejected by the Subordinate Judge on the 7th of December 1895, on the ground that the boundaries of the plots of land, as given in the application, did not tally with those given in the sale-certificate. Thereupon the auction-purchaser presented a petition, purporting to be an application for a review of the order of the 7th of December 1895, and praying for a rectification of the sale-certificate as to boundaries. This application was treated by the Subordinate Judge as one for review under s. 623 of the Civil Procedure Code ; and on the 13th of June 1896, the Court granted the review and set aside the order complained of. Eventually, after going into evidence, the Subordinate Judge passed an order on the 2nd September 1897, amending the sale-certificate in the manner applied for, as regards plot No. 2 only.

[530] The judgment-debtor appealed to the High Court against the order of the lower Court, dated the 2nd of September 1897, and also took objection to the order, dated the 13th of June 1896.

Babu *Saligram Singh*, and Babu *Mahabir Sahay*, for the appellant.

Mr. *C. Gregory*, and Babu *Makhan Lal*, for the respondent.

On behalf of the respondent a preliminary objection was taken that the appeal did not lie.

The judgment of the High Court (GHOSE and STEVENS, JJ.) was as follows:—

JUDGMENT.

This is an appeal against an order of the Subordinate Judge of Shahabad, dated the 2nd September 1897, derecting that a sale-certificate granted to the auction-purchaser—the decree-holder at whose instance a certain property was sold—be amended, as prayed for by the said auction-purchaser.

It appears that the auction-purchaser had previously made an application for delivery of possession in accordance with the boundaries which he set forth as the correct boundaries of the lands which had been sold ; but his prayer was refused on the 7th December 1895, upon the ground that the boundaries as set forth by him did not agree with those in the certificate of sale. An application was subsequently made on the 27th February 1896, for amendment of the sale-certificate. It was treated as an application for review under s. 623 of the Code ; and a review was granted on the 13th June 1896. An investigation was then ordered, the result of which was that on the 2nd September 1897, an order was made, directing the amendment of the sale-certificate in the manner applied for by the auction-purchaser as far as one of the plots, *viz.*, No. 2, was concerned. In this appeal, the propriety of the order of the 2nd of September 1897, as also that of the order dated the 13th June 1896, granting the review, have been questioned. The respondent, however, has raised a preliminary objection upon the ground that no appeal lies to this Court against the order complained against. We think that this objection must prevail. The Code does not provide for an appeal [531] against such an order. The only section of the Code which the appellant relies upon is s. 244, it being contended that the question raised was one relating to the execution, discharge or satisfaction of the decree. We are unable to accept this

contention as correct; for the decree itself has already been executed, and no question now arises in relation to the execution thereof, the only question being whether the certificate given to the auction-purchaser gives a right description of the property sold. In this view, we are supported by the case of *Bhimal Das* v. *Ganesha Koer* (1) decided by Trevelyan and Stevens, JJ. We hold that this appeal is incompetent, and must therefore be dismissed.

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We have, however, been asked to deal with this appeal as an application under s. 622 of the Code, but we do not think we ought to do so in the present proceedings.

We make no order as to costs in this appeal.

M. N. R. *Appeal dismissed.*

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26 C. 531.

APPELLATE CIVIL.

Before Mr. Justice Ghose and Mr. Justice Stevens.

GANU SINGH (*Plaintiff*) v. JANGI LAL AND OTHERS (*Defendants*).* [27th January, 1899.]

Attachment—Attachment before judgment. Effect of—Alienation during attachment—Civil Procedure Code (Act XIV of 1882), ss. 483, 484, 485, 486, 487, 488, 489, 490, 276.

Any private alienation of a property attached before judgment, during the continuance of the attachment, is void as against all claims enforceable under the attachment.

The effect of an attachment of a property under the Civil Procedure Code, whether made before or after decree, is the same, provided that in the former case a decree is made for the plaintiff at whose instance the attachment takes place

Raj Chunder Roy v. *Issur Chunder Roy* (2) referred to.

[Disappr., 38 B. 105 = 15 Bom. L.R 848 = 21 Ind. Cas. 330.]

[532] THE facts of the case, so far as they are necessary for the purposes of this report, are as follows:—

The defendants (1st party) Jangi Lal, Bhagwati Pershad, and Inderdan Pershad, brought a suit on a bond against the defendants (2nd party), Harihar Singh, Posa Singh, and Ramdilal Singh, in the Court of the Additional Munsif at Mozufferpore, and before judgment had 4 annas share of a certain *putti* belonging to the defendants (2nd party) attached on the 30th October 1886. While the said attachment was subsisting, the plaintiff Ganu Singh, it is alleged, purchased from the defendants (2nd party), 4 gundas and odd share of the property attached, by a *kobala*, dated the 9th June 1894. During execution proceedings instituted by Jangi and others, who had succeeded in their suit, Ganu Singh objected and his objection was disallowed with regard to the said 4 gundas and odd share. Thereupon Ganu Singh brought a suit for the said share, and the Munsif dismissed the suit, the decision of the Munsif being confirmed on appeal to the Judge of Tirhoot.

The plaintiff appealed to the High Court.

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* Appeal from Appellate Decree, No. 1468 of 1897, against the decree of A. Mackie, Esq., District Judge of Tirhoot, dated the 15th of May 1897, affirming the decree of Moulvie Ali Ahmed, Munsif of Mozufferpore, dated the 28th of July 1896.

(1) 1 C.W.N. 658. (2) (1865) Bourke, O.C. 139.

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Babu *Umakali Mukerjee*, and Babu *Lakshmi Narayan Singh*, for the appellant.

Babu *Sarada Charan Mitter*, and Babu *Shorasi Charan Mitter*, for the respondents.

The judgment of the High Court (GHOSE and STEVENS, JJ.) was as follows :—

JUDGMENT.

This appeal ariess out of a suit in which the plaintiff, who is the appellant before us, asked for a declaration of his title in respect to a 4 gundas odd share in a certain property as acquired by him under a bill of sale executed by the defendant, second party, Harihar Singh, on the 9th June 1894. The respondents before us, Babu Jangi Lal and others, who are the creditors of Harihar Singh, on the institution of a suit against that individual for recovery of a certain amount of money, obtained an attachment before judgment of the 4 gundas and odd share of the property.

The Courts below have dismissed the suit upon the ground [533] that the sale of the plaintiff on the 9th June 1894, while the attachment before judgment was subsisting, was bad in law, and that therefore the plaintiff is not entitled to judgment.

It has, however, been argued before us by the learned Vakil on behalf of the plaintiff that the Courts below, before giving effect to the attachment before judgment, ought to have determined whether that attachment had been made in accordance with the provisions of the Civil Procedure Code. It has also been argued that *that* attachment did not prevent the judgment-debtor Harihar Singh from alienating his property to the plaintiff.

As regards the first point raised before us, it seems to be quite clear, looking at the judgments of both the Courts below, that there really was no dispute between the parties, that there was an attachment, and that the attachment was duly made. That being so, we are of opinion that we should not interfere with the judgments of the Courts below upon this ground.

As to the other question, namely, what may be the effect of the attachment before judgment, it seems to us, upon a consideration of ss. 483 to 490 of the Code of Civil Procedure, read with the sections which deal with attachment after judgment, in course of the execution of a decree, that the effect of an attachment, whether it be before or after decree, is the same, provided that in the former case a decree is made for the plaintiff, at whose instance the attachment takes place. It will be observed that the main object of an attachment before judgment is to enable the plaintiff to realize the amount of the decree, supposing a decree is eventually made, from the defendant's property. Section 483 provides that "if at any stage of any suit the plaintiff satisfies the Court by affidavit or otherwise that the defendant with intent to obstruct or delay the execution of any decree that may be passed against him is about to dispose of the whole or any part of his property," and so on, "the plaintiff may apply to the Court to call upon the defendant to furnish security to satisfy any decree that may be passed against him, and, on his failing to give such security, to direct that any portion of his property within the jurisdiction of the [534] Court shall be attached until further order of the Court." Section 484 empowers the Court to call upon the defendant, either to furnish security to produce and place at the disposal of the Court when required, the property sought to be attached, or such portion thereof as may be sufficient to satisfy the decree, or to appear and show cause

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why he should not furnish security. Section 485 lays down that in the event of the defendant failing to show cause or to furnish the required security, "the Court may order that the property specified in the application, or such portion thereof as appears sufficient to satisfy any decree which may be passed in the suit, shall be attached." Section 486 provides that "the attachment shall be made in the manner herein provided for the attachment of property in execution of a decree for money." Section 487 says: "If any claim be preferred to the property attached before judgment, such claim shall be investigated in the manner hereinbefore provided for the investigation of claims to property attached in execution of a decree for money." Then we have s. 488, in which it is laid down that, "when an order of attachment before judgment is passed, the Court which passed the order shall remove the attachment whenever the defendant furnishes the security required together with security for the costs of the attachment, or when the suit is dismissed," clearly indicating that in the event of the suit not being dismissed but decreed, the attachment shall subsist. Section 489 then provides that "attachment before judgment shall not affect the rights, existing prior to the attachment, of persons not parties to the suit, nor bar any person holding a decree against the defendant from applying for the sale of the property under attachment in execution of such decree." It would seem that, save and except in these two classes of cases, the intention of the Legislature is that an attachment before judgment should be fully operative. Then we have s. 490 providing that "when property is under attachment by virtue of the provisions of this chapter, and a decree is given in favour of the plaintiff, it shall not be necessary to re-attach the property in execution of such decree."

This section confirms the view which we have just expressed. No doubt, as has been pointed out by the learned Vakil for [535] the appellant, there is no distinct provision in chap. XXXIV of the Code, which deals with arrest and attachment before judgment, similar to that which is to be found in s. 276 of the Code, *viz.*, that when an attachment is made in execution of a decree, alienation of the property so attached during the continuation of the attachment shall be void as against all claims enforceable under the attachment. But looking at the various sections to which we have just referred as a whole, there can be very little or no doubt that the Legislature intended that the same effect should be given to an attachment before judgment as is expressly provided in s. 276 in respect to an attachment in execution of a decree.

In this view we think we are supported by the decision in the case of *Raj Chunder Roy* v. *Isser Chunder Roy* (1), where Mr. Justice Norman, referring to the provisions of the old Code in regard to attachment before judgment, expressed the opinion that the process in attachment before judgment is in all respects the same as in cases of attachment after judgment, and that the effect, namely, of binding the property so as to prevent private alienation, is the same in both cases. No doubt, as has been pointed out by the learned Vakil for the appellant, the precise question that the learned Judge had to decide in that case was different from that with which we have to deal here; but the reasoning upon which that decision was arrived at, is the reasoning which we think we may well

(1) (1865) Bourke, O. C. 139.

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adopt in this case. If we were to adopt the opposite view, an attachment before judgment would be entirely futile and of no efficacy whatever.

In this view of the matter, we are of opinion that the Courts below have come to a right conclusion. The result is that the appeal must be dismissed with costs.

M. N. R. *Appeal dismissed.*

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26 C. 536 = 3 C.W.N. 294.

[536] APPELLATE CIVIL.

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, and Mr. Justice Banerjee.

NAGENDRA NATH BASU AND ANOTHER (*Plaintiffs*) v. SATADAL BASINI BASU (*Defendant*).* [21st February, 1899.]

Land Registration Act (*Bengal Act* VII *of* 1876), s. 78—*Suit for rent, without registration of name, whether maintainable by the legal representatives—Succession Certificate Act* (VII *of* 1889), s. 4, *cl.* (2)—*Debt, Meaning of.*

A suit for rent, accruing due partly during the lifetime of a registered proprietor, and partly after his death, was brought by his representatives; the defence was that the suit was not maintainable inasmuch as the plaintiffs were not registered proprietors, and had no certificate under the Succession Certificate Act.

Held, that s. 78 of the Land Registration Act is not a bar to the realization of rent accruing due during the lifetime of the registered proprietor, but a suit for rent accruing due after the death of the registered proprietor is not maintainable, by his representatives, without having their names registered under the Land Registration Act.

Held, also, that rent is not a "debt" within the meaning of s. 4 of the Succession Certificate Act, and therefore no certificate of succession is necessary.

[F., 27 C. 535 (538).]

THIS appeal arose out of an action brought by the plaintiffs for recovery of arrears of rent which had accrued between April and the 4th December 1893. The father of the plaintiffs, who was a registered proprietor of the property in respect of which rent was claimed, died on the 19th September 1893, and his heirs sold the property on the 4th December in that year. The defence (*inter alia*) was that the suit was not maintainable, inasmuch as the plaintiffs had not registered their names under the provisions of the Land Registration Act. The Court of first instance overruled the objection raised by the defendant, and decreed the plaintiffs' suit. On appeal, the Subordinate Judge set aside the decision of the first Court. From this decision the plaintiffs appealed to the High Court.

[537] Dr. *Ashutosh Mookerjee*, for the appellants.

Babu *Tara Kishore Chowdhry*, for the respondent.

The following judgments were delivered by the High Court (MACLEAN, C. J., and BANERJEE, J.):—

JUDGMENTS.

MACLEAN, C. J.—This case in my opinion does not fall within s. 78 of Bengal Act VII of 1876.

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* Appeal from Appellate Decree No. 586 of 1897, against the decree of Babu Bulloram Mullick, Subordinate Judge of 24 Pergunnahs, dated the 12th of February 1897, reversing the decree of Babu Nritya Gopal Sarkar, Munsif of Diamond Harbour, dated the 28th of August 1896.

The facts are these: The father of the present plaintiff was the registered proprietor of the property in question. He died on the 19th September 1893, and his heirs sold the property on the 4th December in that year. This suit is for the recovery of the rents which accrued between April and the 4th December, 1893. As regards the rent accruing between the 19th September, 1893 when the father, the registered proprietor, died, and the 4th December 1893, when his heirs sold the property, it cannot be recovered, for the plaintiffs must be regarded as suing as proprietors, and they were not registered as such, and consequently as regards that part of the claim they are successfully met by s. 78 of Bengal Act VII of 1876. But as regards the rent accruing between April and the particular date fixed for payment, which I understand was some day in July, they are entitled in my judgment to maintain the action to recover that amount as representatives of their late father. They are not suing as proprietors; they are suing as his heirs, and anything they may recover will belong to his estate. Otherwise, if a registered proprietor did not get in his rents, then sold the property to a purchaser who registered and the previous proprietor then died, his representatives could not recover the arrears of rent. This cannot be. The answer, as I have said, is that they are suing not as themselves proprietors, but as the legal representatives of the late registered proprietor, and s. 78 does not apply to such a case.

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A case somewhat similar in principle to the present was recently decided by a Division Bench of this Court, of which I happened to be a member—*Belchambers* v. *Hussan Ali* (1).

[538] It has been suggested that the plaintiffs cannot sue as representatives, inasmuch as they have no certificate in accordance with the provisions of s. 4 of the Succession Certificate Act VII of 1894. That is successfully met by sub-s. 2 of the section, which says that the word "debt" includes any debt except rent. The debt in this case is for rent.

Upon these grounds the appeal must be allowed to the extent I have indicated, and the appellant must have proportionate costs in this Court and in the Court below.

BANERJEE, J.—I am of the same opinion. I think as regards that portion of the claim which is for rent that accrued due during the lifetime of the plaintiffs' father, that is the rent for the first quarter of the Bengali year 1300, that it is not in any way barred by the provisions of s. 78 of Bengal Act VII of 1876, because that portion of the rent the plaintiffs are entitled to claim not merely as proprietors, but also as the legal representatives of the deceased proprietor who was registered under Bengal Act VII of 1876, and in whose lifetime it fell due. Section 78 bars the claim for rent only when the claim is made by the plaintiff as proprietor or manager of an estate or revenue-free property, in respect of which he is required by the Act to cause his name to be registered, and, as I have just stated above, the plaintiffs are entitled to make the claim, not as proprietors for the time when the rent accrued, but as legal representatives of the proprietor to whom the rent became due.

Then, it was urged by the learned Vakil for the respondent that, if the plaintiffs claimed the rent as being money due to the estate of their deceased father, they must in the first place produce a succession certificate under s. 4 of Act VII of 1889, and in the second place, the

(1) 2 C. W. N. 493.

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claim would in that case be of the Small Cause Court class, and this second appeal would be barred by s. 586 of the Code of Civil Procedure.

As to the first contention, as has been pointed out by the learned Chief Justice, it is met by sub-s. 2 of s. 4 of Act VII of 1889. As to the second objection that, I think, is met by art. 8 of the second schedule of Act IX of 1887, [539] the claim made by the plaintiffs being one for rent. In taking this view, I do not overlook the principle of law that a party cannot, by any wilful unwarrantable addition to or modification of his claim, oust the jurisdiction of the Court in which the suit ought properly to have been brought. I do not think, having regard to the facts of this case, that it is one that comes within the application of that principle.

In regard to the rest of the claim, I have nothing to add to what has been said by the learned Chief Justice.

S. C. G. *Appeal allowed.*

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26 C. 539 = 3 C.W.N. 403.

APPELLATE CIVIL.

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, and Mr. Justice Banerjee.

HIRA LAL GHOSE, MINOR, BY HIS MOTHER AND NEXT FRIEND RAI KAMINI DASSI (*Auction-purchaser*) *v.* CHUNDRA KANTO GHOSE AND OTHERS (*Judgment-debtors*).* [28th February, 1899.]

Second appeal—Code of Civil Procedure (Act XIV of 1882), ss. 2, 311 and 588—Decree—Fraud—Questions relating to the execution of the decree between parties to the suit—Auction-purchaser, a third party.

An application was made by the judgment-debtor against the decree-holder and the auction-purchaser, who was a third party, to have a sale set aside, on the ground of irregularity in publishing or conducting the sale, as also on the ground of fraud. The Court of first instance rejected the application and refused to set aside the sale. On appeal to the Subordinate Judge he reversed the decision of the first Court. On a second appeal to the High Court by the auction-purchaser an objection was taken that no second appeal lay at his instance.

Held, that, inasmuch as the application was under s. 244 of the Civil Procedure Code, a second appeal would lie. The question of a right to a second appeal does not turn upon who may happen to be the appellant, but upon whether or not the case is one within s. 244 of the Code.

[F., 25 B. 418; 32 B. 572 (574) = 10 Bom. L.R. 752; 31 C. 385 (390); 6 C.W.N. 283; 12 C.W.N. 136 N; **Appl.**, 13 C.L.J. 535 (539) = 15 C.W.N. 685 = 10 Ind. Cas. 148; **Appr.**, 6 C.W.N. 279; **R.**, 27 C. 197 (200); 34 M. 417 (421) = 8 Ind. Cas. 429 = 21 M.L.J. 928 = 9 M.L.T. 152 (153) = (1910) M.W.N. 662; 13 C.L.J. 257 (261) = 15 C.W.N. 512 (515); 7 Ind. Cas. 769; 14 C.L.J. 489 = 12 Ind. Cas. 745; 16 C.L.J. 96 = 16 Ind. Cas. 975 (976); 19 C.L.J. 81 = 20 Ind. Cas. 191; 17 C.W.N. 602 (604) = 16 Ind. Cas. 202; 16 Ind. Cas. 690 (691); 17 Ind. Cas. 884 = 8 N.L.R. 177; 25 Ind. Cas. 267; **D.**, 10 Ind. Cas. 412 (413).]

THIS appeal arose out of an application to set aside a sale. The allegation of the petitioners (two of the judgment-debtors) was that the sale took place about twelve years ago, and that they did not know of the sale until the auction-purchaser [540] instituted a regular suit against the judgment-debtor and others to obtain *khas* possession of the property,

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* Appeal from Order No. 373 of 1898, against the order of Babu Kailash Chunder Mazumdar, Subordinate Judge of Koolneah, dated the 5th of September 1898, reversing the order of Babu Ganendronath Mookerjee, Munsif of Bagerhat, in the district of Jessore, dated the 4th of June 1898.

and summonses were served upon them. The Court of first instance, having held that there was no evidence that the auction-purchaser fraudulently concealed the fact of the sale from the petitioners, refused to set aside the sale on the ground that the application was barred by limitation. On appeal the Subordinate Judge reversed the decision of the first Court, holding that the application was not time-barred, but he did not decide the question whether there was any fraud in the case or not. Against this decision the auction-purchaser appealed to the High Court.

1899 FEB. 28. — APPELLATE CIVIL. — 26 C. 539 = 3 C.W.N. 403.

Dr. *Asutosh Mookerjee*, and Babu *Bepin Behary Ghose*, for the appellant.

Babu *Nilmadhub Bose*, and Babu *Sib Chandra Palit*, for the respondent.

The judgments of the High Court (MACLEAN, C.J. and BANERJEE, J.) were as follow:—

JUDGMENTS.

MACLEAN, C.J.—A preliminary objection is taken that no second appeal lies in this case. The appeal arises out of an application by the judgment-debtor against the decree-holder and auction-purchaser, to have the sale, at which the latter purchased the applicant's property, set aside on the ground, not only of the irregularity mentioned in s. 311 of the Code of Civil Procedure, but also of fraud. The application is undoubtedly entitled under s. 244 of the Code; and it is conceded that if the case fall within the provisions of that section, a second appeal will lie, but it is contended for the respondent that the appellant here being the auction-purchaser and so not a party to the suit, the case is not within the section, and that no second appeal lies. It is said that a second appeal will not lie when the appellant is neither the judgment-debtor nor the decree-holder. I do not think that this distinction is well founded.

A Division Bench of this Court has recently decided in the case of *Nemai Chand Kanji* v. *Deno Nath Kanji* (1) that a [541] second appeal will lie, at the instance of the judgment-debtor, and that decision was followed by another Division Bench of this Court in the case of *Bhubon Mohun Pal* v. *Nunda Lal Dey* (2). In both those cases, the appellant to the High Court was the judgment-debtor.

I ought in passing to say that the case of *Kinoc Khan* v. *Kawbiz Mullah* (3) was uncontested. We have sent for our judgment in that case, and it is clear that for same reason or other the case was not contested, It must not consequently be regarded as any authority.

To appreciate whether a case is, or is not, within s. 244, we must consider what the application was, and whether at the time it was made, it was an application under the section. It was an application by the judgment-debtor against the decree-holder and the auction-purchaser, whose purchase had been confirmed, to have the sale set aside. The question was one between the parties to the suit in which the decree was passed, *viz.*, the judgment-debtor and the decree-holder, relating to the execution of the decree, and was, undoubtedly, an application under that section. The circumstance that the auction-purchaser was a party to the application does not make it any the less a case under the section [see the case of *Prosunno Kumar Sanyal* v. *Kali Das Sanyal* (4).] If that be so a second appeal would have lain at the instance of the judgment-debtor or the decree-holder. Why not at the instance of the auction-purchaser, who is the person most directly interested?

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(1) 2 C.W.N. 691. (2) 26 C. 324. (3) 1 C.W.N. cc.
(4) 19 C. 683 = 19 I. A. 166.

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A narrow construction ought not to be placed on this section: see the case I have just cited. If the contention of the respondent were to prevail, we should have to face the anomaly that both the judgment-debtor and the decree-holder would have a right of second appeal, but that the auction-purchaser, whose sale has been confirmed, and who is really more materially interested in the matter than the decree-holder, [542] would have no such right; whilst if the case were properly within the section, he could not have brought a separate suit in which, if he could have brought it, he would have had an appeal to this Court.

The question of a right to a second appeal does not turn upon who may happen to be the appellant, but upon whether or not the case is one within s. 244. If, as has been held, both the judgment-debtor and the decree-holder have such a right, it is difficult to appreciate upon what ground it should be denied to the auction-purchaser, who is equally a party to the proceedings, though not a party to the suit. The judgment-debtor brought the auction-purchaser before the Court, and now says that, having so brought him there, he is not to have the same rights *qua* appeal as either the judgment-debtor or decree-holder, whilst, at the same time, he is to be taken as bound by the order and barred from bringing a separate suit. That does not seem to me to be right.

Looking at the principle of the authorities to which I have referred, the contention of the respondent must, in my opinion, fail.

Upon the merits the appellant is right. The Subordinate Judge has decided that the respondent was not barred by the Statute of Limitation, and then has proceeded to say off hand that the sale must be set aside, without considering the evidence upon that question. The question of limitation must be taken as concluded; but the case must go back to the lower Court for a decision upon the evidence whether the sale ought or ought not to be set aside. The costs will abide the result.

BANERJEE, J.—I am of the same opinion. The appeal arises out of an application for setting aside a sale in execution of a decree on the ground of fraud, and also on the ground of material irregularity in publishing and conducting the sale which has caused substantial injury to the judgment-debtors. The first Court rejected the application on the ground that it was barred by limitation. On appeal by the judgment-debtors, the lower appellate Court has reversed the order of the first Court and set aside the sale, holding that the application was saved from being barred by [543] limitation by virtue of the provisions of s. 18 of the Limitation Act, as the decree-holder and the auction-purchaser had kept the judgment-debtors from the knowledge of their right to make this application by means of fraud. Against this order of the lower appellate Court the auction-purchaser has preferred this appeal on the ground that the lower appellate Court is wrong in setting aside the sale without coming to any finding either that the sale was brought about by fraud, or that it was vitiated by irregularity leading to substantial injury.

At the hearing of the appeal, a preliminary objection is taken by the learned Vakil for the respondent that no second appeal lies, as the case cannot come under s. 244 of the Code of Civil Procedure, the question raised not being one between the parties to the suit, but being raised by the auction-purchaser, who was no party to the suit, and in support of this objection the case of *Kinoo Khan* v. *Kawbiz Mullah* (1) is cited.

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(1) 1 C. W. N. cc.

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In answer to the objection it is urged by the learned Vakil for the appellant that the question whether a second appeal lies or not will have to be determined, not by considering who the appellant is, but by considering what the nature of the question is that was raised in the Court below and has been determined by the order appealed against. The question involved in the preliminary objection is not quite free from difficulty. After a careful consideration of the arguments on both sides, I am of opinion that, having regard to the circumstances of this case, the preliminary objection ought to be overruled.

With reference to the case cited by the learned Vakil for the respondents, I do not think it necessary for me to say anything in addition to what has been said in the judgment of the learned Chief Justice. The judgment of this Court in that case proceeded upon the footing of there being really no contest as to the applicability of the preliminary objection to the case.

Turning now to the reasons urged in support of the objection, I am of opinion that the real question for determination is whether what is appealed against is a decree within the meaning of s. 2 of the Code of Civil Procedure. If it is a decree [544] within the definition given in that section, this second appeal lies. That definition includes an order determining any question mentioned or referred to in s. 244, but not specified in s. 588. Now the question that has been determined in this case by the lower appellate Court is that the sale of the judgment-debtor's property is liable to be set aside, it is not clearly stated on what grounds, but evidently, it would seem, on the ground of fraud. That being so, the order appealed against has determined a question which is either mentioned or referred to in s. 244, and which is not specified in s. 588. For the question whether the sale should be set aside or should be allowed to stand, is a question that arose as between the judgment-debtors and the decree-holder, and was a question relating to the execution of the decree, and it is not specified in s. 588, because cl. 16 of s. 588, which is the only portion of the section that can have any bearing upon the present case, contemplates only the setting aside of a sale on the ground of material irregularity in the conduct of the sale leading to substantial injury as provided in s. 312 of the Code of Civil Procedure, and does not apply to an application for setting aside a sale on the ground of fraud.

It was argued by the learned Vakil for the respondents that, although that may be so, still as the decree-holder is satisfied with the order of the Court below passed in favour of the judgment-debtors, and as the only person who questions the correctness of that order is the auction-purchaser, who is a third party, the case does not come under s. 244 of the Code of Civil Procedure.

But the question in the Court below was one between the parties to the suit, and though one of the parties interested in the determination of that question was the auction-purchaser, a third party, that circumstance could not take the case out of the scope of s. 244. This must be taken to be settled by the decision of the Privy Council in the case of *Prosunno Kumar Sanyal* v. *Kali Das Sanyal* (1). The fact of the decree-holder not appealing, but being apparently satisfied with the order of the lower appellate Court, does not make any difference because [545] what we have to consider is whether the order appealed against is one that determines any question mentioned or referred to in s. 244, and not

(1) 19 C. 683 = 19 I.A. 166.

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specified in s. 588; and that condition is satisfied, though after the making of the order it might have been accepted by both parties to the suit and the order may be contested only by the auction-purchaser.

Perhaps there may arise cases in which there may be no contest between the parties to the suit from the beginning, and in such cases it would be difficult to say that an appeal would lie at the instance of the auction-purchaser; but that would be so, not because the auction-purchaser was the appellant, but because the question from the beginning was not one arising between the parties to the suit within the meaning of s. 244 of the Code That, however, is not the case here. The view I take is in accordance with the decision of this Court in the cases of *Nemai Chand Kanji* v. *Dino Nath Kanji* (1); *Bhuban Mohan Pal* v. *Nunda Lal Dey* (2).

On the merits of the appeal, it is clear that the appellant's contention ought to succeed. For all that the learned officiating Subordinate Judge has found is that as in consequence of the fraudulent conduct of the decree-holder and the auction-purchaser, the petitioners were kept from the knowledge of their right to have the sale set aside, the application is not barred by limitation. That may be quite true, and by reason of the fraudulent conduct of the decree-holder and the auction-purchaser, the applicant may be entitled to the extension of time provided for in s. 18 of the Limitation Act; and yet the sale may not be vitiated either by fraud or by any material irregularity which has led to substantial injury. The case must, therefore, go back to the lower appellate Court for the determination of the question whether the sale is so vitiated or not.

S. C. G. *Appeal allowed; case remanded.*

26 C. 546 = 3 C.W.N. 336.

[546] APPELLATE CIVIL.

Before Mr. Justice Banerjee and Mr. Justice Rampini.

SHEO NANDAN ROY (*Plaintiff*) *v.* AJODH ROY AND OTHERS (*Defendants*).* [2nd February, 1899.]

Bengal Tenancy Act (VIII of 1885), s. 116—Zerait land—Raiyat brought on zerait land by lessee, Right of, on expiry of lease—Trespasser—Right of occupancy—Liability to Ejectment.

Section 116 of the Bengal Tenancy Act applies even in a case where a person is brought on the malik's *zerait* land as a *raiyat* by a lessee for a term of years; therefore such a person cannot acquire any right of occupancy or non occupancy on the said land, and he, being a trespasser only on the expiry of the lease of the lessee, is liable to ejectment.

Henderson v. *Squire* (3), *Oomatara Debia* v. *Penna Bibee* (4), and *Hurish Chunder Roy Chowdhry* v. *Sree Kalee Mookerjee* (5), referred to,

Binad Lal Pakrashi v. *Kalu Pramanik* (6) distinguished.

[Rel., 24 Ind. Cas. 183; R., 34 C. 57 = 5 C.L.J. 181 = 11 C.W.N. 225; D., 19 Ind. Cas. 395 (396).]

THIS appeal arose out of an action brought by the plaintiff to recover *khas* possession of certain lands. The allegation of the plaintiff was

* Appeal from Appellate Decree No. 2 of 1897, against the decree of Babu Behary Lal Mullick, Subordinate Judge of Sarun, dated the 12th of September 1896, affirming the decree of Babu Umesh Chunder Sen, Munsif of Chupra, dated the 9th of March 1896.

(1) 2 C. W. N. 691. (2) 26 C. 324. (3) (1869) 4 L.R.Q.B. 170.
(4) 2 W.R. 155. (5) 22 W.R. 274. (6) 20 C. 708,

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that the disputed lands were part and parcel of 27 bigahs 6 chittaks of *zerait* land, of which one Mahomed Ishak was the admitted proprietor, who granted a *thika* lease of the said lands to one Ajodh Roy, which extended up to 1300 F. S.; that on the expiry of Ajodh Roy's lease in 1301 F. S. the said lands were settled with him; and that on his attempt to take possession he was resisted by the defendants.

The defence was that out of the lands in dispute 3 bighas were the *raiyati* holding of the defendant Ajodh Roy and the remaining 6 bighas were the *raiyati* holding of the defendant Deva Roy, and that they had acquired a right of occupancy in them.

The Munsif held that the lands were the *zerait* lands of the proprietor; that Ajodh Roy, the former lessee, on the expiry of his [547] lease had no title to the 3 bighas of land claimed by him, and that the remaining 6 bighas the defendant Deva Roy had a right to hold, inasmuch as he was holding the lands as a *raiyat* under the former lessee, and accordingly he gave a decree for *khas* possession in respect of the 3 bighas claimed by Ajodh Roy, but dismissed the suit in respect of the 6 bighas claimed by Deva Roy.

On appeal by the plaintiff the Subordinate Judge affirmed the decision of the Munsif, holding that s. 116 of the Bengal Tenancy Act did not apply to the case, as the plaintiff had failed to show that the disputed 6 bighas of land had been held by the defendant Deva Roy under a lease for a term of years or from year to year.

From this decision the plaintiff appealed to the High Court.

Babu *Lakshmi Narayan Singh*, for the appellant.

Babu *Amarendra Nath Chatterjee*, and Dr. *Asutosh Mookerjee*, for the respondents.

The judgment of the High Court (BANERJEE and RAMPINI, JJ.) was as follows:—

JUDGMENT.

This appeal arises out of a suit brought by the plaintiff, who is the lessee of the proprietor, to recover *khas* possession of certain lands, the area of which is stated in the plaint to be 9 bighas 10 cottahs, on the allegation that those lands are part of the *zerait* or private lands of the proprietor, and that the defendants have no right to remain on them.

The defence was a denial of the fact that the lands were *zerait*, and the defendants claimed an occupancy right in them.

The first Court found that the lands were the *zerait* lands of the proprietor: that out of the entire area claimed, which is stated as being 9 bighas only, a quantity of 3 bighas had been held by the defendant Ajodh Roy, the former lessee, without any title upon the expiry of his lease; and that the remaining 6 bighas had been held by the defendant Deva Roy as a *raiyat* under the former lessee; and it gave the plaintiff a decree for *khas* possession in respect of the 3 bighas claimed [548] by the defendant Ajodh Roy, but dismissed the suit in respect of the 6 bighas claimed by Deva Roy.

On appeal by the plaintiff, the lower appellate Court has affirmed the decree of the first Court, holding that s. 116 of the Bengal Tenancy Act did not apply to this case, as the plaintiff had failed to show that the 6 bighas of land in question, which was found by the first Court to be the *zerait* land of the proprietor, had been held by the defendant Deva Roy under a lease for a term of years or under a lease from year to year.

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There was a cross-appeal by the defendant Deva Roy, in which it was urged that the first Court ought to have held that he was a *raiyat* with a right of occupancy. The cross-appeal was dismissed on the ground that it was unnecessary to determine in this case to what class of *raiyats* the defendant Deva Roy belonged.

Against this decision of the lower appellate Court the plaintiff has preferred this second appeal, and it is urged on his behalf, *first*, that s. 116 of the Bengal Tenancy Act applies to this case; *secondly*, that, if it does apply, the defendant Deva Roy had no right to remain on the lands after the expiry of the lease of the former *thikadar* under whom he held; and, *thirdly*, that the lower appellate Court was wrong in not coming to any decision as regards the 10 cottahs of land in excess of the 3 bighas and 6 bighas in relation to which alone the rights of the parties had been determined by its judgment.

The judgment of the lower appellate Court proceeds on the assumption that the lands were the proprietor's *zerait* lands. The learned Vakil for the appellant contends that the lower appellate Court has in effect affirmed the first Court's finding that the lands were the proprietor's *zerait* lands. On the other hand, the learned Vakil for the respondents contends that there has been no affirmance of the finding of the first Court by the lower appellate Court on this point; and that if the appellant's contention on the point of law as to the meaning of s. 116 of the Bengal Tenancy Act be given effect to, it will be necessary to remand the case to the lower appellate Court for **[549]** a finding on the point whether the lands were the proprietor's *zerait* lands or not.

We are of opinion that the lower appellate Court has not come to any finding of its own upon the question whether the land in dispute was the proprietor's *zerait* land, it having been unnecessary, in the view that it took of the law, to arrive at any finding on the point; and that if the view of the law taken by the lower appellate Court is not affirmed, the respondents are entitled to a remand, as it was competent to them to ask the lower appellate Court to affirm the decree of dismissal made by the first Court upon the ground that the land was not the proprietor's *zerait* land, they having in the first Court denied that the land was *zerait* and the parties having gone to trial upon an issue on that point. This being premised, let us see how far the opinion of the lower appellate Court that s. 116 of the Bengal Tenancy Act is inapplicable to this case is correct.

It was found by the first Court that the lands were *zerait*, and for the purpose of the present question we must proceed upon the assumption that they are so. It is also found that the defendant Deva Roy came upon the land while it was held by the other defendant Ajodh Roy as a *thikadar* under the proprietor under a lease for a term of years; and the question is whether these two circumstances are not sufficient to bring the case within s. 116 of the Bengal Tenancy Act. We are of opinion that this question ought to be answered in the affirmative. The section says: "Nothing in chap. V shall confer a right of occupancy in, and nothing in chap. VI shall apply to, a proprietor's private lands known in Bengal as *khamar*, *nij* or *nijjote*, and in Behar as *zerait*, *nij*, *sir* or *kamat*, when any such land is held under a lease for a term of years or under a lease from year to year." Here the lands, upon the assumption upon which we are now proceeding, were *zerait* lands, and they were held by the defendant Ajodh Roy under a lease for a term of years at the time when the defendant Deva Roy, who claims the benefit of chap. V and to whom has been accorded the benefit of chap. VI by the Court below, came upon the

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lands. Therefore, in our opinion, the lands in dispute must be held to be excluded from the [550] operation of chap. V, so far as it confers a right of occupancy, and also from the operation of chap. VI of the Bengal Tenancy Act.

It was argued by the learned vakil for the respondents that the true meaning of the section is this, that it excludes the operation of chaps. V and VI in respect of *zerait* lands only when such lands are held directly under the proprietor by the person who claims the benefit of either of those two chapters, under a lease for a term of years or under a lease from year to year; and that when such lands are held by the person claiming an occupancy or a non-occupancy right (and the latter is a very substantial right, regard being had to s. 44 of the Act) not directly under the proprietor, but under a lessee, that is a tenure-holder under the proprietor, the acquisition of an occupancy or a non-occupancy right, as the case may be, cannot be prevented; in other words, that the section applies only to cases where the proprietor retains his *zerait* lands as such directly under him, without interposing any tenure-holder between him and the actual *raiyat*, and takes the precaution of letting in *raiyats* either under leases for terms of years or under leases from year to year. The language of the section is not very clear, and the question raised before us is not altogether free from doubt; but after weighing the conflicting considerations that arise, we are of opinion that the construction which the learned vakil for the appellant seeks to put upon it is the true construction, and our reason is shortly this: As we understand the section, its object is evidently to exclude the proprietor's private lands from the operation of chaps. V and VI of the Bengal Tenancy Act, provided that the proprietor has taken a certain precaution which is indicated by the concluding words of the section, "where any such land is held under a lease for a term of years or under a lease from year to year." The question then arises—held by whom? The learned vakil for the appellant answers "held by any one whether a *thikadar* or a *raiyat* to whom the proprietor has let it out." And this answer is quite in accordance with the language of the section, the Legislature not having said "where such land is held by a *raiyat*." On the other hand, the learned vakil for the respondents contends that the section applies only where the land is held by a *raiyat* who alone [551] can claim the benefit of chaps. V and VI under a lease for a term of years or under a lease from year to year. But this construction is in the first place open to the objection that it interpolates the words, "by a *raiyat*" after the words "is held," and in the second place there is this further difficulty in the way of our accepting it, that it would prevent the protection contemplated by the section from being operative, although the landlord may take the precaution of leasing the land to the person to whom he lets it for a term of years or from year to year. Take the case of a proprietor, for instance, who has lands that are admittedly his private lands, which are partially let out to *raiyats* under leases for short periods, and suppose that he leases the whole of his *zerait* lands to a farmer for a term of years slightly longer than the longest term for which any of the *raiyats* holds the same. Upon the expiry of the lease to the farmer the landlord will be precluded from obtaining *khas* possession from any of the *raiyats*, because the *raiyats* will then have held the land after the expiry of their leases under the farmer, and after the interposition of the farmer or tenure-holder had, according to the respondents' contention, destroyed the *zerait* character of the lands. We do not think that such a result could have been intended. If the proprietor lets out his private lands

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either under a lease for a term of years or under a lease from year to year, in our opinion he does all that is necessary to be done by him under s. 116 of the Bengal Tenancy Act to entitle him to the protection of that section so as to have his *zerait* lands secured against being burdened with any occupancy or non-occupancy rights in favour of *raiyats* contemplated in chaps. V and VI; and this having been done with reference to the lands in dispute, s. 116 of the Bengal Tenancy Act applies to this case.

Then arises the question, the subject of the second contention on behalf of the appellant, namely, whether upon that view of the case the defendant Deva Roy, on the expiry of the former *thikadar's* lease, ceased to have any right in the lands. He having been brought on the land by his landlord, who was a lessee under the proprietor for a limited term of years, *prima facie* his right would come to an end upon the expiry of his landlord's lease. This view is in accordance with general principles [552] —see the case of *Henderson* v. *Squire* (1), and also the cases of *Oomatara Debia* v. *Peena Bibee* (2), and *Hurish Chunder Roy Chowdhry* v. *Sree Kalee Mukerjee* (3).

It was argued upon the authority of *Binad Lal Pakrashi* v. *Kalu Pramanik* (4) that the mere fact of the title of the person who inducts a *raiyat* upon any land ceasing or being non-existent, would not be sufficient to show that the *raiyat's* title ceased or did not exist. We are of opinion that *that* case can have no application to a case like the present. The ground for the decision in that case was, as stated in the judgment of the learned Chief Justice, that the only right of the person who has obtained possession of the zemindari is to the rent payable for the land and not to obtain *khas* possession of the land itself unless he can do so under the provisions of the Bengal Tenancy Act; and that ground is not applicable to *zerait* lands protected by s. 116, the primary character of such lands being that the proprietor is entitled to be in *khas* possession of them, and no *raiyat* can acquire any occupancy or non-occupancy right in them.

In this view of the case, and for the reasons we have stated at the outset, it becomes necessary to remand the case to the lower appellate Court for disposal after determination of the question whether the lands are really the proprietor's *zerait* lands; and we think it is also necessary to remand it for the determination of the question raised in the third contention on behalf of the appellant, namely, what are the rights of the parties in respect of the ten cottahs of land in regard to which the Courts below have come to no finding.

The costs will abide the result.

S. C. G. *Appeal allowed; case remanded.*

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(1) (1869) L.R. 4 Q.B. 170.
(2) 2 W.R. 155.
(3) 22 W.R. 274.
(4) 20 C. 708.

26 C. 553.

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[553] APPELLATE CIVIL.

Before Mr. Justice Hill and Mr. Justice Rampini.

DILBAR SARDAR AND ANOTHER (*Defendants*) v. HOSEIN ALI BEPARI (*Plaintiff*).* [26th January, 1899.]

Co-sharers – Joint possession, Suit for—Effect of purchase of a right of occupancy, not transferable by custom, by a co-sharer landlord without the consent of the other co-sharer—Abandonment—Right to partition.

In a suit to recover joint possession of an occupancy holding in respect of his share by a co-sharer landlord, on the ground that the defendant acquired no title by the purchase of the said holding, as it was not transferable by custom, and that there was an abandonment of the holding by the former tenant, the defence (*inter alia*) was that the plaintiff was not entitled to joint possession, and that he could not get any relief except by bringing a suit for partition inasmuch as they (the plaintiff and the defendants) were joint proprietors.

Held, that the plaintiff was entitled to the relief claimed, and that the claim for joint possession without partition was maintainable.

Watson & Co v. *Ramchund Dutt* (1), and *Lachmeswar Singh* v. *Manowar Hussain* (2), distinguished.

[R., 15 C.W N. 188 (189) = 7 Ind. Cas. 124 (125); 14 C.P.L.R. 76 (79); 17 C. P. L. R. 17 (18).]

THE facts of this case are shortly these: The lands in dispute appertained to two *taluks*, of which the plaintiff was the owner of a fourteen annas share and the remaining two annas belonged to the defendants Nos. 1 and 2. The plaintiff's allegation was that defendants Nos. 3 and 4 had rights of occupancy in the disputed lands; that defendant No. 1 purchased the occupancy holding of defendant No. 3 in execution of a decree for money against him, whilst the defendants Nos. 1 and 2 purchased the occupancy holding of defendant No. 4 by a private sale; that by the said purchases the defendants Nos. 1 and 2 did not acquire any right to the disputed lands, inasmuch as the right of occupancy was not transferable by custom or by local usage; that the defendants had no right to retain possession of the said lands to the extent of the plaintiff's share [554] without his consent; that defendants Nos. 3 and 4, since the sale, had abandoned the holding, and left the place, and that the plaintiff was entitled to recover possession of the disputed lands to the extent of his share, with mesne profits.

There were two suits, and the defendants Nos. 1 and 2, in each of these suits, pleaded (*inter alia*) that the plaintiff's claim was bad for misjoinder of causes of action; that it was barred by limitation; that inasmuch as they were co-sharers, the plaintiff's claim for *khas* possession without partition was not maintainable; and that there was not such a forfeiture of the right of occupancy as would entitle the plaintiff to get a decree for *khas* possession.

The Munsif overruled the objections of the defendants, decreed the suits, and ordered that the plaintiff should recover possession of the fourteen annas share of the disputed land in each of the suits in *ijmali* with the defendants Nos. 1 and 2. On appeal the Subordinate Judge confirmed the decision of the first Court.

* Appeal from Appellate Decree No. 1592 of 1897 against the decree of Babu Juggoddurlav Mazumdar, Subordinate Judge of Dacca, dated the 14th of July 1897, affirming the decree of Babu Rajani Nath Ghose, Munsif of Naraingunge, dated the 30th of September 1896.

(1) 18 C. 10 = 17 I.A. 110. (2) 19 C. 253 = 19 I.A. 48.

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Against this decision the defendants appealed to the High Court.

Babu *Harendra Narayan Mitter*, for the appellants.

Dr. *Rash Behary Ghosh*, and Babu *Jogesh Chunder De*, for the respondent.

The judgment of the High Court (HILL and RAMPINI, JJ.) was as follows:—

JUDGMENT.

The appellants in this Court are, it appears, co-proprietors with the plaintiff in a certain *taluk*, the former holding a two-anna and the latter a fourteen-anna share thereof.

It also appears that the appellants obtained a money decree against one of the tenants holding under the *talukdars* as a body, and in execution of that decree they brought the holding to sale, purchased it themselves, and obtained possession. The holding in question was an occupancy holding; and it has been found, as a matter of fact, that in that particular locality occupancy holdings are not transferable without the consent of the landlord.

The plaintiff brought the present suit for the purpose of regaining joint possession along with the appellants of the lands comprised in the holding in question.

[555] Both the Courts below have decreed in his favour, and have restored the plaintiff to joint possession of the land.

In this Court it is contended that the form of the suit was misconceived, and that the plaintiff, if entitled to any relief whatever, is entitled only to a partition of the estate. No authority has been cited for this proposition, but reliance has been placed upon a remark made in the judgment which was delivered in the case of *Palakdhari Rai* v. *Manners* (1), which possibly, so far as it goes, may tend to sustain the contention. That, however, is merely an *obiter dictum*; and there is no doubt that the view of this Court has been, so far as we are aware, for a long series of years to the contrary effect. Reliance has also been placed upon the well-known cases of *Watson and Co.* v. *Ramchund Dutt* (2) and *Lachmeswar Singh* v. *Manowar Hossein* (3). The cases are, however, in our opinion, clearly distinguishable from the present. Upon the findings of fact arrived at by the Courts below, the present case might thus be stated: A two-anna sharer in the *taluk* has, without the consent of his co-sharers, expelled (for it comes to that) one of the common tenants of the *talukdars*, and has possessed himself to the exclusion of his co-sharers of the lands held by him. But this is not a case such as is contemplated by either of the decisions cited. For there are in this case no considerations whatever of an equitable kind, so far as we can perceive, to sustain the claim brought forward by the appellants to retain possession of the land from which they have expelled the tenants to the exclusion of their co-sharers.

As to the question of abandonment, it has been held by the Courts below (and we think correctly) that, as a matter of fact, there has been an abandonment on the part of the occupancy tenant; that that abandonment has been acquiesced in by the landlords, and consequently, there having been consent to the termination of the tenancy on the part of both the tenants and the landlord, the tenancy must be taken to have determined.

[556] Then the question of mesne profits was raised. Apparently the Courts below have given the plaintiff a decree for mesne profits, not

(1) 23 C. 179 (185). (2) 18 C. 10=17 I.A. 110. (3) 19 C. 253=19 I.A. 48.

on the footing of the rent previously received from the tenant who was in occupation of the land, but on the footing of the profits which might have been realized from the land, if properly used and cultivated. It is contended here, however, that all that the plaintiff is entitled to is mesne profits at the rate paid previously by the occupancy tenants by way of rent. We see no reason, however, for dissenting from the view of the lower Courts on this question. The defendants have possessed themselves wrongfully of these lands to the exclusion of the co-sharer, and we therefore think, so far as that question is concerned, they are liable for mesne profits, and we think they ought to pay them, not merely at the rate of rent paid by the tenant for the holding, but upon the ordinary footing of the profits which might have been derived in the course of cultivation from the land.

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These being our views, we dismiss the appeal with costs.

S. C. G. *Appeal dismissed.*

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26 C. 556.

APPELLATE CIVIL.

Before Mr. Justice Hill and Mr. Justice Rampini.

NAROHARY JANA (*Appellant*) v. HARI CHARAN PRAMANICK AND OTHERS (*Respondents*).* [2nd May, 1899.]

Second Appeal—Bengal Tenancy Act (VIII of 1885), *ss.* 105, 108—*Order of Special Judge as to standard of measurement of lands.*

An order of the Special Judge as to the length of the standard of measurement to be used in measuring certain lands is not a decision in a case under s. 106 of the Bengal Tenancy Act, and therefore no second appeal lies from such an order to the High Court.

Mathura Mohun Lahiri v. *Uma Sundari Debi* (1), and *Dengu Kazi* v. *Nobin Kissori Chowdhrani* (2), distinguished.

[557] THIS was an appeal, preferred by the landlord, against an order of the Special Judge of Midnapore, holding that no appeal lay to him from the order of the Settlement Officer, who had held that the standard of measurement to be used in measuring the lands of a village, named Joyram Chuck, was a pole of 7 feet 6 inches. The appellant, who was the landlord of the village, contended that the standard of measurement was a pole of 7 feet 5½ inches. When the appeal was preferred to the Special Judge, the Settlement Officer had done nothing but settle the length of the measure; he had not measured the lands, nor ascertained the area of the tenant's holdings, nor either recorded or settled rents. On appeal the Special Judge held that the question of the standard of measurement could not affect any of the records which form the record of rights, and that no appeal lay to him from the decision of the Settlement Officer, which was not a decision under chap. X of the Bengal Tenancy Act (VIII of 1885), and dismissed the appeal. From this decision the landlord appealed to the High Court.

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* Appeal from Appellate Decree No. 2029 of 1897, against the decree of H. R. H. Coxe, Esq., District Judge of Midnapur, dated the 9th of August 1897, affirming the decree of Babu Monmotho Nath Chatterjee, Settlement Officer of that District, dated the 18th of January 1897.

(1) 25 C. 34. (2) 24 C. 462.

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Babu *Jagat Chandra Banerjee*, on behalf of the respondents, raised the objection that no appeal lay to the High Court from the order of the Special Judge, as his decision did not come under s. 106 of the Act.

Babu *Hara Chandra Chakravarti*, for the appellant.—A second appeal does lie to this Court. The cases of *Mathura Mohun Lahiri* v. *Uma Sundari Debi* (1) and *Dengu Kazi* v. *Nobin Kissori Chowdhrani* (2) are entirely in favour of a second appeal.

The decision of the High Court (HILL and RAMPINI, JJ.) was as follows:—

JUDGMENT.

This is a second appeal against an order of the Special Judge of Midnapore, dated the 9th August 1897, holding that no appeal lies to him from an order of a Settlement Officer, finding that the standard of measurement to be used in measuring the lands of a village, named Joyram Chuck, is a pole of 7 feet 9 inches. The appellant, who is the landlord of the village, contended that the standard of measurement is a pole of 7 feet 5½ inches.

[558] It appears to us (1) that no second appeal lies to us, and (2) that the decision of the Special Judge is right and that no appeal lay to him.

We think no second appeal lies to us because the decision of the Special Judge is not a decision in a case under s. 106 of the former chap. X of the Bengal Tenancy Act, which was in force when the order of the Special Judge was passed. The dispute between the parties was not a dispute as to the correctness of an entry in the record of rights for the following reasons: (1) there is no entry in any record of rights as to the standard of measurement; (2) no record of rights has been made or is at present being made; and (3) there is at present nothing to show that the question of length of the standard of measurment will even indirectly affect any entry in the record of rights.

The learned pleader who appears for the appellant, however, relies on the cases of *Mathura Mohan Lahiri* v. *Uma Sundari Debi* (1) and *Dengu Kazi* v. *Nobin Kissori Chowdhrani* (2), under the former of which he contends a second appeal does lie to this Court from a decision of a Settlement Officer about the standard of measurement, and the second of which shows that a dispute may be raised at any time about an entry or even a proposed entry in the record of rights. But the facts of the case of *Mathura Mohun Lahiri* v. *Uma Sundari Debi* (1) are very different from those of the present one. In that case there had been a measurement, the landlords had applied for a settlement of rents, and the parties disputed, not only in respect of the standard of measurement, but as to whether the tenants were in possession of excess lands, and whether they held their lands on a consolidated rent or not. There was an appeal to the Special Judge on all these points.

The facts of the present case are quite different. The Settlement Officer at the time when his decision now under appeal was passed had, as far as we can see, done nothing but settle the length of the measure he was about to use in the measurement **[559]** of the lands of the village. He had not measured the lands, ascertained the area of the tenants' holdings or either recorded or settled rents. There was then no record of rights and no entry or even proposed entry in a record of rights,

(1) 25 C. 34. (2) 24 C. 462.

and hence we consider neither of the cases cited by the pleader has any application to the present case. 1899 MAY 2.

Then the Special Judge has pointed out that the question of the standard of measurement cannot affect any of the records which form the record of rights. These are the *khewat* and *khatian*—see the Government rules under the Tenancy Act, chap VI, rule 8. The former is a record of proprietary interests. The latter is a record of tenants' rights, the entries in which only can form the subject of dispute between the parties to this case. But the area of the tenants' holdings in the *khatian* is entered in *acres* (see cols. 5, 6, 7 and 8). This is in accordance with s. 92 of the Act and rule 64 of the Board's Settlement Manual. The question of the local standard of measurement cannot affect the entries in these columns. The only columns the entries in which may possibly be affected by the question of the local standard of measurement are columns 9 and 10. In column 9 is recorded the existing rent. If this is a lump rental, the question of the standard of measurement cannot affect it. If it is a fluctuating rental at so many rupees per bigha, it may affect it. But it remains to be seen what entry will be made in this column. Column 10 is the column in which is entered the rent settled by the Settlement Officer, if he finds it necessary to settle any rent. He will not have to do so, unless the *raiyats* are found in possession of excess lands. Hence, there is at present no certainty nor indeed any reasonable ground for supposing that any entry in the record of rights will be affected by the question of the local standard of measurement. The contention of the parties at present is neither an "objection" under s. 105, nor a "dispute" under s. 106.

APPELLATE CIVIL.

26 C. 556.

Thus, the order of the Settlement Officer, being an order neither under s. 105, s. 106 nor. s. 107, is not a decision under chap. X of the Act; for there is no other section in the chapter under which a Settlement Officer can decide [560] anything. That being so, no appeal lay from his order to the Special Judge under s. 108 (2), and the Special Judge's order not being a decision under s. 106, no second appeal lies to us under s. 108 (3).

We accordingly dismiss this appeal with costs.

Appeal dismissed.

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26 C. 560=3 C.W.N. 412.

CRIMINAL REFERENCE.

Before Mr. Justice Prinsep and Mr. Justice Stanley.

QUEEN-EMPRESS v. MATI LAL LAHIRI.* [2nd March, 1899.]

Penal Code (Act XLV of 1860), ss. 409, 477A—Criminal Procedure Code (Act V of 1898), ss 222 (2), 234—Criminal breach of trust by public servant—Acquital—Framing new charge—General falsification of accounts for a period extending over two years.

The alteration in the law by s. 222 (2) of the Criminal Procedure Code (Act V of 1898), does not apply to a charge under s. 477A of the Penal Code. It applies only to criminal breach of trust or dishonest misappropriation of money.

[Appl., 4 Bom.L.R. 433 (434); Rel. on, 41 C. 722=18 C.W.N. 1152=15 Cr.L.J. 153 =22 Ind. Cas. 729; R., 32 A. 57 (58)=6 A.L.J. 977=11 Cr.L.J. 53 (54)=4 Ind. Cas. 808.]

THIS was a reference under s. 307 of the Code of Criminal Procedure by the Officiating Sessions Judge of the Assam Valley Districts.

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* Criminal Reference No. 46 of 1898, made by B.G. Melitus, Esq., Offg. Sessions Judge of Assam Valley Districts, dated 23rd December 1898.

1899 MARCH 2. — CRIMINAL REFERENCE. — 26 C. 560 = 3 C.W.N. 412.

The accused Mati Lál Lahiri was tried in the month of March 1897 before a jury on a charge under s. 409 of the Indian Penal Code of having, as Treasurer of the Dhubri Collectorate, embezzled Government stamps of the value of Rs. 18,493. The jury acquitted the accused; but the Sessions Judge, being dissatisfied with the verdict of the jury, referred the case to the High Court under s. 307 of the Criminal Procedure Code. The High Court (HILL and JENKINS, JJ.) upon that reference, on the 30th July 1897, directed that the case should be retried.

The retrial was held on the 29th of October 1897 and following days, when a majority of the jury again found the accused not guilty, and again the Sessions Judge, disapproving of the verdict, referred the case to the High Court under the above-mentioned **[561]** section. The charge was in these terms so far as is material, *viz.* :—

"That you, between June 1894 and October 1896 (inclusive), at Dhubri, being entrusted with property in your capacity as the Treasurer of the Government Treasury at Dhubri, committed criminal breach of trust in respect of that property, *viz.*, in respect of stamps or the value thereof to the extent of Rs. 18,493-15-6."

In directing a retrial Mr. Justice Hill pointed out that the order of the Court was not connected with the merits of the case but was founded solely on the nature of the charge which embraced a series of separate defalcations extending over a period of considerably more than two years, and that, according to the recent decisions when a charge was based, as in this case, on a general deficiency in accounting, the charge must be limited to three specific acts of misappropriation committed within a period of twelve months. Mr. Justice Jenkins assigned the same reasons for setting aside the proceedings and directing a retrial. These cases were tried under the Code of 1882 and before the law had been altered in respect of such charges by s. 222 (2) of the Code of 1898.

Fresh charges under s. 409 of the Penal Code were framed giving particulars of three acts of misappropriation; and a new charge was added under s. 477A of the Penal Code. The added charge was :—

"That you being employed as Treasurer at the Dhubri Treasury, and in such capacity being authorized to sell stamps of different denominations to the public, and being required to keep correct accounts of the sale of stamps, and to credit daily the sale-proceeds to the said Treasury, wilfully and with intent to defraud, between June 1894 and October 1896 (inclusive), falsified the accounts and registers of the sale of stamps and thereby committed an offence punishable under s. 477A of the Indian Penal Code and within the cognizance of the Court of Sessions."

At the second retrial the accused was again acquitted by the jury, and the case was again referred to the High Court, the Judge expressing his opinion that the accused was guilty under s. 477 A of the Penal Code and not guilty on the other charges.

Mr. *Garth*, Mr. *P. L. Roy*, Mr. *B. Chakravati*, and Babu *Gobind Chunder Dey Roy*, for the accused.

[562] Babu *Dasarathi Sanyal*, for the Crown.

JUDGMENT.

The judgment of the High Court (PRINSEP and STANLEY, JJ.) after stating the facts, proceeded as follows :—

It appears that on the hearing of this reference the learned vakil who appeared for the prosecution stated to the Court that he was in a

1899 MARCH 2. — CRIMINAL REFERENCE. — 26 C. 560 = 3 C.W.N. 412.

position to specify three acts of misappropriation by the accused which might properly be made the basis of a charge against him, and Mr. Justice Hill expressed his regret that, this being so, the trial should have been allowed to proceed to an abortive issue upon the charge as it then stood. New charges were framed under s. 409, giving particulars of three acts of alleged criminal breach of trust on the part of the accused. In addition to these an entirely new charge was added under s. 477A of the Indian Penal Code in the following terms (1).

This charge is an obvious departure from the charge upon which the accused had been, after two lengthened trials, acquitted by the jury, and would appear to have been added with the object of avoiding the necessity of specifying in the indictment particulars of the items of official misconduct which the High Court considered it requisite that the prosecution should specify.

The accused again pleaded not guilty to the charges, and a lengthened investigation ensued, after which the jury unanimously acquitted the accused.

Again the Sessions Judge has for the third time felt it to be his duty to refer the case to the High Court for orders, being satisfied, as he says, that the accused committed an offence under s. 477A of the Indian Penal Code. He considers that the accused was rightly acquitted upon the other charges.

Counsel on behalf of the accused has before us raised two preliminary objections to the review of the case. In the first place he argues that the formulating by the Magistrate of an additional and distinct charge under s. 477A was not justified under the circumstances, and having regard to what occurred on the previous trials and on the references to the High Court, that the accused ought to have been tried under [563] s. 409 of the Indian Penal Code alone. In the next place he contended that the charge as framed under s. 477A was defective as being an arraignment of the accused on general acts of falsification of accounts extending over a period of nearly two and a half years.

As regards the first point taken by Counsel for the accused we think that it is doubtful whether on the former reference the parties ever contemplated that under the order of the Court an entirely new charge might be framed against the accused, but looking at the terms of the order we cannot say that the Magistrate and Sessions Judge over-stepped the limit of their powers.

As to the second objection more serious considerations arise. In place of the charge of criminal breach of trust the accused is charged with a general falsification of his accounts for a period extending from May 1894 to October 1896. No particulars whatever of any falsification are specified, but the accused is put upon his trial on a vague and general allegation of falsification of his accounts during a period of nearly two years and a half. It would seem to us that this charge was in all probability framed with the object of relieving, if possible, the prosecution from the obligation which lay upon them in respect of the charges under s. 409 of proving specific acts of misappropriation. Has it done so? We think not. Every act of falsification of a book or account in our opinion would amount to an offence under the Code under s. 234 of the Code of Criminal Procedure. An accused can only be charged and tried at one trial for any number of offences of the same kind not

(1) 26 C. 561.

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exceeding three committed within the space of one year. The explanation appended to s. 477A does not purport to override this section. In the present case it does not appear what number of acts of falsification are complained of, but the Sessions Judge finds that false entries were systematically made by the accused for the period above referred to—a period of nearly two years and a half. The papers alleged to have been falsified consisted of single Lock Registers and monthly returns. The charge does not specify any particular single Lock Register or monthly return which was so falsified. [564] The alteration in the law by s. 222 (2) of the Code of 1898 does not apply to a charge under s. 477A of the Penal Code. It applies only to criminal breach of trust or dishonest misappropriation of money.

It appears to us for the foregoing reasons that the charge formulated under s. 477A was irregular, if not absolutely illegal.

The Sessions Judge, as we have stated, finds that the charges under s. 409 are unsustainable. We are of opinion for the reasons above stated that the second objection advanced by Counsel for the accused is well founded, and we rule accordingly; and under all the circumstances, and having regard to the protracted nature of this prosecution, to the fact that the accused has suffered considerably from the admittedly untenable charges upon which he was originally tried, and to the fact that he has been in confinement for upwards of a year and a half while these abortive proceedings were being prosecuted, we think that in the ends of justice it is undesirable that further proceedings against the accused be taken, and we accordingly so direct; and we order that the accused be forthwith discharged from custody.

F. K. D.

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26 C. 564 (F.B.) = 3 C.W.N. 464.

FULL BENCH.

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, Mr. Justice Macpherson, Mr. Justice Ghose, Mr. Justice Hill and Mr. Justice Jenkins.

SHAROOP DASS MONDAL (*Defendant*) *v.* JOGGESSUR ROY CHOWDHRY (*Plaintiff*).* [11th April, 1899.]

Limitation Act (XV of 1877), sch. II, arts. 32 and 120 and 143—Bengal Tenancy Act (VIII of 1885), ss. 25 and 155—Suit to compel the defendant to fill up a tank and to pay compensation, or in the alternative for khas possession.

In a suit brought by a landlord against a tenant where the primary relief sought was a mandatory injunction directing the defendant to fill up [565] a tank excavated by him in contravention of the terms of the tenancy and to pay damages to the plaintiff for his wrongful act, and where the secondary relief sought was ejectment, the defence (*inter alia*) was that the suit was barred by limitation, inasmuch as it was brought more than two years after the excavation of the tank.

Held, that art. 32 of sch. II of the Limitation Act (XV of 1877), applied to the case, and the suit was barred by limitation.

Soman Gope v. *Raghubir Ojha*(1), and *Gangadhar* v. *Zahurriya* (2), approved.

[F., 26 B. 430 (432) = 4 Bom.L.R. 72; 32 C. 527 = 1 C.L.J. 167; 6 C.L.J. 535; 4 N.L.R. 49 (54); R., 37 M. 381 = 14 Ind. Cas. 254 (255) = 22 M.L.J. 485 = 11 M.L.T. 325 (326) = (1912) M.W.N. 516; D., 15 Ind. Cas. 285 = 124 P.R. 1912 = 2 P.L.R. 1913 = 132 P.W.R. 1912; 4 M.L.T. 278 = 18 M.L.J. 602.]

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* Reference to a Full Bench in Appeal from Appellate Decree No. 852 of 1897.

(1) 24 C. 160. (2) 8 A. 446.

1899 APRIL 11. — FULL BENCH. — 26 C. 564 (F.B.) = 3 C W.N. 464.

THIS appeal arose out of an action brought by the landlord against a tenant for ejectment and compensation. The plaintiff's allegation was that the defendant had excavated a tank on the land rendering it unfit for the purposes of the tenancy, and he therefore prayed that the defendant might be directed to fill up the tank and to pay damages to him, failing which the Court might award *khas* possession of the said land to the plaintiff. The defence (*inter alia*) was that the suit was barred by limitation, inasmuch as it was brought more than two years after the date of the excavation of the tank.

The Court of first instance decreed the plaintiff's suit on the ground that art. 120 of the Limitation Act applied to the case, and the plaintiff was entitled to bring his suit within six years from the time of the excavation of the tank. On appeal, the Subordinate Judge upheld the decision of the first Court. Against this decision the defendant appealed to the High Court. On the appeal coming on for hearing the case was referred to a Full Bench by MACLEAN, C. J., and BANERJEE, J., on the 10th January 1899, with the following opinion:—

"In this appeal, which arises out of a suit brought by the plaintiff-respondent to compel the defendant, a tenant under him, to fill up a tank and to pay compensation, or, in the alternative, to recover *khas* possession of the land on which the tank has been excavated, one of the questions for determination is whether the suit, which, according to the finding of the first Court, not displaced by the lower appellate Court, was brought more than two years but less than six years after the excavation **[566]** of the tank, is barred by limitation; in other words whether art. 32 or art. 120 of the second schedule of the Limitation Act applies to the case.

"Upon that question there is a conflict of decisions in this Court, the case of *Kedarnath Nag* v. *Khettur Paul Sritirutno* (1) laying it down that a suit like the present is governed by art. 120 of the second schedule of the Limitation Act and is not barred if brought within six years from the time when the cause of action arose, while the case of *Soman Gope* v. *Raghubir Ojha* (2) decides that such a suit comes under art. 32, and is barred if not brought within two years from the date when the land is perverted to an unallowable purpose. There being this conflict of decisions, the question must be referred for determination to a Full Bench; and as the question arises in a second appeal the whole case must be so referred."

Babu *Joy Gobind Shome*, for the appellant.

Babu *Saroda Churn Mitter*, Babu *Jogendra Chunder Ghose* and Babu *Satis Chunder Ghose*, for the respondent.

The judgment of the Full Bench (MACLEAN, C.J., and MACPHERSON, GHOSE, HILL and JENKINS, JJ.) was as follows:—

JUDGMENT.

MACLEAN, C.J.—The question submitted for our consideration is whether art. 32 or art. 120 of the second schedule of the Limitation Act applies to the present case.

To ascertain this, we must consider what was the nature of the suit and what was the relief sought. The primary relief sought was in effect a mandatory injunction directing defendant to fill up the tank in question and to pay the plaintiff compensation for his alleged wrongful act; the secondary relief was for ejectment. We say secondary, for the ejectment was not to follow, and could not follow, save upon failure of the defendant

(1) 6 C. 34. (2) 24 C. 160.

1899 APRIL 11. — FULL BENCH. — 26 C. 564 (F.B.) = 3 C.W.N. 464.

to fill up the tank and make the compensation ; it was contingent on that failure. For the tort complained of, the plaintiff had three remedies, (1) damages,(2) a mandatory injunction, and(3) ejectment, contingent upon the tenant not complying with certain conditions. This being the nature of [567] his suit, under which article of the Limitation Act does the case come ? If under art. 32, the plaintiff is barred ; if under art. 120, he is not.

Article 32 is as follows : "Against one who having a right to use property for specific purposes perverts it to other purposes." As a general principle, in construing this Act of the Legislature we ought not to regard a case as coming under art. 120, unless clearly satisfied that it does not come under one of the many articles dealing with specific cases. Further, if there be two articles which may cover the case, the one, however, more general and the other more particular or specific, as a principle of construction the more particular and specific article ought to be regarded as the one governing the case. It cannot be successfully contended that, reading the language used according to its usual and ordinary acceptance, the words of art. 32 are not sufficiently wide to cover the present case. The case is clearly within the words of the article : it is the precise case provided for by the article. The defendant is one, who, having a right to use the property demised to him for agricultural purposes, has perverted it to another purpose, *viz.*, that of a tank. Upon what principle then can we properly say that the article cannot apply ? We are invited rather to wander into the jungle of speculation than follow the beaten track defined by the language used.

It is contended for the respondent, and this was the stress of his contention, that this is an action based upon, or framed under, s. 155 of the Bengal Tenancy Act, 1885, and that, as that Act was not in existence when the Limitation Act of 1877 was passed, the Legislature could not have intended that art. 32 of the latter Act should apply to cases framed under the provisions of the former Act.

This appears to us a fallacy. Suits against a tenant for perverting property to purposes other than those for which he had the right to use it were well known before the Bengal Tenancy Act of 1885, though before that Act there might have been no right to eject for such perversion independent of contract. Section 155 creates no fresh class of suit; it affords [568] no fresh cause of action ; it only provides that in ejectment suits a tenant may obtain relief against forfeiture on certain terms. It would be a strange thing to infer from that section that the Legislature intended to interfere with the operation of the provisions of the Statute of Limitations then in force, or by reason of s. 155 to say that when a person is sued for perverting the property demised to him to purposes other than those specified the ordinary Statute of Limitations did not apply. The Bengal Tenancy Act of 1885 deals specifically with the question of limitation in certain cases, and this supports an inference that the Legislature intended that any other cases should be left to the general law, and the policy of shortening the period of limitation in cases more or less analogous to the present, is indicated by art. 1 in sch. III. But even if the plaint had merely asked for ejectment, leaving it to the defendant to raise his claim to relief against forfeiture, as given him by s. 155, seeing that the claim to eject is based on the case expressly provided for by art. 32, we should have said that that article applied. That article says nothing about the relief to be sought or to be granted ; it only lays down within

what particular period of limitation a particular suit based upon a particular tort is to be brought.

It is said that the Bengal Tenancy Act describes an action such as this as an "ejectment action," and it is consequently suggested that art. 143 applies; but this article, which is more general in its terms than art. 32, only applies to a case where the plaintiff is entitled to possession by reason of forfeiture or breach of condition, that is, a condition of the tenancy; but the plaintiff here would only be entitled to possession upon non-compliance by the defendant with the order of the Court as to filling up the tank and making compensation. The present suit is framed in tort, not on breach of any contract. In our opinion the case is within art. 32—a conclusion consistent with the decision in this Court in the case of *Soman Gope* v. *Raghubir Ojha* (1), and with the principles of the case of *Gangadhar* v. *Zahurriya* (2), although in the latter case the [569] plaintiff did not seek to eject. These authorities we prefer to those of the cases of *Kedarnath Nag* v. *Khettur Paul Sritirutno* (3), and *Gunesh Dass* v. *Gondour Koormi* (4). The plaintiff is consequently out of time, and the appeal must be allowed with costs, and the suit dismissed with costs.

S. C. G. *Appeal allowed.*

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26 C. 569=3 C.W N. 393.

CRIMINAL REFERENCE.

Before Mr. Justice Prinsep and Mr. Justice Stanley.

QUEEN-EMPRESS *v.* SALEMUDDIN SHEIK AND OTHERS (*Accused*).*
[14th March, 1899.]

Confession—Confession to Police Officer—Evidence Act (I *of* 1872), *s.* 25.

The provisions of s. 25 of the Indian Evidence Act (I of 1872), which declare that no confession made to a Police officer shall be proved as against a person accused of any offence, applies to every Police officer and is not to be restricted to officers of the regular Police Force.

THIS was a reference to the High Court under s. 438 of the Criminal Procedure Code. The facts appear from the letter of reference, which was as follows:—

"The petitioners have been convicted under s. 25 of the Indian Forest Act (VII of 1878) for cutting and removing forest produce from a Government reserved forest without a proper license.

"There is no evidence whatever that the petitioners cut and removed the wood in their possession from a Government reserved forest. The petitioners were arrested at a market where they were evidently trying to sell the twenty pieces of *sundri* wood in their possession. There is no evidence except an alleged confession to the *chowkidar* who arrested them to show where they had obtained the pieces of wood in question. Now it has been held that a confession to a *chowkidar* is a confession to a Police officer, and as such is inadmissible in evidence. If this confession be therefore excluded, there is absolutely no evidence to support the conviction.

"The Magistrate in his explanation says, that 'there is of course no evidence to prove that the accused were seen within the forest boundary,

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* Criminal Reference No. 44 of 1899, made by L. Palit, Esq., Sessions Judge of Khulna, dated the 27th February 1899.

(1) 24 C. 160. (2) 8 A. 446. (3) 6 C. 34. (4) 9 C. 147.

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or when cutting the wood in it. But this is not always possible, and the admission of the accused before the witnesses for the prosecution (*chowkidars* [570] though they are) is I think legally admissible.' As I have however already remarked, such confessions have been held to be inadmissible.

"I therefore refer the case to the High Court with the recommendation that the conviction and sentence be set aside, and that the fine, if realized, be directed to be refunded."

The judgment of the High Court (PRINSEP and STANLEY, JJ.) was as follows:—

JUDGMENT.

The petitioner was arrested by a *chowkidar* in possession of a load of newly cut wood, which it was suspected had been cut from a Government reserved forest, and after his arrest it is said that he admitted to the *chowkidar* having so obtained it. He has accordingly been convicted and sentenced to fine under s. 25 of the Indian Forest Act (VII of 1878). The Sessions Judge has referred this case to us as a Court of Revision, that the conviction and sentence may be set aside, on the ground that a confession so made is not admissible in evidence, and as that is the only evidence in the case, there is no evidence to justify the conviction and sentence.

Section 25 of the Evidence Act declares that no confession made to a Police officer shall be proved as against a person accused of any offence. We are not inclined to restrict this to officers of the regular Police Force. In our opinion, it applies to every Police officer. In *Empress* v. *Rama Birapa* (1) it was held to apply to a Police *patel*, and in *In the matter of Hiran Miya* (2) it was held that the proper construction of s. 25 of the Indian Evidence Act is one that excludes confessions to a Police officer under any circumstances. The High Court, too, accepted the opinion expressed by Garth, C. J., in *The Queen* v. *Hurribole Chunder Ghose* (3), that the term "Police officer" should not be read in a strict technical sense, but according to its more comprehensive and popular meaning. As without the confession there is no evidence to prove the offence, the conviction and sentence must be set aside, and the fine if paid refunded.

F. K. D.

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26 C. 571 = 3 C.W.N. 365.

[571] CRIMINAL REVISION.

Before Mr. Justice Prinsep and Mr. Justice Stanley.

UMESH CHUNDER GHOSE (*Petitioner*) *v.* QUEEN-EMPRESS (*Opposite-party*).* [8th March, 1899.]

Opium Act (I of 1878), ss. 5 and 9—Licensed vendor, liability of, under s. 9 for keeping incorrect accounts.

Section 5 of the Opium Act (I of 1878) declares that the Local Government, with the previous sanction of the Governor-General in Council, may make rules consistent with the Act regulating the sale of opium. Under this section rules were issued by the Government of Bengal with the previous sanction of the

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* Criminal Revision No. 31 of 1899, made against the order passed by C. P. Caspers, Esq., Sessions Judge of Alipur, dated the 8th November 1898.

(1) 3 B. 12. (2) 1 C.L.R. 21. (3) 1 C. 207.

Governor-General in Council on the 21st February 1898, rule 15 (1) of which declares that a person to whom a license has been granted may sell opium by retail in accordance with the conditions specified in the license. The conditions of the license for the retail sale of opium are contained in Form No. 1 made under rule 15 (1). Under art. 13 of this form, the holder of the license is to keep a daily correct account showing the quantity of opium received and sold, and other details. Article 18 sets out that on infringement of any of the conditions contained in the form or imposed by the Opium Act the license may be cancelled.

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CRIMINAL REVISION.

26 C. 571 = 3 C.W.N. 365.

The petitioner, a licensed vendor of opium, was convicted of having kept incorrect accounts in contravention of the rules made under s. 5 of the Opium Act, and having thereby committed an offence punishable under s. 9 of that Act. He was sentenced to pay a fine of Rs. 200, and in default of payment to undergo rigorous imprisonment for four months.

Held, that the conviction and sentence must be set aside, there being nothing in any of the rules made under s. 5 of the Act which would make the preparation of an incorrect account punishable under s. 9.

[D., 1 A.L.J. 245 (247).]

THE petitioner, Umesh Chunder Ghose, was licensed as a vendor of opium, and was convicted by the Magistrate of Alipur of having kept incorrect accounts of the sale of opium in contravention of the rules made by the Local Government under s. 5 of the Opium Act (I of 1878), and of having thereby rendered himself liable to punishment under s. 9 of that Act. The Magistrate sentenced him to pay a fine of Rs. 200, [572] and in default of payment to undergo rigorous imprisonment for four months. On appeal this sentence was confirmed by the Sessions Judge.

Rule 15 (1) of the rules made under s. 5 enacts that

"a person to whom a license has been granted . . . . may sell opium by retail in accordance with the conditions specified in the license."

The specified conditions material to this case were arts. XIII and XVIII. Article XIII states that the licensee—

"shall keep a daily correct account in the following form, to be balanced at the close of each day; this account to be kept in a printed account book to be purchased at the Collector's office."

DATE.	Quantity of opium remaining in store yesterday.	Quantity received this day and whence received.	Total quantity to be accounted for.	Quantity sold this day.	Quantity remaining in store.
	M. S. C.	M. S. C.	M. S. C.	M. S. C.	M. S. C.

No. XVIII of the conditions states :—

"That on the infringement of any of the above articles or any of the conditions imposed by the Opium Act, 1878, or by the rules made thereunder . , . this license and any other license or licenses he may have obtained for the sale of opium may be cancelled by the Collector, and he shall not be entitled to the refund of any fee payable under the license which he has paid in advance, and he must pay the fee for the month in which the license is cancelled."

Babu *Hem Chunder Mitter*, for the petitioner.

The Deputy Legal Remembrancer (Mr. *Gordon Leith*), for the Crown.

(1) Notification No. 1225 S.R., published in the *Calcutta Gazette*, 23rd February 1898.

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The judgment of the Court (PRINSEP and STANLEY, JJ.) was as follows:—

JUDGMENT.

The petitioner has been convicted by the Magistrate of having kept incorrect accounts of a shop of which he was a licensed vendor of opium, and thereby of having committed a breach of the rules under the Opium Act, and thus of having committed an offence punishable under s. 9 of the Act, and he has been sentenced to a fine of Rs. 200 or, in default, to undergo rigorous imprisonment for four months. On appeal, the Sessions Judge has affirmed the conviction and sentence, but has held that the petitioner has brought himself within the purview of rules [573] 39 and 40 of the Government rules. We have not been able to find these rules, but Mr. Leith, who appears for the Government in support of this conviction, informs us that he has reason to believe that these rules are obsolete rules, which have been replaced by certain rules in the hands of those who appear in this case representing the adverse parties. Now we should not be inclined to set aside this conviction, if, notwithstanding this reference to obsolete rules by the Sessions Judge, it could be shown to us that the facts on which the petitioner has been convicted by both the Magistrate and the Sessions Judge would amount to a breach of the law rendering him so punishable, but we have been unable to find any legal authority justifying the conviction and sentence passed.

The petitioner has been convicted under s. 9 of the Opium Act of 1878 of having contravened the rules made under s. 5 of that Act. Section 5 declares that the Local Government, with the previous sanction of the Governor-General in Council, may make rules consistent with the Act regulating the sale of opium, and the case for the prosecution is that, by making false or incorrect accounts regarding the sale of opium, the petitioner has contravened these rules. Now, s. 15 of the rules issued by the Government of Bengal with the sanction of the Governor-General in Council, on the 21st February 1898, declares that a person to whom a license has been granted may sell opium by retail in accordance with the conditions specified in the license. We are next referred to the subsidiary rules issued under the authority of the Board of Revenue, the appendix attached to which sets out what is described as Form I, professing to have been made under rule 15 (1) already referred to. This appendix contains the conditions under which opium licenses are granted. Amongst these conditions, no doubt, is an obligation set out in rule 13 in regard to the regular maintenance of a register in the prescribed form showing the sales of opium and other details relating thereto, and rule 18 sets out the penalty for an infringement of any of the abovementioned conditions, or of any of the conditions imposed by the Opium Act of 1878, or by the rules made under that Act, *viz.*, that the license shall be cancelled. But there is nothing in any of the rules made by the [574] Government under s. 5 of the Act which would make the preparation of an incorrect account punishable under s. 9. We cannot consider that rule 15 (1) regularly made under s. 5 of the Opium Act, which enables a person to whom license has been granted to sell opium by retail, in accordance with the conditions specified in the license, would subject him for any breach of any of these conditions to a penalty under s. 9, unless there was some specific rule declaring that any such breach would so render him liable. The conviction and sentence must, therefore, be set aside and the fine, if paid, must be refunded.

F. K. D. *Conviction set aside.*

26 C. 574. 1899 MARCH 22.

CRIMINAL REVISION.

CRIMINAL REVISION. 26 C. 574.

Before Mr. Justice Prinsep and Mr. Justice Stevens.

ANANT PANDIT AND OTHERS (*Petitioners*) *v.* MADHUSUDAN MANDAL (*Opposite-party*).* [22nd March, 1899.]

Rioting—Unlawful assembly—Right of Private defence of property—Causing hurt in furtherance of common object—Penal Code (Act XLV of 1860*), ss.* 147, 323.

The party of the accused accompanied by *R* went armed with *lathis* to fish in a tank in which *R* had a two annas share. The complainant, who with some other co-sharers represented an eleven annas interest in the tank, went there with some of these co-sharers, to protest on the ground that the accused had no share or interest in the tank. A fight ensued in the course of which some of the complainant's party received slight injuries.

Held, that the accused were rightly convicted of rioting and voluntarily causing hurt under ss. 147 and 323 of the Penal Code.

Ganouri Lal Das v. *Queen-Empress* (1), followed. *Pachkauri* v. *Queen-Empress* (2), referred to.

[R., 12 C.W.N. 384 (388).]

A LARGE number of persons, including the accused, and accompanied by Ramchandra Rai, to whose party they belonged, went armed with *lathis* to fish in a tank in which Ramchandra Rai alleged [575] that he had a two annas share. The complainant, Madhusudan Mandal, who with some other co-sharers represented an eleven annas interest, went with some of these shareholders to protest on the ground that the defendants had no share or interest in the tank, and therefore no right to fish there. A quarrel ensued, in the course of which some of complainant's party were beaten, and received slight injuries. It was found by the Deputy Magistrate that Ramchandra Rai was in actual possession of a two annas share in the tank, and that he had satisfactory documents to show his *bona fides* in going to the tank to fish there. He held, however, that Ramchandra Rai had no right to go there with a body of armed men to assert his claim and possession over the tank by force, and he convicted the accused of rioting and voluntarily causing hurt under ss. 147 and 323 of the Penal Code. From this conviction the accused applied to the High Court under its revisional powers.

Babu *Karuna Sindhu Mookerjee*, for the petitioner.

The judgment of the Court (PRINSEP and STEVENS, JJ.) was as follows:—

JUDGMENT.

This is a case in which the petitioners have been convicted of a riot and hurt in connection with their attempt to assert and enforce a right to fish in a certain tank, in which they were opposed by the other co-sharers. The learned pleader for the petitioners maintained that inasmuch as they had a right to fish and are found to have a share in the tank, they were justified in proceeding even by force to enjoy that right, even if they apprehended resistance on the part of others, that is to say, others having a share in the same tank. As an authority for this, our attention was drawn to the case of *Pachkauri* v. *Queen-Empress* (2). It is extremely

* Criminal Revision No. 216 of 1899 made against the order passed by Moulvie Abdul Sabhan, Deputy Magistrate of Birbhoom, dated 17th of February 1899.

(1) 16 C. 206. (2) 24 C. 686.

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difficult in cases of this description to adopt and apply a general proposition of law as applicable to the facts of different cases. Some of the observations made in that case may perhaps be applied to the facts of the present case, but even that seems doubtful. Our attention has also been drawn to the case of *Ganouri Lal Das* v. *Queen-Empress* (1). That case has [576] been distinguished in the case of *Pachkauri* v. *Queen-Empress* (2), to which reference has already been made. In our opinion, the law laid down in the case of *Ganouri Lal Das* v. *Queen-Empress* (1) is what should be applied to the present case, and, so far as we understand the facts of that case, they are analogous to the facts of the present case. If this case is properly distinguishable from the case of *Pachkauri* v. *Queen-Empress* (2) the opinion we hold is not inconsistent with that judgment. We agree with the view of the law expressed by the learned Judges of this Court in the case of *Ganouri Lal Das* v. *Queen-Empress*, and we therefore refuse this application.

F. K. D. *Application refused.*

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26 C. 576.

CRIMINAL REVISION.

Before Mr. Justice Prinsep and Mr. Justice Stanley.

JIB LAL GIR (*Petitioner*) *v.* JOGMOHAN GIR (*Opposite Party*).*
[22nd March, 1899.]

Recognisance to keep peace—Criminal Procedure Code (Act V of 1898), s. 106—*Security for keeping the peace on conviction—Conviction under* s. 143 *of the Penal Code (Act XLV of* 1860).

Conviction of a person under s. 143 of the Penal Code is not necessarily a ground for making an order against him under s. 106 of the Criminal Procedure Code.

In order to bring his acts within the terms of the latter section, there must either be an express finding to the effect that his acts involved a breach of the peace, or an evident intention of committing the same, or the evidence must be so clear as to satisfy the Court (without an express finding) that such was the case.

[F., 30 C. 93 (94); 8 C.W.N. 517 (519); R., 27 C. 983 (984); 31 C. 419 (420); 9 O.C. 381 (384); U.B.R. (1904) 1st Qr., Penal Code, p. 4.]

THE petitioner in this case was convicted under s. 143 and s. 379 of the Penal Code and sentenced to pay a fine of Rs. 100 or in default to undergo rigorous imprisonment for one month, and was further directed under s. 106 of the Criminal Procedure Code to execute a bond for Rs. 500 with one surety of Rs. 500 for keeping the peace for one year, or in default to undergo simple imprisonment for the same period.

[577] Mr. *P. L. Roy*, and Babu *Joy Gopal Ghose*, for the petitioner.

Mr. *Jackson*, and Babu *Joges Chunder Dey*, for the opposite party.

The judgment of the High Court (PRINSEP and STANLEY, JJ.) was as follows:—

JUDGMENT.

The petitioner has been convicted under ss. 143 and 379 of the Indian Penal Code of being a member of an unlawful assembly and of theft, and in addition to the sentences passed he has been required under s. 106 of

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* Criminal Revision No. 68 of 1899.

(1) 16 C. 206. (2) 24 C. 686.

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the Code of Criminal Procedure to give security to keep the peace. A rule has been granted on his application to consider the conviction and sentence for theft and the order under s. 106 of the Code of Criminal Procedure.

The complainant and the petitioner have for some time past been disputing regarding the right to the properties which have formed the subject-matter of the theft, and various orders have been obtained from the Civil Courts on this subject. But it is clear that when the act found to constitute the offence of theft was committed no order had been obtained against the petitioner. His act cannot therefore be regarded as a dishonest act within the terms of the Penal Code so as to constitute the offence of theft. Mr. Jackson, who shows cause against the rule, informed us that he was not prepared to maintain this order.

But though the petitioner has been convicted under s. 379 as well as under s. 143 of the Penal Code, only one sentence of fine has been passed on him, so that if the conviction under s. 143 be maintained there is no reason for interfering with that sentence, which is appropriate under s. 143. The acts found, both by the Magistrate and by the appellate Court to have been committed by the petitioner, amply establish the conviction under s. 143 of the Penal Code, and we accordingly decline to interfere with the sentence.

The question next arises whether the order under s. 106 of the Code of Criminal Procedure requiring the petitioner to give security to keep the peace is a valid order.

That section enables certain specified Courts, after convicting a person of any of certain offences, to pass an order summarily [578] binding him over to keep the peace. Amongst those offences an offence under s. 143 of the Penal Code does not appear. But it is contended that it is included amongst the offences specified in the section in general terms. Section 106 of the Code of 1898 runs thus: "Whenever any person accused of rioting, assault or other offences involving a breach of the peace or of abetting the same or of assembling armed men or taking other unlawful measures with the evident intention of committing the same is convicted, &c." The terms of s. 106 of the Code of 1898 are the same as those of s. 106 of the Code of 1882, with the exception of the words "involving a breach of the peace."

Now, being a member of an unlawful assembly does not necessarily involve a breach of the peace; the members may abstain from proceeding to such lengths. It does, however, involve an apprehension that a breach of the peace may result. Nor does a conviction of an offence under s. 143 of being a member of an unlawful assembly necessarily amount to a conviction of "taking unlawful measures with the evident intention of committing" a breach of the peace. In order to bring the acts of the accused within either of these terms it is necessary that the Magistrate should expressly find that the acts of the person convicted amount to this, or at all events that the evidence is so clear that without such an express finding a superior Court, such as a Court of Revision, should be satisfied that the acts do involve a breach of the peace or an evident intention of committing the same. In the case before us we are not satisfied that this is established, and we cannot assume that the Magistrate found that this was established. The summary order requiring security to keep the peace must therefore be set aside.

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26 C. 579 = 3 C.W.N. 568.

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[579] APPELLATE CIVIL.

Before Mr. Justice Banerjee and Mr. Justice Rampini.

NISA CHAND GAITA AND OTHERS (*Defendants*) *v.* KANCHIRAM BAGANI (*Plaintiff.*)* [23rd March, 1899.]

Possession, Suit for—Previous possession, short of the statutory period of limitation—Dispossession—Suit brought more than six months after dispossession, Effect of.

Mere previous possession for any period short of the statutory period of twelve years will not entitle a plaintiff to a decree for recovery of possession in a suit brought more than six months after dispossession, even if the defendant could not establish any title to the disputed land.

Wise v. *Ameerunnissa* (1) referred to.

Ismail Ariff v. *Mahomed Ghous* (2) distinguished.

Enaetoollah Chowdhry v. *Kishen Soondur Surma* (3) and *Mahabeer Pershad Singh* v. *Mohabeer Singh* (4) dissented from.

[**Diss.**, 26 M. 514 = 13 M.L.J. 146; 5 Bom. L.R. 264; 15 Ind. Cas 613 (614); **Rel. on**, 21 Ind. Cas. 118 (119); **R.**, 31 C. 647 = 8 C.W.N. 446; 13 C.L.J. 649 = 10 Ind. Cas. 469; 15 C.W.N. 163 (168) = 6 Ind. Cas. 806; 73 P.R. 1902 = 137 P.L.R. 1902; **D.**, 23 M. 179 (183).]

THIS appeal arose out of an action brought by the plaintiff to recover possession of a plot of land on establishment of his *jamai* right thereto, as well as on a title acquired by twelve years' adverse possession. The plaintiff's allegation was that he had been in possession of the disputed *jama* for more than twelve years under the *maliks*; that in the year 1295 B. S. defendants 9 and 10 dispossessed him from a portion of the said land, but he recovered possession of the same by a suit brought under s. 9 of the Specific Relief Act; that in the year 1296 B. S., the principal defendants wrongfully cut and carried away the paddy grown by him upon the disputed land, and he brought a suit for compensation against the said defendants, which was dismissed. Thereupon the plaintiff brought the present suit.

[580] The defendants denied the plaintiff's alleged *jamai* right as well as his *maliks'* zemindari right to the disputed land; they also pleaded limitation.

The Munsif found that the plaintiff was in possession of the disputed land for about seven or eight years within twelve years from the date of the suit, but he had been out of possession for the last six years; but he held that inasmuch as the plaintiff could not prove his title by adverse possession of twelve years, nor his *jamai* right, the suit must be dismissed notwithstanding that the defendant could not establish any title to the disputed land. On appeal, the Subordinate Judge reversed the decision of the Munsif and decreed the plaintiff's suit.

From this decision the defendants appealed to the High Court.

Babu *Saroda Churn Mitter*, and Babu *Hara Kumar Mitter*, for the appellants.

Babu *Nil Madhab Bose*, for the respondent.

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* Appeal from Appellate Decree No. 770 of 1897, against the decree of Babu Mahima Chandra Ghose, Subordinate Judge of Faridpur, dated the 29th of January 1897, reversing the decree of Babu Chandra Bhusan Mukerjee, Munsif of Madaripur, in that District, dated the 26th of February 1896.

(1) 7 I.A. 73. (2) 20 C. 834 = 20 I.A. 99. (3) 8 W.R. 386. (4) 7 C. 591.

The judgment of the High Court (BANERJEE and RAMPINI, JJ.) was as follows:— 1899 MARCH 23.

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JUDGMENT.

This appeal arises out of a suit brought by the plaintiff respondent to recover possession of a plot of land, on his *jamai* right, that is, his right as tenant thereof, as well as on a title acquired by twelve years' adverse possession.

The question for decision is, whether the plaintiff is entitled to a decree merely upon proof of previous possession for a period less than twelve years, on the ground that the defendant has established no title, the suit having been brought more than six months after the date of dispossession. That question was raised in the Courts below. The first Court answered it in the negative, and dismissed the suit. The lower appellate Court, on appeal by the plaintiff, has answered the question in the affirmative and given the plaintiff a decree.

In second appeal it is contended that this view is wrong in law; and in support of the contention urged on behalf of the defendants appellants the cases of *Ertaza Hossein* v. *Bany* [581] *Mistry* (1), *Debi Churn Boido* v. *Issur Chunder Manjee* (2), *Purmeshur Chowdhry* v. *Brijo Lall Chowdhry* (3), *Shama Churn Roy* v. *Abdul Kabeer* (4), and *Wise* v. *Ameerunnissa Khatoon* (5), have been relied upon; while, on the other side, the cases of *Enetoollah Chowdhry* v. *Kishen Soondur Surma* (6), *Mohabeer Pershad Singh* v. *Mohabeer Singh* (7) and *Ismail Ariff* v. *Mahomed Ghous* (8) have been cited as supporting the judgment of the lower appellate Court.

The cases of *Enaetoollah Chowdhry* v. *Kishen Soondur Surma* (6) and *Mohabeer Pershad Singh* v. *Mohabeer Singh* (7) no doubt support the respondent's contention; but the case of *Ismail Ariff* v. *Mahomed Ghous* (8) is quite distinguishable from the present case. If that were not so, then notwithstanding that a different view is taken in the more recent decisions of this Court, we should have been bound to follow the decision in that case, it being a decision of the Privy Council. Now the distinction between the case of *Ismail Ariff* v. *Mahomed Ghous* (8) and the present case is this. There the plaintiff was in possession when he brought his suit, whereas in the present case the plaintiff is out of possession. What the plaintiff asked for in the case of *Ismail Ariff* v. *Mahomed Ghous* was a decree declaring his right, and an injunction restraining the defendant from disturbing his possession; what the plaintiff asks for in this case is only recovery of possession; and what was said by their Lordships of the Judicial Committee with reference to the plaintiff's right to obtain this relief is to be found in the following passage of their judgment: "It appears to their Lordships that there is here a misapprehension of the nature of the plaintiff's case upon the facts stated in the judgment. The possession of the plaintiff was sufficient evidence of [582] title as owner against the defendant. By s. 9 of the Specific Relief Act (I of 1877), if the plaintiff had been dispossessed otherwise than in due course of law, he could by a suit instituted within six months from the date of the dispossession, have recovered possession, notwithstanding any other title that might be set up in such suit. If he could thus recover possession from a person who might be able to prove a title, it is certainly right and just that he should be able, against a person who has no title and is a mere wrong-doer, to obtain

(1) 9 C. 130. (2) 9 C. 39. (3) 17 C. 256.
(4) 3 C.W.N. 158. (5) 7 I.A. 73. (6) 8 W.R. 386.
(7) 7 C. 491. (8) 20 C. 834=20 I.A. 99.

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a declaration of title as owner, and an injunction to restrain the wrong-doer from interfering with his possession." This shows, as we understand the judgment, that the reason for their Lordships' decision was this: that as the plaintiff, had his position been rendered somewhat worse by his being dispossessed, could, by instituting a suit within six months for recovery of possession under s. 9 of the Specific Relief Act, have recovered possession even as aginst a person who might establish a better title, it was only right and just that if he brought his suit before he was dispossessed he should be declared entitled to retain possession as against a mere wrong-doer, and should obtain an injunction restraining the wrong-doer from interfering with his possession. But, though that was so in the case of a plaintiff who was in possession, and had, therefore, a possibility open to him of being restored to possession upon mere proof of possession, by instituting a suit under s. 9 of the Specific Relief Act upon being dispossessed, it does not follow that it should be so in the case of a plaintiff who had been in possession, and allowed more than six months to elapse after his dispossession, and therefore lost the possibility of recovering possession by a suit under s. 9 of the Specific Relief Act, upon mere proof of previous possession. The case of *Ismail Ariff* v. *Mahomed Ghous* (1) does not, therefore, in our opinion, help the plaintiff in this case.

Then as regards the cases in this Court which have been cited by the plaintiff respondent, they have been regarded in the latter decisions of this Court as practically overruled by the decision [583] of the Privy Council in *Wise* v. *Ameerunissa Khatoon* (2). In this last mentioned case their Lordships observe: "It is quite clear that the plaintiffs have failed to make out a title. The defendants were put into possession by the Government, who were entitled to the lands, and they were ordered by the Magistrate under the Code of Criminal Procedure to be retained in possession. If the plaintiffs had wished to contend that the defendants had been wrongfully put into possession, and that the plaintiffs were entitled to recover on the strength of their previous possession, without entering into the question of title at all, they ought to have brought their action within six months, under s. 15 of Act XIV of of 1859; but they did not do so;" and then their Lordships add: "The High Court with reference to this point say (and in their Lordships' opinion, correctly say): 'Further, *de facto* possession having been given to the defendants under s. 318 of the Code of Criminal Procedure, in accordance with the Deputy Collector's award the plaintiff will not be entitled to a decree until and unless he can shew a better title to these lands than the defendants. The fact that the plaintiff's possession as regards B, C, and D was confirmed under Act IV of 1840, and that the defendants Nos. 2 and 3 unsuccessfully endeavoured to disturb them by regular suit, does not bar the right of Government. Section 2 of Act IV of 1840 only affects persons concerned in the dispute. If Kalkini had belonged to a private individual he might have reduced into his own possession lands which had accreted to the estate, and which undoubtedly were his. But lands to which he is unable to make out a title cannot be recovered on the ground of previous possession merely, except in a suit under s. 15 of Act IV of 1859, which must be brought within six months from the time of that dispossession.' "

Following these observations of their Lordships of the Privy Council, this Court in the cases of *Ertaza Hossein* v. *Bany Mistry* (3), *Debi Churn*

(1) 20 C. 834 = 20 I. A. 99. (2) 7 I. A. 73. (3) 9 C. 130.

Boido v. *Issur Chunder Manjee* (1), and [584] *Purmeshur Chowdhry* v. *Brijo Lall Chowdhry* (2) has held that a plaintiff in a suit for possession brought more than six months after his dispossession, is not entitled to possession, merely upon proof of previous possession short of possession for the statutory period of twelve years which can give a title by adverse possession; and the last case cited for the appellant, namely, *Shama Churn Roy* v. *Abdul Kabeer* (3) also takes the same view, and distinguishes suits for recovery of possession from that class of cases which the Privy Council had to consider in the case of *Ismail Ariff* v. *Mahomed Ghous* (4). The weight of authority is therefore clearly in favour of the view contended for by the learned Vakil for the appellant. That being so, it is not necessary for us to go into the matter any further. If it were necessary to give reasons in support of this view, we should say that in a suit to recover possession brought more than six months after the date of dispossession, the plaintiff must prove title, and mere previous possession for any period short of the statutory period of twelve years cannot be sufficient for the purpose, because, if that were so anomalous results might arise ; and it would be difficult to determine what should be the relative durations of possession of the plaintiff and the defendant to entitle the former to a decree. For take a case like this : A plaintiff whilst in possession, which had lasted for eight years, is dispossessed by the defendant, and does not bring his suit until after seven years. Why should eight years' possession of the plaintiff entitle him to a decree against the defendant, whose possession, though originating it may be in force, was allowed to continue for seven years peaceably? Or, again, the periods may be reversed ; and a plaintiff who was in possession for seven years may be dispossessed, and may not bring his suit until after eight years. These difficulties and anomalies must arise unless we accept the view contended for by Babu Saroda Charan Mitter on behalf of the appellant. It is true s. 9 of the Specific Relief Act does not expressly prohibit a person from recovering possession upon [585] mere proof of previous possession in a suit brought more than six months after dispossession ; but the inclination of our minds is, that if a person wishes to recover possession merely upon proof of previous possession, without proof of any title, the remedy prescribed for him is to be found in s. 9 of the Specific Relief Act. If he does not avail himself of that remedy by bringing a suit within six months, it becomes barred.

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The result is, that this appeal must be allowed, and the decree of the lower appellate Court be set aside and that of the first Court restored and affirmed, with costs in this Court and the Court below.

S.C.G. *Appeal allowed.*

(1) 9 C. 39.
(2) 17 C. 256.
(3) 3 C.W.N. 158.
(4) 20 C. 834 = 20 I.A. 99.

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APRIL 5.

ORIGINAL CIVIL.

26 C. 585.

26 C. 585.

ORIGINAL CIVIL.

Before Mr. Justice Stanley.

TARAK MOHINEY DASSEE *v.* GREES CHUNDER DASS (AND TWO OTHER SUITS).* [5th April, 1899.]

Reference to Registrar—Statement of facts, filing of after appointed time—Right of party failing to appear and support such statement—Practice—Rules of High Court, Nos. 522, 537.

On the 4th February 1899 one *G* was granted a month's time to file his statement of facts in a reference which was pending before the Registrar, and in default thereof it was ordered that the reference should be heard *ex parte* against him. The statement of facts was filed before the Registrar seven days after the proper time. The Registrar refused to deal with the statement of facts without an order of Court. *G* then applied to the Court for an order that the Registrar might be at liberty to refer to the statement of facts, and that *G* might be permitted to appear and support them. The party opposing contended that *G* ought not to be allowed to file his statement of facts, that he might appear in person, but had no right to employ counsel or attorney. *Held*, that *G* was entitled to file his statement of facts, and that the reference should be proceeded with in the usual course.

BY a decree in these suits, dated the 26th February 1890, certain inquiries were directed to be made by the Second Assistant Registrar. On the 10th May 1890 it was ordered that the defendant Grees Chunder Dass and two other parties should file their [586] statement of facts within a certain time. No proceedings, however, having been taken in the matter the reference was struck out from the list of references on the 23rd March 1892. The reference was restored on the 18th December 1897, and Grees Chunder Dass was ordered to file his statement of facts within a fortnight, and in default the reference was to be heard *ex parte* as against him. The statement of facts was not filed as directed, and no further proceedings were taken for a year. On the 3rd February 1899 Grees Chunder Dass was served with a Registrar's summons, dated the 28th January 1899, to calling upon him to appear on the 4th February 1899 to proceed with the reference. On the 4th February 1899, on the application of Grees Chunder Dass, the Court granted him a month's further time to file his statement of facts and in default thereof the reference was to be heard *ex parte* as against him. Grees Chunder Dass prepared his statement of facts, and on the 2nd or 3rd of March 1899 asked his attorney to file them, but there being at that time a conflict of interest between Grees Chunder Dass and his attorney the latter refused to act for him, and the statement of facts was not filed. Grees Chunder Dass was summoned to appear before the Registrar on the 11th March 1899 to proceed with the reference pursuant to the order of the 4th February 1899. On the 11th March 1899 he appeared and filed his statement of facts before the Registrar. On the 17th March 1899 the Registrar directed Grees Chunder Dass to obtain an order from the Court authorizing him to deal with the statement of facts. On the 29th March 1899 Grees Chunder Dass applied in Chambers for an order that the Assistant Registrar might be at liberty to refer to the statement of facts filed by Grees Chunder Dass, and that Grees Chunder might be allowed to appear and support his statement of facts as in an ordinary reference.

* Original Civil Suits Nos. 375 of 1886, 90 of 1887, and 172 of 1888.

Mr. *Pugh*, for the defendant Grees Chunder Dass. 1899

Mr. *Dunne*, for the defendants Kumud Chunder Dass and Benode Chunder Dass. APRIL 5.

Mr. *Pugh.*—Grees Chunder Dass cannot be shut out from defending, though he was late in filing his statement of facts. The [587] only question is that of costs. *Collins* v. *The Vestry of Paddington* (1). He is in contempt for not complying with the order of the Court; still it is submitted he is entitled to take any step which may be necessary for the purposes of his defence. *Haldane* v. *Eckford* (2); *Fry* v. *Earnest* (3). Where a party summoned to attend on a reference fails to attend at the time appointed the Judge may reconsider the proceedings if he be satisfied that the absent party was not guilty of wilful delay or negligence.—Rule 507, Belchambers' Rules and Orders. Had Grees Chunder Dass been guilty of wilful disobedience the Court might then refuse to give him relief. *Haigh* v. *Haigh* (4). ORIGINAL CIVIL. 26 C. 585.

Mr. *Dunne contra.*—The order of the 4th February 1899 clearly states that if Grees Chunder Dass does not file his statement of facts within a month the reference should proceed *ex parte.* This Court is bound by that order and cannot review it. Grees Chunder may appear in person and check what we do, but has no right to employ counsel and solicitor. Parties must follow the rules of the Court and take steps within the proper time. The cases of *Mootichand* v. *Foolchand* and *Radhabullav Dass* v. *Bholanath Dass*, both unreported, were referred to.

The judgment of the Court was as follows:—

JUDGMENT.

STANLEY, J.—In this matter a summons was taken out by Grees Chunder Dass, the defendant in the first-mentioned suit and the plaintiff in the second and third-mentioned suits, for an order that the Assistant Registrar may be at liberty to refer to the statement of facts filed by him, and that he may be allowed to appear and support the statement of facts filed by him as in an ordinary defended reference.

It appears that a decree was made so far back as the 26th of February 1890, directing an inquiry as to the properties belonging to the defendants jointly, an account of the joint estate and joint and separate liabilities as between the defendants, land an account of the sums spent by the defendants respectively, [588] and whether such sums ought to be debited against the defendants jointly or against the individual making the expenditure. On the 10th May 1890, Wilson, J., ordered the defendants to file a statement of facts. Negotiations took place for the compromise of the suits, and no steps having been taken in prosecution of the same on the 23rd March 1892 the suit was struck out from the General Reference list as having been abandoned under Rule 537.

On the 27th May 1893 the case was reinstated on General Reference list on the application of the two defendants who are now resisting this application.

There were no proceedings taken after the reinstatement, and again the suit was under the rule deemed to be abandoned.

On the 18th December 1897 another application was made to restore the case to the list, and an order was made to reinstate it, and by that order Grees Chunder Dass was ordered to file a statement of facts and accounts before the 28th February 1898, and in default of his doing so it was directed that the reference was to be proceeded with against him *ex parte.*

(1) (1880) L.R. 5 Q.B.D. 368.
(2) (1869) L.R. 7 Eq. 425.
(3) (1863) 9 Jur. N.S. 1151.
(4) (1885) L.R. 31 Ch. D. 478.

1899 APRIL 5. — ORIGINAL CIVIL. — 26 C. 585.

Negotiations for a compromise were again opened, and the order of the 18th of December 1897 was not complied with. On the 4th February 1899 an application was again made to restore the case to the list of references, and Sale, J., ordered that the reference directed by the decree of 1890 be proceeded with, and the defendant Grees Chunder Das was directed within one month to file his statement of facts, and in default the reference was to proceed *ex parte* as against him. The statement of facts was not filed within the month, but was handed to Babu Grees Chunder Banerjee, the Second Assistant Registrar of the Court, seven days, after the expiration of the month, and Grees Chunder Dass asked that the Registrar should proceed with the reference in the ordinary way.

The two defendants, who are opposing the present application, objected to this, and urged that the reference must, under Mr. Justice Sale's order, be proceeded with *ex parte* as against Grees Chunder Dass. The Assistant Registrar then sent the matter up to the Court for directions.

[589] Mr. Pugh for the applicants submits that the application is one which his client is entitled to have granted *ex debitio justitioe*, and that the only question for the Court relates to the costs of the motion.

Mr. Dunne has offered strenuous opposition to the motion, and he submits that the order of Mr. Justice Sale has determined the matter, and that I am bound by that order and cannot review it; that as the statement of facts was not filed in time the inquiries directed by the decree must proceed *ex parte*, that is, that the applicant cannot be allowed to use the statement of facts filed by him or make any substantive case before the Assistant Registrar or be represented by an attorney on the inquiry.

The order of Mr. Justice Sale directs that the reference directed by the decree be taken up and proceeded with by the Second Assistant Registrar of the Court at the expiration of one month from the date of the order, and orders that Grees Chunder Dass do, within the time aforesaid, file his statement of facts and accounts as directed by the said order, and that in default thereof the said reference be proceeded with *ex parte* as against him. Mr. Dunne contended that the original reference directed by the decree of 1890 had been abandoned, and that the order of Mr. Justice Sale amounted to a new reference. This does not appear to me to be so. Rule 537 says: "If default be made in complying with rule 159, or if at any stage of a reference no steps shall be taken to prosecute it for thirty days, any party may apply, by summons, at Chambers, that the suit be dismissed or discontinued for want of prosecution, and such order may be made thereon as to costs or otherwise as to the Judge shall seem fit. If no such application be made, the suit shall, at the end of fourteen days from the time of such default, or of such thirty days, be struck out of the General Reference list, and be deemed to have been abandoned." Under this rule the suit is deemed to be abandoned, not the reference. Mr. Dunne says it is the reference which must be deemed to have been abandoned and not the suit—and that Mr. Justice Sale's order was a new order of reference and is binding upon me.

I think that is not the proper construction to be placed on [590] the learned Judge's order. Rule 537 merely provides that the suit shall be deemed to have been abandoned if proceedings are not taken in time, but an application can be made to revive it, and, if it is revived, it is revived as a suit in which a decree has been made directing that the applicant shall file a statement of facts and accounts.

If the order of Mr. Justice Sale is interpreted as an order that the applicant shall not file a statement of facts unless he does so within a limited time, it appears to me that this order would be a modification and over-ruling of the decree in the suit which directs that he shall account. The applicant is bound to account, and so long as he fails to do so he is in contempt and liable, I would say, to attachment. 1899 APRIL 5. ORIGINAL CIVIL. 26 C. 585.

Can an order of this Court preclude him from purging his contempt? I think not. I understand Mr. Justice Sale's order to amount to nothing more than this, that if the applicant fail to file his statement within the time limited by the order the reference shall notwithstanding proceed. If no statement is filed by the applicant so much the worse for him, as he cannot raise any objection to the accounts filed by the opposite party inasmuch as he had not filed any verified statement. (Rule 522.)

I was referred to two unreported cases recently decided by the Chief Justice of this Court where he laid down that parties must follow the rules of Court as to the time within which steps should be taken. *Moti Chand* v. *Fool Chand* and *Radhabullav Dass* v. *Bholanath Dass*. Those cases are distinguishable from the present. There the application was for an extension of time for appealing after judgment had been pronounced when the opposite party had obtained a vested interest in the judgment; here it is different; nothing has been decided between the parties. The questions between them are still undecided. A party cannot be shut out from filing a statement when by doing so he is only purging the contempt he was in in not having done so before. Each party has a right to have the dispute determined on the merits, and the Court should do everything to favour the fair trial of the issues between the parties. The application is, I think, a matter *ex debito justitiæ*.

[591] I have not gone into any of the matters contained in the affidavits dealing with the delays which have taken place or into the charges which have been made by the applicant. I think that these charges ought not to have been made. If they had not been made, Mr. Dunne's client would not, I think, have been justified in resisting this application. Consequently, though I hold that the statement of facts may be filed and the reference proceeded with in the usual course, I direct that the applicant shall pay the costs of this application.

Attorney for the applicant Grees Chunder Dass: Babu *Kally Das Bhunjo*.

Attorneys for the opposing defendants: Messrs. *Remfry & Rose*.

D. S.

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26 C. 591=3 C.W.N. 670.

ORIGINAL CIVIL.

Before Mr. Justice Stanley.

NISTARINI DASSEE *v.* NUNDO LALL BOSE. [9th June, 1899.]

Practice—Evidence taken on commission on behalf of defendant—Right of plaintiff to refer to such evidence as part of record of suit—Civil Procedure Code (*Act XIV of* 1882), *ss.* 389 *and* 390—*Act VIII of* 1859, *s.* 179.

Defendant examined a witness on commission. The commission was returned to the Court. The plaintiff in opening his case claimed the right to refer to the evidence taken on commission as part of the record of the suit. Defendant objected, contending that if plaintiff read it, he must read it as his own evidence.

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Held, that the plaintiff was entitled to refer to the evidence as part of the record. *Dwarkanath Dutt* v. *Gunga Dayi* (1) followed.

[F., 23 M. 216 (218); R. 35 C. 28 (32); 36 C. 566 = 11 C.L.J. 150 (151) = 13 C.W.N. 525 = 1 Ind. Cas. 366; 37 C. 197 = 11 C.L.J. 250 = 14 C.W.N. 507 = 5 Ind. Cas. 198 (199); 6 A.L.J. 71 (97).]

IN this case a commission had issued at the instance of one of the defendants, Nundo Lall Bose, for the examination of a witness on his behalf. The examination of the witness having been completed the commission was returned to the Court. The plaintiff in opening his case claimed the right to refer to such evidence taken on commission as part of the record in the case.

The Officiating Advocate-General (Mr. *J. T. Woodroffe*), Mr. [592] *W. C. Bonnerjee*, Mr. *Dunne*, Mr. *J. G. Woodroffe*, and Mr. *K. S. Bonnerjee*, for the plaintiff.

Mr. *Hill*, Mr. *O'Kinealy*, Mr. *Chakravarti*, and Mr. *B. C. Mitter*, for the defendant Nundo Lal Bose.

Mr. *W. C. Bonnerjee* submitted he was entitled to refer to the evidence taken on commission on behalf of the defendant Nundo Lal Bose, and referred to *Dwarkanath Dutt* v. *Gunga Dayi* (1).

Mr. *Hill, contra*, contended that the plaintiff in his opening was not entitled to refer to and comment on the evidence taken on commission. It has not been tendered and is not yet before the Court, and in commenting on the case in the pleadings counsel is not at liberty to refer to the evidence taken under commission. If the plaintiff wishes to read the evidence he can only read it as his own.

Mr. *W. C. Bonnerjee* in reply.—Section 389 of the Civil Procedure Code provides that the commission and the return thereto and the evidence taken under it shall, subject to the provisions of s. 390, form part of the record of the suit; therefore this commission forms part of the record of this suit, and I submit that under s 389 I am entitled to refer to the same without putting in such evidence. The case I have cited was under the provisions of s. 179 of Act VIII of 1859, and is directly in point.

RULING.

STANLEY, J.—In my opinion, having regard to the language of s. 389 of the Civil Procedure Code, the plaintiff is entitled to refer to the evidence as a matter of record. I shall follow the decision in *Dwarkanath Dutt* v. *Gunga Dayi* (1).

Attorney for the plaintiff: Babu *Romesh Chunder Basu*.

Attorney for the defendant Nundo Lall Bose: Babu *Hirendra Nath Dutt*.

Attorney for the defendant Pasupaty Nath Bose: Messrs. *G. C. Chunder & Co.*

D. S.

(1) 8 B. L. R. App. 102.

26 C. 593=3 C.W.N. 610.

1899 APRIL 18.

APPELLATE CIVIL.

26 C. 593= 3 C.W.N. 610.

[593] APPELLATE CIVIL.

Before Mr. Justice Macpherson and Mr. Justice Stevens.

JANHAVI CHOWDHURANI (*Defendant*) v. BINDU BASHINI CHOWDHURANI AND OTHERS (*Plaintiffs*).* [18th April, 1899.]

Right of way—Limitation Act (XV of 1877), s. 26—Easement—Prescription—Continuance of enjoyment as of right—Cessation of user—Actual user.

No rule can be laid down as to what would or would not constitute a continuance of the enjoyment as of right of a right of way, when there has been no exercise of it for any given period: that must depend upon the circumstances of each case and the nature of the right claimed.

For the plaintiff to succeed in a suit for the declaration of a right of way, as acquired under s. 26 of the Limitation Act, conceding that he need not prove an *actual* user of the way up till the end of the statutory period of twenty years, there must, when there is no user for a long time, be circumstances from which the Court can infer the continuance of enjoyment as of right over the whole statutory period, and the cessation of the user must be at least consistent with such continuance. The enjoyment required by the Act cannot be in abeyance, and at the same time continue see as to give the plaintiff the special right claimed. The question of continued enjoyment is an inference to be drawn from facts, rather than one of fact, and if there are no facts to sustain the inference, a decision in favour of such enjoyment cannot stand.

The plaintiffs sued the defendant for the declaration of a right of way, as acquired under s. 26 of the Limitation Act, over a plot of land belonging to the defendant. It was alleged that in April 1892, the defendant dispossessed the plaintiffs from the dominant tenement; and that the plaintiffs sued the defendant for recovery of possession of it under s. 9 of the Specific Relief Act, and having obtained a decree, got possession on the 19th June 1895. It was further alleged that thereupon the defendant, on the 21st June 1895, obstructed the disputed way by erecting sheds. The present suit was instituted on the 25th November 1895.

Held, that the enjoyment of the right of way on the part of the plaintiffs not having continued until within two years of the institution of the suit, the suit must fail.

Koylash Chunder Ghose v. *Sonatun Chung Barooie* (1), distinguished.

[594] THE facts of the case, so far as they are necessary for the purposes of this report, are as follows:—

The plaintiffs sued for the declaration of their right of way over a piece of land belonging to the defendant, upon the ground that the tenants of plaintiffs Nos. 1 and 2 had used the disputed way peaceably, openly, without interruption, and as of right, for more than twenty years; that in April 1892, the defendant had dispossessed the plaintiffs Nos. 1 and 2 and their tenants from the land forming the dominant tenement, known as the *chunia bari*, that the plaintiffs Nos. 1 and 2 and their tenants brought a possessory suit against the defendant under s 9 of the Specific Relief Act; that having obtained a decree in that suit, they got *khas* possession of the dominant tenement on the 19th of June 1895; and that thereupon the defendant, on the 21st of June 1895, obstructed the alleged pathway by raising sheds thereon and thereby prevented their egress from and ingress to the dominant tenement. The present suit was instituted on the

*Appeal from Appellate Decree No. 1734 of 1897, against the decree of Babu Dwarkanath Bhuttacharjee, Subordinate Judge of Mymensingh, dated the 14th of August 1897, affirming the decree of Babu Kali Krishna Chowdhry, Munsif of Attia, dated the 29th of June 1896.

(1) 7 C. 132.

1899 APRIL 18. — APPELLATE CIVIL. — 26 C 593 = 3 C.W.N. 610.

25th November 1895. Besides the statutory easement claimed, the plaintiffs also claimed, in the alternative, an easement of necessity in regard to the alleged pathway.

The defence, amongst other things, was that the plaintiffs, not having been in enjoyment of the disputed right of way within two years of the suit, their claim was barred under s. 26 of the Limitation Act.

Upon this plea the Munsif found that, although the plaintiffs never used the pathway during the period that the defendant was in the possession of the dominant tenement, the right of way remained in abeyance during that period; that about eight or nine days after the plaintiffs had recovered possession of the dominant tenement, the defendant raised a straw shed on the spot over which the way was claimed; and accordingly, as well as on the merits, decreed the suit.

On appeal the Subordinate Judge held as follows:—

"I find as a fact, from the evidence adduced by both the parties, that the defendant having taken possession of the *chunia bari*, as also of other *baris* contiguous to it, made material alteration in them, and that since [595] then the plaintiff ceased to use the way. The question also admits of being looked at from another point of view The evidence adduced by the plaintiffs goes to prove that they obtained possession of the dominant holding on the 19th June 1895, and this suit was instituted on the 25th November 1895, *i.e.*, within six months from the date of the delivery of possession. I, therefore, hold that the plea of limitation is untenable."

Agreeing with the Munsif in this, as well as in the other points, the Subordinate Judge dismissed the appeal.

The defendant then appealed to the High Court.

Sir *Griffith Evans*, Babu *Srinath Das*, Babu *Dwarka Nath Chakravarti*, Babu *Basanta Kumar Bose*, and Babu *Krittanta Kumar Bose*, for the appellant.

Mr. *J. T. Woodroffe*, Babu *Jogesh Chandra Roy*, and Babu *Mukund Nath Roy*, for the respondents.

The judgment of the High Court (MACPHERSON and STEVENS, JJ.) was as follows:—

JUDGMENT.

The Subordinate Judge has in this case affirmed the decision of the Munsif, and held that the plaintiffs have, under the provisions of the 26th section of the Limitation Act, acquired a right of way over the land of the defendant. The plaintiffs claimed to be the owners of a plot of land appertaining to an estate which belonged to their predecessors and the predecessors of the defendant; they said that this plot had been allotted to them when a partition of the estate was made many years ago; that it had since been in their possession, and that the approach to it was by the way in question, which they and their tenants had always used for that purpose. They claimed a right of way both by grant as an easement of necessity and as acquired under s. 26 of the Limitation Act. We are only concerned with the last mentioned claim, which is the one found to be established. The others have not been considered. No exception is now taken to the finding that the plaintiffs have proved an uninterrupted enjoyment of the way as of right for a period of twenty years. The points urged are, that it is not directly found that the plaintiffs are the owners of the plot of land to which the right of way is said to be appurtenant, and that it is wrongly found that the twenty years' period of [596] enjoyment continued till within two years of the time when the suit was instituted.

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We think there is nothing in the first point. There was no issue upon it and it was not separately dealt with, but the question whether the way had been used by the plaintiffs in the manner alleged depended very largely upon the question whether this plot of land was in their possession or in that of the defendant. The first Court found that the plaintiffs' tenants were in possession of it for more than twenty years, and the lower appellate Court took the same view of the evidence.

As regards the second point, the facts found are these: In April 1892 the defendant dispossessed the plaintiffs of the plot which forms the dominant tenement. The plaintiffs got a decree for the possession of it under s. 9 of the Specific Relief Act (I of 1877), and in execution of the decree were restored to possession on the 19th of June 1895. Two days after this the defendant obstructed the way, and the plaintiffs brought this suit on the 25th November 1895. They did not use the way after the dispossession in April 1892. On these facts it is contended here, as it was in the Court below, that the claim, in so far as it is based on s. 26 of the Limitation Act, must fail.

Section 26 enacts that the twenty years' period of enjoyment which must be proved before the plaintiffs can succeed "shall be taken to be a period ending within two years next before the institution of the suit wherein the claim to which such period relates is contested." The suit referred to must be this suit, as the suit under the Specific Relief Act did not relate to the right of way, and had nothing to do with the statutory period now required to be proved. As the plaintiffs did not use the way for a period of more than three and a half years before suit, the question is, whether notwithstanding such non-user the enjoyment as of right can be said to have continued so as to complete the statutory period. If it did not continue, the claim under this section must fail.

It was held in the case of *Koylash Chunder Ghose* v. *Sonatun Chung Barooie* (1) that the term "enjoyment" in s. 26 did not [597] mean actual user, although the illustration (*b*) attached to the section might indicate that it was intended to have that meaning. The right claimed in that case was a right of passage for boats over the defendant's land when it became covered with water during the rainy season; it could only be exercised at a particular season of the year, and then only if the defendant's land happened to be sufficiently flooded. The lower Court had dismissed the suit on the ground that no actual exercise of the right had taken place within two years before suit. This Court held that that was a wrong view of the law, and said, with reference to the particular case before it, that so long as the plaintiffs' right was not interfered with whenever they had occasion to use it, their enjoyment must be considered as continuing all the year round. No rule was or could be laid down as to what would or would not constitute a continuance of the enjoyment as of right when there was no exercise of it for any given period, and obviously that must depend upon the circumstances of each case and the nature of the right claimed.

But, conceding that the plaintiffs need not prove an actual user of the way up till the end of statutory period, there must, when there is no user for a long time, be circumstances from which the Court can infer the continuance of an enjoyment as of right over the whole statutory period, and the cessation of the user must be at least consistent with such continuance. The circumstances under which the plaintiffs ceased to use the

(1) 7 C. 132.

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way preclude, we consider, any inference of a continued enjoyment. The defendant, wrongfully it may be, took possession of the dominant tenement; and the plaintiffs ceased to use the way which led to it over the defendant's land.

It cannot be said that during the period of dispossession, a period of more than three years, the plaintiffs had, or supposed they had, an open, peaceable, uninterrupted enjoyment of the way as of right, or that the defendant suffered such enjoyment, although there was no attempt to exercise it. The defendant did not, it is true, actually obstruct the way till June 1895, but when the plaintiffs ceased to use it there was no necessity to obstruct it, and the plaintiffs can derive no benefit from the circumstance that it [598] was not obstructed earlier. The Munsif considered that the enjoyment was in abeyance during the period of the plaintiffs' dispossession, but we are unable to see how the enjoyment required by the Act could be in abeyance, and at the same time continue so as to give the plaintiff the special right claimed. The grounds on which the Subordinate Judge found that the enjoyment continued are not clearly stated, but he seemed to consider that it was sufficient that the suit was brought within a few months of the time when the plaintiffs recovered possession of the dominant tenement. That we think does not help the plaintiffs and does not bring the case within the provisions of the section which requires that the way shall have been enjoyed in the manner specified for the full defined statutory period of twenty years. At whatever time the suit is brought the enjoyment must be found to have continued till within two years of that time, and if that cannot be found, the claim fails.

It is said that the question of continued enjoyment is a question of fact. It is an inference to be drawn from facts, and if, as here, there are no facts to sustain the inference, the decision cannot stand.

We must, therefore, set aside the decision of the Subordinate Judge, and hold that the right claimed under s. 26 has not been established. The case must go back in order that he may determine whether the plaintiffs are entitled to succeed on either of the other claims. The appellant will get his costs in this Court.

M. N. R. *Appeal allowed; case remanded.*

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26 C. 598.

APPELLATE CIVIL.

Before Mr. Justice Banerjee and Mr. Justice Rampini.

RAJ NARAIN PURKAIT (*Defendant No.* 1) *v.* ANANGA MOHAN BHANDARI AND OTHERS (*Plaintiffs*).* [6th February, 1899.]

Review—Civil Procedure Code (Act XIV of 1882), ss. 102, 103 and 623—Dismissal of a suit for default under s. 102—Review of judgment without applying to re-instate the suit under s. 103 of the Code.

[599] Where a suit was dismissed for default under s. 102 of the Code of Civil Procedure, and an application for review of judgment was made by the plaintiff

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* Appeals from Appellate Decrees Nos 775 and 840 of 1897, against the decree of J. Pratt, Esq., District Judge of 24-Pergunnahs, dated the 22nd of January 1897, modifying the decree of Babu Sham Chand Dhur, Subordinate Judge of that District, dated the 18th of February 1896.

without a previous application to have the order of dismissal set aside under s. 103 of the Code:

Held, that the Court had jurisdiction to entertain the application for review of judgment.

Kailash Mondol v. *Nabadwip Chandra Kar* (1) distinguished.

[F., 16 C.W.N. 643=15 Ind. Cas. 554 (555); 121 P.R. 1907=51 P.W R. 1907; R. & F., 19 Ind. Cas. 481=109 P.R. 1913=181 P.L.R. 1913=108 P.W.R. 1913; R., 7 P.L.R. 1900, 30 (32)]

THE facts of this case, so far as they are necessary for the purposes of the report, are shortly these: In a suit for partition of a certain family property the plaintiff failed to appear on the date fixed for the hearing of the case, but the defendant appeared, and the Court of first instance dismissed the suit under s. 102 of the Civil Procedure Code. Thereupon the plaintiff, instead of applying to the Court for an order to set aside the dismissal under the provisions of s. 103 of the Code, made an application for review of judgment. The review was granted and the suit was tried on its merits. The Subordinate Judge decreed the suit in accordance with the report of the Commissioner. On appeal to the District Judge he varied the decree to a small extent, but confirmed the decision of the first Court in the main. Against this decision the defendant appealed to the High Court, mainly on the ground that the Court of first instance had no power to entertain an application for review of judgment made after the dismissal of the suit for default under s. 102 of the Code of Civil Procedure, but the proper course for the plaintiff was to make an application to have the order of dismissal set aside under s. 103 of the Code.

Dr. *Ashutosh Mookerjee*, and Babu *Sarat Chunder Ghose*, for the appellant.

Babu *Nil Madhub Bose*, and Babu *Shib Chunder Palit*, for the respondents.

The judgment of the High Court (BANERJEE and RAMPINI, JJ.) was as follows:—

JUDGMENT.

These two appeals arise out of a suit for partition of certain joint property, appeal No. 775 being a second appeal from [600] the preliminary decree for partition, and appeal No. 840 being a second appeal from the final decree made in the suit.

The questions raised by the learned Vakil for the defendant-appellant are, *first*, whether the application for review of judgment made after the dismissal of the suit for default was not barred by limitation, and whether the subsequent proceedings in the suit were not therefore altogether null and void; *second*, whether, on the pleadings, the learned Judge below should have gone into the question as to whether Arannagore was joint property; and, *third*, whether on the facts found, the tank referred to in the judgment ought not to have been kept joint.

Upon the first question it is argued that as the suit was originally dismissed under s. 102 of the Code of Civil Procedure for default on the part of the plaintiff, his proper course was to make an application for setting aside the order of dismissal under s. 103; that the Court had no power to entertain an application for review of judgment under s. 623 in respect of an order of dismissal under s. 102; and that as at the time when the application in question was made, the time for making an application under s. 103 had expired, the plaintiff cannot derive any benefit by asking

(1) 2 C.W.N. 318.

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the Court to consider his application made under s. 623, as one under s. 103; and in support of this contention the case of *Koilash Mondol* v. *Nabadwip Chandra Kar* (1) is cited. It is further argued that if the application for review was not entertainable, and if the time for making an application under s. 103 had expired, the order dismissing the suit ought to stand, and the subsequent proceedings in the case ought to be set aside as being null and void. This point does not appear to have been raised in either of the Courts below. But as it is a point of law which touches the legality of the whole of the proceedings we allowed it to be raised on second appeal. We are, however, of opinion that this contention ought not to prevail. It is quite true that the case cited is authority for the proposition that where a suit is dismissed under s. 98, no application for review [601] of judgment under s. 623 of the Code of Civil Procedure can be entertained against the order of dismissal. But in the present case the dismissal was one not under s. 98, but under s. 102 of the Code of Civil Procedure; and the difference between the two sections, so far as the present point is concerned, is this, that whereas s. 98, which applies to the case of neither party appearing, provides that "the suit shall be dismissed unless the Judge, for reasons to be recorded under his hand, otherwise directs," s. 102, which applies to a case in which the defendant appears and the plaintiff does not, direct that "the Court shall dismiss the suit unless the defendant admits the claim, or part thereof, in which case the Court shall pass a decree against the defendant upon such admission, and where part only of the claim has been admitted, shall dismiss the suit so far as it relates to the remainder." So that, while in regard to cases which come under s. 98 where the Court does not otherwise direct, a dismissal of the suit is the only consequence, and the proviso, "unless the Judge, for reasons to be recorded under his hand, otherwise directs," evidently relates to the postponing of the case and not to the making of any final order in it, in cases coming under s. 102, the dismissal of a suit need not be the only final order which the Court can make, but a partial decree might be passed in some cases; and therefore, whilst it would be unreasonable to say that there may be an application for review of judgment in a case coming under s. 98, because there is no judgment, neither party having appeared before the Court, and the Court having simply dismissed the suit, it cannot be said that it would be equally unreasonable for the plaintiff, in a case coming under s. 102, to apply for review of judgment under s. 623, for it may be open to him to show that the partial decree, which the Court has made upon the defendant's admission, gives him less than the Court ought to have given upon that admission, and that upon that ground he is entitled to have the judgment reviewed. We are, therefore, of opinion that the reason for the decision in the case of *Koilash Mondol* v. *Nabadwip Chandra Kar* (1) [602] does not in its integrity apply to a case like the present. The argument based on the ground of the unreasonableness and unmeaningness of an application for review of judgment, is, in our opinion, strictly applicable only to an order of dismissal made under s 98 of the Code of Civil Procedure and does not apply equally to an order of dismissal made under s. 102.

We may observe that in the present case in which the suit was one for partition, there was, if not very clear and express, at least an ambiguous and implied admission that some of the properties of which partition was claimed were joint properties, so that it cannot be said that an application

(1) 2 C.W.N. 318.

under s. 623 was altogether not entertainable in this case. The first contention of the appellant, therefore, in our opinion, fails. 1899 FEB 6.

As to the second contention, the argument is that upon the facts stated in the plaint the question whether Arannagore was joint property did not arise. But the learned District Judge has in his judgment explained the circumstances under which he allowed that question to be raised. He observes: "Much has been made of the omission in the plaint to specifically mention the exclusion" (that is of the property Arannagore). "It must be remembered that the plaintiff was an old man at death's door, and I think allowance must be made for his having given imperfect instructions for drawing the plaint." That being so, we cannot give effect to the second contention raised before us. APPELLATE CIVIL. 26 C. 598.

As to the third contention there is no doubt some hardship in the defendant's proprietorship of the tank being subjected to a right of user of the ghat and the water by the plaintiff, but the existence of this hardship has been taken into consideration, and it is in view of this circumstance that the amount payable to the plaintiff by the defendant has been reduced by the lower appellate Court.

We do not therefore think that any ground has been made out for our interference with the judgment of the lower appellate Court. We accordingly affirm it, and dismiss appeal No. 840 with costs. That being so, second appeal No. 775 will also be dismissed.

S. C. G. *Appeals dismissed.*

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26 C. 603=3 C.W.N. 531.

[603] APPELLATE CIVIL.

Before Mr. Justice Hill and Mr. Justice Rampini.

BABAR ALI (*Plaintiff*) v. KRISHNAMANINI DASSI AND ANOTHER (*Defendants*).* [7th February, 1899.]

Bengal Tenancy Act (VIII of 1885), ss. 11, 12 and 13—Sale of a tenure in execution of a decree not for arrears of rent—Effect of Non-payment of landlord's fee or the fee for service of notice of the sale on the landlord before the confirmation of sale.

Under s. 13 of the Bengal Tenancy Act, when a permanent tenure is sold in execution of a decree other than a decree for arrears of rent due in respect thereof, and the landlord's fee prescribed by s. 12 of the said Act is not paid before the confirmation of the sale, the sale is invalid.

[D., 1 C.L.J. 500 (503) (513); 7 C.W.N. 591 (593); 8 C.W.N. 239.]

THIS appeal arose out of an action for arrears of rent and cesses with interest in respect of a *seputni* tenure alleged to have been held by the defendant No. 1 under the plaintiff. The allegation of the plaintiff was that the defendant No. 1 took a *seputni* lease of lot Kolebatpore under a registered *kabuliat* dated 2nd December 1892, and since then he had been in possession of the property by collecting rents from the tenants; the defendant having failed to pay rent for the period between October 1895 and May 1896, the present suit was brought. The defence, *inter alia*, was that the *seputni* was sold on the 9th December 1895 in execution of a decree other than a decree for arrears of rent and was purchased by one

* Appeal from Appellate Decree No. 1079 of 1897, against the decree of J. F. Bradbury, Esq., District Judge of Hooghly, dated the 26th of March 1897, affirming the decree of Babu Kali Prasanna Mukerjee, Subordinate Judge of that District, dated the 22nd of December 1896.

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Babu Ram Mitter; and that therefore the defendant had no interest in the tenure after the sale, and was not liable to pay any rent which became due after that date. The sale in which Babu Ram Mitter purchased the tenure was confirmed on the 16th January 1896, but the purchaser did not, before the confirmation of the sale, pay either the landlord's fee or the fee for the service of the notice of the sale on the landlord.

The Subordinate Judge held that the confirmation of the sale to Babu Ram Mitter effectually extinguished the defendant's interest in the tenure, and accordingly he dismissed the suit, in [604] so far as it related to the rent for the period subsequent to the confirmation of the sale. On appeal the District Judge confirmed the decision of the Subordinate Judge.

Against this decision the plaintiff appealed to the High Court.

Babu *Saroda Churn Mitter*, and Babu *Haro Kumar Mitter*, for the appellant.

Babu *Boidya Nath Dutt*, Babu *Bepin Behary Ghose*, and Babu *Jadu Nath Mundle*, for the respondents.

The judgment of the High Court (HILL and RAMPINI, JJ.) was as follows :—

JUDGMENT.

The suit out of which this appeal arises was brought by the plaintiff, the holder of a *darputni* tenure against a *seputnidar* for arrears of rent for the period between Kartik 1302 and Jaista 1303 B. S. (October 1895 to May 1896).

It appears that in execution of a decree other than a decree for arrears of rent the *seputni* tenure had been put up for sale on the 9th December 1895 and purchased by one Babu Ram Mitter. That sale was confirmed on the 16th January 1896, but the purchaser did not, before the confirmation of the sale, pay into Court, as required by s. 13 of the Bengal Tenancy Act, either the landlord's fee or the fee for service of notice of the sale on the landlord, nor has either of these fees been since paid.

The defendant's answer to the suit was that under the sale of the 9th December 1895 her interest in the tenure had passed to Babu Ram Mitter, and that she was therefore not liable for any rent which became due after that date. As to the period prior to that date she pleaded payment. But it is only with the former branch of her answer that we are now concerned.

Upon that question both the Courts below agreed in holding that the confirmation of the sale to Babu Ram Mitter effectually extinguished the defendant's interest in the tenure, and they accordingly dismissed the suit, in so far as it related to the rent for the period subsequent to the confirmation of the sale. The question, which we have now to decide, is whether they were right or wrong in so doing.

[605] Section 13 of the Bengal Tenancy Act, upon which this question turns, provides, so far as it is material, that "when a permanent tenure is sold in execution of a decree other than a decree for arrears of rent due in respect thereof, the Court shall, before confirming the sale under s. 312 of the Code of Civil Procedure, require the purchaser to pay into Court the landlord's fee prescribed by the last foregoing section, and such further fee for service of notice of the sale on the landlord as may be prescribed." It was argued on behalf of the appellant (the plaintiff in the suit) that the effect of this section is to prohibit the confirmation of a sale unless the prescribed fees have been previously paid into Court. For the respondent it was contended, on the other hand, that the duty is cast on the Court of requiring the purchaser to pay these fees; that an omission

on the part of the Court to discharge this duty amounts merely to an irregularity which is cured by the confirmation of the sale; that the language of the section is merely directory; and that this view is supported by a comparison of the language of s. 13 with that of s. 12 in which the duties of a registering officer are laid down.

It appears to us that the contention of the appellant must prevail. The sale of permanent tenures of the kind now in question is regulated by the Bengal Tenancy Act, by s. 11 of which the general rule is laid down that every permanent tenure shall, subject to the provisions of the Act, be capable of being transferred in the same manner and to the same extent as other immoveable property. Then follows s. 12, which provides the rules, subject to which a voluntary transfer of a permanent tenure may be made, and s. 13 which provides similarly for the sale of a permanent tenure in execution of a decree other than a decree for rent. The law thus enacted has effected considerable changes in the law relating to the sale of permanent tenures, dispensing as it does with the recognition of the sale by the landlord, as a condition to its validity. And we entertain no doubt that the more unfettered freedom of transfer confirmed by the Act was intended to be exercised, if at all, in strict conformity to the conditions which the Act prescribes, [606] and that unless those conditions are substantially complied with the transfer is invalid and ineffectual.

Much stress was laid by the respondents' pleader upon the absence from s. 13 of express words of prohibition.

This consideration is, however, to our minds by no means conclusive; a prohibition may be implied although not conveyed in express language, and although the enactment is silent as to the consequences or non-observances of the forms which it prescribes. The question is as to the intention of the Legislature, and "where," as it is put by Sir P. H. Maxwell (Maxwell on the Interpretation of Statutes, 3rd edition, p 518) "the whole aim and object of the Legislature would be plainly defeated if the command to do the thing in a particular manner did not imply a prohibition to do it in any other, no doubt can be entertained as to the intention." We certainly think that were we to hold that it is a matter of indifference so far as concerns the validity of the transfer whether the fees for which s. 13 provides have or have not been paid prior to the confirmation of the sale, we should be defeating the obvious intention of the Legislature and rendering nugatory the scheme which it thought fit, for reasons which are well understood, to substitute for the previous law on the subject.

Nor are we pressed by the consideration upon which reliance was also placed, that there is a change of phraseology in s. 13, as compared with s. 12, in which latter section clear words of prohibition are no doubt employed. That may be accounted for in various ways and does not by any means necessarily imply a change of intention on the part of the Legislature (see Maxwell, p. 452). What we have to look to is the substance of the matter, and we entertain no doubt that the Legislature intended by enacting s. 13 to prohibit the confirmation of a sale such as is contemplated by the section unless prior to the confirmation the purchaser has paid into Court the fees for which the section provides.

We are, therefore, of opinion that the sale to Babu Ram Mitter was invalid and ineffectual as a transfer of the tenure [607] from the defendant. This being so, the decree appealed against must be set aside, in so far as

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it affects the plaintiff's claim for the period subsequent to the 16th January 1896, and the case must be remitted to the lower appellate Court to be dealt with by it according to law. Costs to abide the result.

S.C.G. *Appeal allowed. Case remanded.*

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26 C. 607.

APPELLATE CIVIL.

Before Mr. Justice Banerjee and Mr. Justice Rampini.

KAMIKHYA NATH MUKERJEE AND ANOTHER (*Defendants*) *v.* HARI CHURN SEN AND OTHERS (*Plaintiffs*).* [22nd March, 1899.]

Probate and Administration Act (V of 1881), ss. 40 & 90—Letters of administration—Effect of Transfer of immoveable property by a Hindu widow with the Judge's sanction, on obtaining letters of administration—Legal necessity—Fraudulent representation.

An alienation made with the permission of the District Judge by a Hindu widow who had obtained letters of administration in respect of the estate, is valid as an absolute alienation under s 90 of the Probate and Administration Act (V of 1881), irrespective of the existence of legal necessity.

THIS appeal arose out of an action brought by the plaintiffs who were the reversionary heirs of defendant No. 3, for a declaration that the alienation made by the said defendant No. 3, a Hindu widow, in favor of defendants Nos. 1 and 2, was invalid beyond the lifetime of the widow, inasmuch as the alienation was made without legal necessity and in collusion with defendants Nos. 1 and 2 in order to defraud the plaintiffs.

The defence of defendant No. 1 was that he had no concern with the purchase; but defendant No. 2 set up that the purchase made by her was *bona fide*, and that the defendant No. 3 had legal necessity for the transfer.

The Subordinate Judge found that there was no legal necessity; that defendant No. 3 had obtained the letters of administration to the estate of her husband and the permission [608] of the District Judge to sell the property by fraudulent misrepresentation of fact; and that defendants Nos. 1 and 2 acted in collusion with defendant No. 3 in obtaining such permission; and he decreed the plaintiff's suit.

On appeal by defendants Nos. 1 and 2 the District Judge confirmed the decision of the first Court, holding that there was no legal necessity for the transfer; that the fact of its having been effected with the permission of the District Judge did not affect the question; but he did not confirm the finding of the first Court upon the question of fraud.

Against this decision the defendants appealed to the High Court.

Sir *Griffith Evans*, Babu *Nilmadhub Bose*, and Babu *Shib Chunder Palit*, for the appellants.

Babu *Boidya Nath Dutt*, for the respondents.

The judgment of the High Court (BANERJEE and RAMPINI, JJ.) was as follows:—

JUDGMENT.

BANERJEE, J.—This appeal arises out of a suit brought by the plaintiffs, respondents, who are the reversionary heirs of the defendant No. 3,

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* Appeal from Appellate Decree No. 1632 of 1897, against the decree of J. F. Bradbury, Esq., District Judge of Hooghly, dated the 14th of June 1897, confirming the decree of Babu Abinash Chunder Mitter, Subordinate Judge of that District, dated the 21st of August 1896.

a Hindu widow, for a declaration that the alienation made by the defendant No. 3 in favour of defendants Nos. 1 and 2 is invalid beyond the lifetime of defendant No. 3, on the ground that the transfer was made without legal necessity, and is vitiated by fraud and collusion.

The defence was, that the alienation was valid and binding; that there was no fraud or collusion in the matter, and that the defendant No. 1 had no concern with the purchase, which was really made by the defendant No. 2 on her own behalf.

The first Court found that the alienation in question was made without any legal necessity, that the defendant No. 3 had obtained letters of administration to the estate of her deceased husband and the District Judge's permission to sell the property now in suit, upon fraudulent misrepresentation of facts, and that the defendants Nos. 1 and 2 made the purchase with the full knowledge of the fraudulent representations made by the defendant No. 3 in [609] obtaining the permission to sell, and had acted in collusion with the defendant No. 3 in obtaining such permission.

On appeal by the defendants Nos. 1 and 2, the learned District Judge has confirmed the decree of the first Court in favour of the plaintiffs, on the ground that the sale in question was not for legal necessity, and that the fact of its having been effected by the defendant No. 3 with the permission of the District Judge under s. 90 of the Probate and Administration Act (Act V of 1881) does not affect the question; but he has not confirmed the finding of the first Court upon the question of fraud, and he has in one or two places questioned the correctness of the inference of fraud from certain of the circumstances relied upon in the Subordinate Judge's judgment.

In second appeal it is contended for the defendants Nos. 1 and 2 that the learned District Judge is wrong in holding that the alienation in question was invalid beyond the widow's life-time, on the ground of the absence of legal necessity, when he ought to have held that the alienation having been made with the permission of the District Judge by the defendant No. 3 who had obtained letters of administration in respect of the estate, it was valid as an absolute alienation under s. 90 of the Probate and Administration Act of 1881.

We are of opinion that the view taken by the learned District Judge that the permission obtained by the defendant No 3 under s. 90 of the Probate and Administration Act can give no validity to the alienation, simply because it was an alienation by a Hindu widow and was made without legal necessity, is wrong. For by s. 4 of the Probate and Administration Act, the administrator of a deceased person is his legal representative for all purposes, and all the property of the deceased person vests in the administrator as such; and by s. 90 of the Act the administrator has, subject to the provisions of that section, power to dispose, as he thinks fit, of all or any of the property for the time being vested in him under s. 4 of the Act; and the provision of the law to which this power is subject is contained in sub-s. 3 of s. 90, which says that "an administrator may not, without the previous sanction [610] of the Court by which the letters of administration were granted, mortgage, charge or transfer by sale, gift, exchange or otherwise any immoveable property for the time being vested in him under s. 4."

Here the sale in favour of the defendants Nos. 1 and 2 was effected by the defendant No. 3, not in her character as the widow of her deceased husband, but in her character as administrator of his estate, and the deed of sale in favour of the defendants Nos. 1 and 2 distinctly recites that the

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alienation is made by her, she having been authorised in that behalf by the permission granted to her by the District Judge. That being so, the alienation would be valid, irrespective of the existence of legal necessity, by virtue of the provisions of s. 90 of the Probate and Administration Act. The ground therefore upon which the learned District Judge has based his decision in favour of the plaintiffs is untenable, and his decision must, therefore, be set aside.

Then arises the question, whether the case ought not to be remanded to the lower appellate Court in order that it may come to a finding upon the question of fraud which was raised in the plaint, and upon which a finding was arrived at by the first Court in favour of the plaintiffs. It was not disputed by the learned Counsel for the appellants, and it cannot be disputed, that if the alienation in question was brought about with the object of defrauding the plaintiffs who are the reversionary heirs, and if the District Judge's permission was obtained by a false representation of facts made by the defendant No. 3, the vendor, and the purchasers, the defendants Nos. 1 and 2, were aware of the fraud and took the conveyance from the defendant No. 3 with the knowledge that the District Judge's permission had been obtained by her upon a fraudulent misrepresentation of facts, in that case s. 90 of the Probate and Administration Act could not make the alienation valid; for fraud would in such a case vitiate the permission and the transfer in favour of the defendants Nos. 1 and 2 who would be participators in the fraud.

But we are asked to hold that as the learned District Judge has, with reference to one or two points, questioned [611] the correctness of the learned Subordinate Judge's inference of fraud, he has in fact altogether negatived the findings of fraud in this case. Reading the learned District Judge's judgment as a whole we are unable to come to that conclusion. It is true that the learned District Judge does not confirm the first Court's finding on the question of fraud, but he has not negatived the finding of fraud which that Court arrived at upon a consideration of the evidence. The case must, therefore, go back to the lower appellate Court in order that it may dispose of the appeal after determining upon the whole of the evidence on the record whether the fraud alleged in the third and fourth paragraphs of the plaint has been established, and established, not only as against the defendant No. 3, but also as against the defendants Nos. 1 and 2. If that question is answered in the negative the suit must be dismissed with costs; if, on the other hand, that question is answered in the affirmative, the plaintiffs will be entitled to a decree. The costs of this appeal will abide the result.

S. C. G. *Appeal allowed. Case remanded.*

26 C. 611=3 C.W.N. 608.

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APPELLATE CIVIL.

26 C. 611=3 C.W.N. 608.

APPELLATE CIVIL.

Before Mr. Justice Hill and Mr. Justice Rampini.

KRISHNA CHANDRA SEN AND OTHERS (*Plaintiffs*) *v.* SUSHILA SOONDURY DASSEE AND OTHERS (*Defendants*).* [5th May, 1899.]

Bengal Tenancy Act (VIII of 1885), *ss.* 74 *and* 179—*Stipulation for payment of* abwab—*Permanent tenure-holder.*

The defendant, a *dur-patnidar*, stipulated in the *kabulyat* for the annual payment of Rs. 4 in lieu of certain quantities of jack fruit, bamboos and fish. This stipulation was contained in a clause perfectly distinct from that containing the payment of rent which was payable quarterly.

Held, (*i*) such a stipulation is a stipulation for the payment of an *abwab*.

(*ii*) A stipulation for the payment of an *abwab*, under a permanent *mokurari* lease is valid, and s. 74 of the Bengal Tenancy Act does not control s. 179 of the Act.

[612] *Assanulla Khan* v. *Tirtha Bashini* (1), and *Atulya Churn Bose* v. *Tulsi Das Sarkar* (2), referred to and followed.

Basanta Kumar Roy Chowdhry v. *Promotha Nath Bhattacharjee* (3) distinguished.

[F., 23 Ind. Cas. 576; R., 40 C. 806=16 C.L.J. 296=17 Ind. Cas. 177; 3 C.L.J. 337; D., 9 Ind. Cas. 47 (48); 13 C.W.N. 9=4 M.L.T. 429=1 Ind. Cas. 153.]

THE plaintiffs were *patnidars* and the defendants *dur-patnidars*. In the *kabulyat* executed by the defendants, there was a stipulation for the annual payment of Rs. 4 in lieu of certain quantities of jack fruit, bamboos and fish, which the defendants were to present annually to the plaintiffs in one instalment, and this was stipulated for in a perfectly distinct clause from that in which the payment of the rent was contracted for. Further, the rent was payable quarterly. The plaintiffs sued the defendants for the payment of sums under this stipulation.

The Court of first instance found that the payment of Rs. 4 was an *abwab*, and as such was not recoverable.

The lower appellate Court agreed with the finding of the Court of first instance that the payment of Rs. 4 is an *abwab* and not recoverable.

From this decision the plaintiffs appealed to the High Court.

Babu *Nalini Ranjun Chatterjee*, for the appellants.—The payment of Rs. 4 per annum is not an *abwab*, but a payment by way of rent; and even if it is an *abwab*, as the plaintiffs are *patnidars* and the defendants *dur-patnidars*, the plaintiffs are, under s. 179 of the Bengal Tenancy Act, entitled to recover that amount. In *Assanulla Khan* v. *Tirtha Bashini* (1) it is pointed out by the learned Judges that s. 179 is not governed by s. 74 of the Bengal Tenancy Act, and the case of *Atulya Churn Bose* v. *Tulsi Das Sarkar* (2) is analogous to the present.

Babu *Karuna Sindhu Mookerjee* (and Babu *Lal Mohan Ganguly*), for the respondents.—The payment of Rs. 4 is clearly an *abwab*, as [613] it is not consolidated with rent, and is in lieu of jack fruit, bamboos and fish, and is payable separately from the rent. Section 74 of the Bengal Tenancy Act invalidates all stipulations as to payment of *abwabs*, and s. 179 of the Act must be controlled by it. In *Basanta Kumar Roy Chowdhry* v. *Promotha Nath Buttacharjee* (3) it was held that s. 67 of the

* Appeal from Appellate Decree No. 720 of 1898, against the decree of Babu Atul Chandra Ghose, Subordinate Judge of Birbhum, dated the 10th of December 1897, modifying the decree of Babu Apora Prosad Mukerjee, Munsif of Suri, dated the 5th of January 1897.

(1) 22 C. 680. (2) 2 C.W.N. 543. (3) 26 C. 130.

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26 C. 611 = 3 C.W.N. 608.

Bengal Tenancy Act does control s. 179 of the Act, and there is no reason why s. 74 should not also control s. 179 of the Act.

The judgment of the High Court (HILL and RAMPINI, JJ.) was as follows :—

JUDGMENT.

This is an appeal against a decree of the Subordinate Judge of Birbhum, dated the 10th December 1897.

Two grounds of appeal have been urged before us : (1) that the sum of Rs. 4 per annum, which the Subordinate Judge has held to be an *abwab* and disallowed, is not an *abwab*; and (2) that even if it is an *abwab*, as the plaintiffs are *patnidars* and the defendants *dur-patnidars*, the plaintiffs are, under s. 179 of the Bengal Tenancy Act, entitled to recover the amount.

On the first point, we think we must affirm the finding of the Subordinate Judge. The annual payment of Rs. 4 is, according to the defendants' *kabulyat*, not part of the rent. It is payable in lieu of certain quantities of jack fruit, bamboos and fish, which the defendants were to present annually to the plaintiffs, and is stipulated for in a perfectly distinct clause from that in which the payment of the rent is contracted for. Further, the rent is payable quarterly. The quantities of produce, or their money equivalent, were to be given, or paid, in one instalment. We think that in these circumstances the Rs. 4 per annum now in dispute is undoubtedly an *abwab*.

The second contention of the appellant is not so easily dealt with. The learned pleader for the appellant relies on the provisions of s. 179, and on the cases of *Assanulla Khan* v. *Tirtha Bashini* (1) and *Atulya Churn Bose* v. *Tulsi Das Sarkar* (2). **[614]** In the former case it is said, though by way of an *obiter dictum*, that though there is some repugnancy between s. 179 and s. 74, there seems good reason for thinking that s. 179 is not controlled by s. 74. In other words, the provisions of s. 74 do not prevent the holder of a permanent tenure (such as a *patnidar*) from granting a permanent *mokurari* lease (such as has been granted to the defendant in this case) "on any terms" he pleases, that is, even stipulating for the payment of *abwabs*.

The second case cited by the pleader for the appellant is analogous in principle to that of *Assanulla Khan* v. *Tirtha Bashini* (1). It rules that s. 179 controls s. 178 (3) (*c*); so that a permanent tenure-holder may in granting a sub-lease of his tenure stipulate for the payment of interest at a higher rate than that allowed by s. 67. The contrary has, however, been laid down in *Basanta Kumar Roy Chowdhry* v. *Promotha Nath Bhuttacharjee* (3). The learned Judges who decided this latter case make no reference to the case of *Atulya Churn Bose* v. *Tulsi Das Sarkar*, probably because it was not brought to their notice.

Another case which has some analogy to the question under discussion is *Mokbul Hossain* v. *Ameer Sheikh* (4), in which it has been held that, notwithstanding the provisions of s. 89, holders of service tenures can be ejected otherwise than in execution of a decree.

The learned pleader for the appellants contends that the ss. 179, 180, 181, 182 and 183, all contained in chap. XV, take the tenures and holdings to which they relate to a large extent outside the other provisions of the Bengal Tenancy Act; and though it is somewhat difficult to suppose that the framers of the Act can have intended to allow the

(1) 22 C. 680. (2) 2 C.W.N. 543. (3) 26 C. 130. (4) 25 C. 131.

proprietors or permanent tenure-holders to stipulate for the payment of *abwabs* by their tenants, yet it may be that it was considered that an [615] arrangement of this nature, so objectionable and liable to give rise to oppression in the case of ordinary *raiyats*, was fraught with less danger in the case of permanent *mokurari* lease-holders. Anyhow, the words of s. 179 "nothing in this Act" are so wide that it seems impossible to resist the contention of the learned pleader for the appellants, and we are therefore constrained to give effect to it.

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26 C. 611 = 3 C.W.N. 608.

We accordingly decree this appeal with costs.

M. R. M. *Appeal allowed.*

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26 C. 615 = 4 C.W.N. 738.

APPELLATE CIVIL.

Before Mr. Justice Hill and Mr. Justice Rampini.

KULDIP SINGH (*Plaintiff*) *v.* GILLANDERS ARBUTHNOT & CO. (*Defendants*).* [15th May, 1899.]

Bengal Tenancy Act (*VIII of* 1885), *s.* 88—*Transfer of a portion of occupancy holding—Custom—Ejectment—Possession.*

The transfer of a portion of an occupancy holding is contrary to the spirit, if not the letter, of s. 88 of the Bengal Tenancy Act VIII of 1885; and the existence of a custom in a particular place by which such a holding is transferable is immaterial and gives no right to the transferee as against the landlord.

[**F.**, 2 C.L.J. 2 (N); **R.**, 27 C. 545 (549); 9 C.W.N. 843 (844); **Doubted**, 9 C.W.N. 134 (139); **D.**, 8 C.L.J. 161 (162); 8 C.W.N. 55 (56); **D. & Doubted**, 2 C.L.J. 369 (374).]

IN this suit the plaintiff was the purchaser of 6¼ bighas of an occupancy *jote* of 8 bighas belonging to one Nanku Roy and others. The plaintiff was dispossessed by the defendants, who are the landlords of the occupancy *jote* of 1 bigha and 15 cottahs, and he sued them for possession by declaration of title.

The Court of first instance held that as the defendants did not allege that the old tenants had abandoned their holding, and as the sale of a portion of an occupancy *jote* does not constitute a ground for forfeiture, the *jote* must be considered for the purpose of this suit to be a transferable one; and as the plaintiff was in possession of the disputed land as proved in the case, whatever might be the title of the plaintiff, the defendants had no right to dispossess him, and upon these findings decreed the plaintiff's claim.

[616] This decision was reversed by the lower appellate Court, on the grounds that the plaintiff, as the transferee of a portion of an occupancy holding, had no title as against the defendants, and that the suit not being a summary suit for possession but a suit for possession by declaration of title, the plaintiff could not recover possession, unless he showed title as against the defendants.

The plaintiff thereupon appealed to the High Court.

Dr. *Ashutosh Mookerjee*, for the appellant.—The plaintiff seeks only to recover possession of the disputed land from which he has been wrongfully ejected; he does not seek to be recognised as a tenant of the

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* Appeal from Appellate Decree No. 941 of 1898, against the decree of Babu Karunamoy Banerjee, Subordinate Judge of Bhagulpore, dated the 7th of February 1898, reversing the decree of Babu Syama Charan Banerjee, Munsif of Beguserai, dated the 27th of July 1897.

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defendants. Bengal Tenancy Act, s. 88, does not apply, as a right of occupancy is different from a holding, and there is no law to prevent the transfer of such a right. Further the appellant alleges that there is a custom, which makes an occupancy holding transferable, and if so, then such a transfer is good in spite of the Bengal Tenancy Act, s. 88. Hence the suit should at least be remanded for a finding, whether the occupancy holding is transferable by custom or not.

The respondent did not appear.

The judgment of the High Court (HILL and RAMPINI, JJ.) was as follows:—

JUDGMENT.

In this suit the plaintiff alleges that he has purchased 6¼ bighas of an occupancy *jote* of 8 bighas belonging to Nanku Rai and others. He further pleads that he has been dispossessed by the defendants who are the landlords of the occupancy *jote* of 1 bigha 15 cottahs, and he sues them for possession.

The lower appellate Court has dismissed the suit on the ground that the plaintiff, as the transferee of a portion of an occupancy holding, has no title as against the defendants. The plaintiff now appeals, and on his behalf it has been contended that the plaintiff dees not seek to be recognized as a tenant by the landlords, but merely prays to be restored to possession of the disputed land from which he has been wrongfully ejected.

We think, however, that the plaintiff is not entitled to recover possession on proof of mere wrongful dispossession. This is not a possessory suit under s. 9 of the Specific [617] Relief Act. That being so, he must show some title to the land as against the defendants. We agree with the Subordinate Judge in thinking that he has proved none. He no doubt shows that he has purchased 6¼ bighas of the *jote* from the occupancy *raiyat*, but this transfer is not binding against the landlords, the present defendants, who are in no way bound to recognize it. As against the landlords, the plaintiff shows no title under which he can demand to be restored to possession of a portion of the holding.

The learned pleader for the appellant urges that there is no law which prohibits the transfer of portion of an occupancy holding. But there is no law under which any such contention as set up by the plaintiff in this case can be supported, and it would seem to us that to admit it to have any force would be contrary to the spirit, if not the letter, of s. 88 of the Bengal Tenancy Act.

The learned pleader prays that the case may be remanded for a finding whether the occupancy holding, from a portion of which the plaintiff alleges himself to have been dispossessed, is or is not transferable by custom. We think it unnecessary to do so, for in either case in our opinion the plaintiff would have no right as against the defendant to recover possession of a portion of the holding.

We therefore dismiss the appeal without costs, the respondent not appearing.

M. R. M. *Appeal dismissed.*

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APPELLATE CIVIL.

Before Mr. Justice Macpherson and Mr. Justice Stevens.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL (*Defendant*) *v.* KAJIMUDDI AND OTHERS (*Plaintiffs*).* [17th March, 1899.]

Enhancement of rent—Bengal Tenancy Act (*VIII of* 1885), ss. 50 (*sub-s.* 2), 115, 104 (*sub-ss.* 2 *and* 3), 113—*Record of Rights—Presumption as to fixity of rent—Settlement of fair and equitable rent—Enhancement for excess land—Enhancement for rise in price of crops.*

[618] The provision contained in s. 115 of the Bengal Tenancy Act against the presumption as to fixed rent under s. 50 (2) of the Act arising in certain cases, has no application in a suit brought by a tenant for the purpose of contesting the correctness of the decision of a Revenue Officer in regard to the entry as to the status of a *raiyat* in a record-of-rights prepared under chap. X of the Act. In such a suit the tenant is entitled to the benefit of the presumption.

Given the circumstance of an increase or decrease in the area of the land for which a tenant is paying rent, it is competent to the Revenue Officer under s. 104 (2) of the Bengal Tenancy Act to settle a fair and equitable rent in respect of the whole of the land of the tenant, including the excess area, and the Revenue Officer can in such a case enhance the rent under the provisions of the Tenancy Act, *e.g.*, on the ground of the rise in the prices of the food crops, and so forth.

[**R.**, 12 C.W.N. 122 (125) ; 12 C.W.N. 904 ; **D.**, 37 C. 30 (41) = 10 C.L.J. 343 = 13 C. W.N. 1149 = 3 Ind. Cas. 449.]

THIS appeal and twenty-six other analogous ones arose out of seventeen suits brought by different tenants of a Government *khas mehal* known as *hissa* 4 annas and odd gundas in Pergunnah Shingergaon, in the District of Tipperah, against the Secretary of State for India in Council, for a declaration that the final record (*khatian*) of rights framed and published by the Revenue Officer in respect of the said *mehal* under chap. X of the Bengal Tenancy Act, be declared illegal and void, and that the tenures and holdings held by the different plaintiffs be declared not liable to enhancement of rent, having borne uniform rents from the time of the Permanent Settlement. They prayed also in the alternative that if the said tenures and holdings be liable to enhancement of rent, proper rents might be fixed by the Court or by Revenue Officers.

By a notification, dated the 6th November 1888, the Local Government made an order under s. 101 (1) of the Bengal Tenancy Act, directing that a survey be made, and a record of rights be prepared, in respect of the lands included in the *khas mehal* in question, and specifying therein the particulars to be recorded as required by s. 102 of the Act. Although no application was made by either the Government or the tenants for settlement of rent, the Settlement Officer appointed to prepare the record of rights of his own motion settled what he considered fair and equitable rents, apparently on the ground that the tenants were holding land in excess of, or less than, that for which they **[619]** were paying rent, as also on the ground that there had been a rise in the average prices of the food crops. After the draft record was published under s. 105 (1) of the Act, the plaintiffs objected to certain entries on the ground that their rents were not liable to enhancement. After disallowing these objections,

* Appeals from Appellate Decrees Nos. 1743 of 1897 and 26 others, against the decrees of Babu Kailash Chandra Mozumdar, Subordinate Judge of Tipperah, dated the 22nd of May 1897, modifying the decrees of Babu Rojoni Kant Mukerjee, Munsif of Chandpur, dated the 26th of June 1896.

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the Settlement Officer finally framed and published the record under s. 105 (2) of the Act. Thereupon the plaintiffs, without appealing to the Special Judge against the orders of the Settlement Officer, instituted the present suits.

The Munsif dismissed the suits on the preliminary ground that the decision of the Settlement Officer under ss. 104 and 105 of the Act operated as *res judicata* and was not liable to be set aside by a Civil Court. On appeal the Subordinate Judge set aside the decree of the Munsif and remanded the suits for trial on the merits. On second appeal, the High Court affirmed the decision of the Subordinate Judge, holding that the entries in the record were, properly speaking, undisputed entries, which under s. 109 of the Act were to be presumed to be correct until the contrary was proved (1). The suits were then tried by the Munsif on the merits and dismissed. The Munsif held that in view of the special provisions of s. 115 of the Bengal Tenancy Act, the presumption under s. 50 (2) of that Act could not arise in favour of the plaintiffs, and that the whole burden of proving that they had held at the same rate of rent from the time of the Permanent Settlement was laid on them. He also held that it was competent to the Settlement Officer to enhance the rent on account of the rise in the price of produce, under s. 30 of the Act.

On appeal the Subordinate Judge agreed with the Munsif as to the plaintiffs not being entitled to the presumption under s. 50 (2) of the Act, but held that the Settlement Officer acted without jurisdiction in settling the rents on the ground of the rise in the price of the produce, and that therefore his acts in this respect were null and void. In the result, sixteen of the appeals were either wholly or partially decreed, and one of them was dismissed.

[620] In eleven of the appeals the plaintiffs, and in sixteen appeals including No. 1743, the defendant, appealed to the High Court.

In appeal 1743 of 1897—

Babu *Ram Charan Mitter*, for the appellant.

Babu *Akhoy Kumar Banerjee*, for the respondents.

The judgment of the High Court (MACPHERSON and STEVENS, JJ.) was as follows :—

JUDGMENT.

In the year 1888 the Local Government notified under s. 101 of the Bengal Tenancy Act that a survey and record of rights would be made in a local area which includes the Government *khas mehal* to which these suits relate. A survey was made and a record of rights prepared by a Revenue Officer, who, in the course of his proceedings, settled the rents payable by certain of the tenants. It is conceded that he was not authorized to settle all rents, and that no application for such settlement was made either by the landlord or by the tenants; and we must take it that the only authority which he had was that conferred by s. 104 of the Tenancy Act, in cases in which the tenant was holding land in excess of or less than that for which he was paying rent.

The record was finally framed and published in March 1891. None of the tenants preferred an appeal to the Special Judge against the decision of the Revenue Officer on any of the points which he was required to determine, or as regards the rent which had been settled. In the same month the tenants brought seventeen suits, which have given rise to these

(1) See 23 C. 257.

appeals, to have it declared, speaking generally, that the proceedings of the Revenue Officer were illegal and not binding on them, and that their rents could not be enhanced consistently with the provisions of the Bengal Tenancy Act. They also asked that the Court would, if it considered that the rents were enhancible, fix a fair rent. All these suits were dismissed by the first Court on the ground that they were not maintainable, the decision of the Revenue Officer being final and binding on the parties. This decision was reversed by the lower appellate Court on the ground, substantially, that the Settlement Officer [621] had acted *ultra vires* in settling the rents of the tenants, and the cases were remanded for trial on the merits.

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There was then a second appeal to this Court which held that the remand order was right. After remand the suits were again dismissed by the Munsif on their merits; but on the appeal of the defendants they were, with one exception, wholly or partially decreed. Of the appeals now before us, sixteen, namely numbers 1743 and 2143 to 2157 were preferred by the Government, the defendant in the suit; and eleven, namely, numbers 1898 and 2380 to 2389, were preferred by the tenants, the plaintiffs.

We may at once dispose of the appeal, 1898, on the ground that it is not pressed, it being admitted that the rent settled is somewhat less than the rent which was before paid. That appeal is, therefore, dismissed with costs.

In dealing with the remaining cases, we cannot, of course, go behind the remand order of this Court, it being conceded that that is an order now binding on the parties. It is necessary therefore to see what was then decided. The learned Judges said, "the first question to be determined is, whether the Settlement Officer had jurisdiction under the Tenancy Act to settle rents in respect of the land held by the plaintiffs." They held that he had jurisdiction to do that of his own accord on the ground that the tenants were holding land in excess of or less than that for which they were paying rent, and that the lower appellate Court was wrong in considering that there was no such authority merely because the record of rights as prepared did not show what the excess lands were, or that the Revenue Officer was acting under this particular provision of the law. Then they said they had to consider the legal effect of his proceedings under ss. 104 and 105 of the Tenancy Act; and they came to the conclusion that his decision on the points which he had to decide, and which had to be shown in the record of rights, had not the force of a decree under s. 107 of the Tenancy Act, but that the entries in the record of rights must be taken as undisputed entries which are to be presumed to be correct until the contrary is proved, and that it was open to the plaintiffs in this suit to establish the incorrectness of those entries.

[622] Two points were, therefore, we think, distinctly settled: *first*, that the Revenue Officer did not act without authority in settling the rents, although the Court did not decide how the rents were to be settled or whether they had been properly settled. And, *secondly*, that the entries made in the record of rights must be presumed to be correct; that it was for the plaintiffs in these cases to show that the entries were wrong, and that they could only succeed by so doing.

After the remand one of the issues tried was this: "Have the holdings and the tenures of the plaintiffs existed from the time of the Permanent Settlement at fixed *jamas*, and are the plaintiffs' *jamas* not fit to be enhanced."

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The Munsif decided that they were enhancible, but he threw upon the plaintiffs the burden of proving that their tenures and holdings had been held from the time of the Permanent Settlement at a uniform rent, and said that they were not entitled to the benefit of any presumption under s. 50 of the Tenancy Act, because, according to the provisions of s. 115 of that Act, the presumption could not apply to them.

That view has been endorsed by the Subordinate Judge, who, like the Munsif, held that the tenants had not proved the fixity of rent from the time of the Permanent Settlement. Section 115 enacts that "when the particulars mentioned in s. 102, cl. (*b*) have been recorded under this chapter in respect of any tenancy, the presumption under s. 50 shall not thereafter apply to that tenancy."

It seems clear that that section has no application to the present case, and cannot deprive the tenants of the benefit of the presumption if they can show that they are entitled to it.

The suits are brought for the purpose of contesting, amongst other things, the correctness of the Revenue Officer's decision in regard to the entry as to the status of the *raiyats*; and the question which the Courts had to decide was whether their status was that of *raiyats* holding at fixed rents or not. Section 115 seems to contemplate a case in which a *raiyat* is seeking to get the benefit of the presumption for a period [623] subsequent to the time when the record-of-rights was framed. The appeals of the tenant defendants, with the exception of appeal 2384, must therefore succeed to this extent that there has been no proper decision as to whether their rent can or cannot be enhanced. These appeals all relate to *raiyati* holdings. Appeal 2384 relates to a *taluk*, and what I have said has no bearing upon that case because it is distinctly found by both the Courts that the *taluk* has been held for terms of years, and the provisions of s. 50 do not apply to tenures of that description.

As regards the Government appeals, it appears that the Revenue Officer settled the rents of the tenures and holdings by assessing rent on lands found to be in excess of the original holding, and also by allowing for an increase in the rise of the prices of the food crops.

The Subordinate Judge has held that in settling the rent he had no power to increase it on the ground of the rise in the value of prices, and that, in so doing, he acted without jurisdiction. Substantially, therefore, he has disallowed the whole of the increase on that ground, and has taken the rent to be the rent formerly payable, *plus* a fair and equitable rent for the land found to be in excess. He says that the Revenue Officer had only power to deal with the excess land, and could not, under s. 104 of the Tenancy Act, increase the rent of the holdings on any other ground.

The contention on the part of Government in the appeals before us is that the Subordinate Judge was wrong in this view of the law, and we think the contention must succeed. Section 104, cl. 2, runs thus: "When it appears that a tenant is holding land in excess of or less than that for which he is paying rent, or either the landlord or the tenant applies for a settlement of rent, or in any case under s. 101, sub-s. (2), cl. (*d*), the officer shall settle a fair and equitable rent in respect of the land held by the tenant." The third clause provides that: "In settling rents under this section, the officer shall presume, until the contrary is proved, that the existing rent is fair and equitable, and shall have regard to the rules laid down in this Act for the [624] guidance of the Civil Court in increasing or reducing rents, as the case may be."

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Given then the circumstance of an increase or decrease in the area of the land for which the tenant was paying rent, it seems to us that under s. 104 the Revenue Officer was competent to settle a fair and equitable rent in respect of the whole of the land of the tenant including the excess area. It would be difficult to say that "the land held by the tenant" is to mean, in the case of a decrease of land, the land which is left, and in a case of excess land, the land which is in excess; or that it has a different meaning in each of the cases referred to in cl. 2 of s. 104.

Another strong reason for holding that the rent of the entire holding is to be settled, is to be found in s. 113 of the Tenancy Act, which provides that "when the rent of a tenure or holding is settled under this chapter it shall not, except on the ground of a landlord's improvement, or of a subsequent alteration in the area of the tenure or holding, be enhanced, in the case of a tenure of occupancy holding, for fifteen years * * *."

The assessment of rent on land for which the tenant was not before paying rent is not, strictly speaking, an enhancement of the rent. It is merely an addition to the rent which had been before paid on account of land for which rent had not been before paid; and it could hardly have been intended by the Legislature that when rent was settled merely by adding to the old rent, the rent which the tenant had to pay for some excess land, there should be no enhancement of the rent, except on the special grounds, for a period of fifteen years.

We must set aside the decree of the Subordinate Judge in all the appeals except appeal No. 1898, to which I have referred, and appeal No. 2384, so far as it relates to the enhancibility of the rent of the *taluk*. The Court must decide whether or not the plaintiffs have made good a case for the presumption referred to in s. 50, and, if they have done so, whether that presumption has been rebutted by the defendant. If it is found that the rent of the holding cannot be enhanced, the existing rent must hold good, but the tenant will of course be liable to pay [625] additional rent for any land in his possession which is in excess of the land for which he had been before paying rent.

If the rents are found to be enhancible, the Court must decide whether the rent fixed by the Revenue Officer for the whole holding is a fair and equitable rent, having regard to the rules laid down in the Tenancy Act for the guidance of the Civil Court in increasing or reducing rents, as the case may be; the burden of showing that the rent so fixed is not fair and equitable being, as already stated, on the plaintiffs. If it is found that the rents settled by the Settlement Officer are not fair and equitable rents, the Court must decide, in accordance with the prayer of the plaintiffs, what is a fair and equitable rent in respect of the *taluks* and holdings, having regard, in this respect also, to the provisions of the Tenancy Act.

We much regret to be under the necessity of prolonging this litigation by directing another remand, but it is impossible, as the record now stands, to dispose of the cases finally.

The Subordinate Judge will take them up and dispose of them with the least possible delay.

The appellants will get their costs in each case other than in appeals 2384 and 1898.

M. N. R. *Appeal allowed: case remanded.*

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APRIL 20.

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26 C. 625=
3 C.W.N.
461.

26 C. 625=3 C.W.N. 461.

CRIMINAL REVISION.

Before Mr. Justice Prinsep and Mr. Justice Wilkins.

DOULAT KOER (2*nd Party, Petitioner*) *v.* RAMESWARI KOERI *alias* DULIN SAHEBA (1*st Party, Opposite Party*).* [20th April, 1899.]

Criminal Procedure Code (*Act V of* 1898), *s.* 145—*Possession, Order of Criminal Court as to—Jurisdiction of Magistrate—Order made by a Civil Court—Power of revision by the High Court.*

It is the duty of the Magistrate when the right to possession has been declared within a time not remote from his taking proceedings under [626] s. 145 of the Criminal Procedure Code to maintain any order which has been passed by any competent Court; and therefore to take proceedings which necessarily must have the effect of modifying or even cancelling such orders, is to assume a jurisdiction which the law does not contemplate.

The power of revision to be exercised by the High Court is limited to matters of jurisdiction, that is to say, to cases in which it is found that the Magistrate by taking proceedings under s. 145 has acted without jurisdiction.

[F., 24 A. 315 (317)=22 A.W.N. 74; 29 C. 209 (210)=6 C.W.N. 38 (39); 2 A.L.J. 274 (275); 6 Bom.L.R. 246 (247); 5 C.W.N. 653=4 L.B.R. 75 (76); R., 33 C. 68=2 C.L.J. 241=9 C.W.N. 1046 (1047) (F.B.)=2 Cr.L.J. 618; 5 O.C. 1 (2); 23 P R. 1902 (Cr.)=135 P.L.R. 1902; D., 33 C 33 (48)=2 C.L.J. 271=10 C.W.N. 257=2 Cr L.J. 670; 15 Cr.L.J. 559=16 M.L.T. 52=24 Ind. Cas. 967 =(1914) M.W.N. 798.]

IN this case there was a dispute concerning the possession of a village between Rani Rameswari Koeri *alias* Dulin Saheba and Mussamat Doulat Koer. Originally the village belonged to one Narain Das. After his death there was a dispute among his heirs as to the genuineness of his will, his widow Doulat Koer being one of the parties. Civil suits were instituted, and the District Judge of Gya gave his decision in favour of Doulat Koer. On appeal the decision of the Judge was reversed by the High Court, but the Privy Council finally decided in favour of Doulat Koer on the 15th of December 1897. During the pendency of these proceedings the property of the said Narain Das, deceased, was placed in the hands of a Receiver. On the 11th of June 1898 the District Judge of Gya made an order directing the Receiver to make over possession of the properties to Doulat Koer, and on the 29th of August possession was made over to her, and on the 1st of November the Sub-divisional Magistrate of Jahanabad took proceedings under s. 145 of the Criminal Procedure Code to determine the possession of the village and decided in favour of Dulin Saheba.

The Magistrate found that on the 19th of April 1894 Doulat Koer transferred her right and interest in the village to one Mahadeo Dutt Misser by a deed of *dur-mokurari* lease, and that Dulin Saheba on the 15th of March 1898 purchased the *dur-mokurari* right from the heirs of Mahadeo Dutt, and that Dulin Saheba had "securely lodged herself in the village and was only waiting for the formal withdrawal of the Receiver to declare her possession openly."

Doulat Koer obtained a rule to show cause why the proceedings taken by the Magistrate under s. 145 of the Criminal Procedure Code should not be set aside on the ground that they [627] were taken without jurisdiction, inasmuch as they were inconsistent with the orders passed by the District Judge relating to the possession of the property.

* Criminal Revision No. 128 of 1899, made against the order passed by B. C. Sen, Esq., Sub-divisional Magistrate of Jahanabad, dated the 31st of January 1899.

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Mr. *Hill*, Mr. *P. L. Roy* and Babu *Raghunandan Prosad*, for the petitioner.

Mr. *J. T. Woodroffe*, Sir *Griffith Evans*, Mr. *C. Gregory*, Babu *Saligram Singh* and Babu *Makum Lal*, for the opposite party.

The following judgments were delivered by the High Court (PRINSEP and WILKINS, JJ.) :—

JUDGMENTS.

PRINSEP, J.—This is a case under s. 145 of the Code of Criminal Procedure, in which the Magistrate has passed an order in favour of Mussamat Dulin Saheba, known as the first party. The rule has been granted on the application of Mussamat Doulat Koer, the second party, to show cause why the proceedings should not be set aside on the ground that they were taken without jurisdiction, inasmuch as they were inconsistent with the orders passed by the District Judge relating to the possession of this property.

In the present state of the law, as we understand it, the power of revision to be exercised by this Court is limited to matters of jurisdiction, that is to say, to cases in which it is found that the Magistrate, by taking proceedings under s. 145, has acted without jurisdiction. It is in that sense that we have to consider the point raised on this application.

The property, which is the subject-matter of these proceedings, has formed part of a litigation which has been taken up in appeal to Her Majesty in Council, and the result has been that the case was decided in favour of Doulat Koer by an order declaring that she is entitled to letters of administration in respect of the estate of her deceased husband. It seems to us that Dulin Saheba also holds a share in this property under a different title. In 1893, a Receiver was appointed to manage this property until the final result of that suit, and, having regard to the order passed in favour of Doulat Koer, we must take it that the Receiver has been acting as on her behalf and in her interests. In December [628] 1897, there was some interference on the part of Dulin Saheba in regard to this property, and the District Judge passed an order warning her to abstain from interference. Doulat Koer, having obtained an order in her favour, was consequently entitled to possession of this property, and we find that on the 11th June 1898 she obtained an order from the District Judge of Gya declaring that as soon as the Receiver shall have completed his accounts with reference to these properties, he should make them over to Doulat Koer. It further appears that on the 29th August following, when the Receiver vacated, possession of some sort was made over to her. On the 1st November the Magistrate took proceedings under s. 145 to determine the possession of this property so as to prevent a breach of the peace, which, in his opinion, was likely to take place, and he has after a trial decided in favour of Dulin Saheba and against Doulat Koer.

Now the object of s. 145, as we understand it, is to enable a Magistrate to intervene and to pass a temporary order in regard to the possession of the property in dispute to have effect until the actual right of one of the parties has been determined by any competent Court. It is consequently his duty, when that right has been declared within a time not remote from his taking proceedings under s. 145, to maintain any order which has been passed by any competent Court, and, therefore, to take proceedings which necessarily must have the effect of modifying, or even cancelling, such orders, is to assume a jurisdiction which the law does not contemplate. In this case we have it that so late as the end of

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August possession was formally given over to Doulat Koer. Nevertheless, the Magistrate has found that Dulin Saheba obtained possession about the same time, and that she and not Doulat Koer is shown to have been in actual possession, and he comes to this conclusion from evidence regarding the receipt of rents from some of the tenants between the end of August and the 1st of November. Dulin Saheba, as has already been mentioned, is a co-sharer in this very property, and, therefore, it would be a matter of no difficulty on her part to obtain such evidence from persons who would be her [629] *raiyats* certainly in regard to that right. Her title, we are told, is derived from one Mahadeo, who is said to have taken a *dur-mokurari* of the same property from Doulat Koer, the lease being given for the purpose of obtaining money to carry on litigation to the Privy Council, and Dulin Saheba is said to have purchased the *dur-mokurari* title from Mahadeo. It is not for the Magistrate in this summary proceeding to consider whether as against Doulat Koer this confers a perpetual title to possession. The duty of the Magistrate was to carry out the orders of the Civil Court and to maintain those orders by assisting the possession of any person whose title is found by that Court. Under such circumstances, we are of opinion that the proceedings under s. 145 were without jurisdiction, and that the Magistrate, on a breach of the peace being certified to him, ought to have contented himself with declaring that the orders of the Civil Court should be maintained. In this view we think that the proceedings under s. 145 were without jurisdiction, and must be set aside, and the possession of Doulat Koer maintained until a competent Court awards possession to some other person.

WILKINS, J.—I generally concur in what has been said. I would like to add that it seems to me that the Magistrate was debarred from exercising jurisdiction in this matter under s. 145; for, from 1893, when the Receiver was appointed, the Civil Court was in possession through that Receiver and on behalf of the parties to the suit, and that Court was not concerned with any claims of, or rights which may have accrued to, any third party by reason of any assignment or transfer during the pendency of that suit. Any interference with that possession by any such third party would be a contempt of the authority of the Civil Court. When the petitioner had been declared entitled to the property by the final decree in the suit, the Civil Court had no option but to give her possession of it upon her taking out the usual letters of administration, and, therefore, the order of the 11th June 1898 was not only a legal order, but it was the only order which could properly be made under the circumstances. The Court having been in possession of the property on behalf of the parties to the suit, was bound to give possession to the successful party in that suit. [630] Any one else entering into possession would be a trespasser. This being so, there remained practically no question of possession within the power of any other Court, such as the Court of the Magistrate, to decide. All that the Magistrate could do was to leave it to the Civil Court to dispose of the property and direct Dulin Saheba to assert her rights as she might be advised. It seems therefore quite clear that this was certainly a case in which the Magistrate had no jurisdiction whatever under s. 145 of the Code of Criminal Procedure, and I agree in making this rule absolute.

S. C. B. *Rule made absolute.*

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Before Mr. Justice Prinsep and Mr. Justice Hill.

TAFAZZUL AHMED CHOWDHRY AND OTHERS (*Petitioners*) v. QUEEN-EMPRESS (*Opposite-party*).* [31st May, 1899.]

Penal Code (*Act XLV of* 1860), *s.* 353—*Deterring a public servant from discharge of his duty—Public servant acting under warrant of attachment—Non-production of the warrant at the trial.*

One of the accused was convicted under s. 353 of the Penal Code (assaulting or using criminal force to a public servant in the execution of his duty) and two others of the abetment of an offence under that section. But the warrant of attachment under which the public servant was acting was not produced at the trial, nor was any secondary evidence given to show its contents.

Held, in the absence of any evidence as to the terms of the warrant either by the production of the original or in the form of secondary evidence, it was impossible to hold that the conviction was good.

[D., 18 P.R. 1910 (Cr.) = 104 P.L.R. 1910 = 32 P.W.R. 1910 (Cr.) = 11 Cr.L.J. 423 = 6 Ind. Cas. 956.]

THE Settlement Officer of Comilla made a certificate under the Public Demands Recovery Act against Tafazzul Ahmed for the cost of certain settlement operations in which Tafazzul Ahmed was concerned. The amount not having been paid, a warrant was issued for the execution of the certificate by attachment of the moveable properties belonging to Tafazzul Ahmed. The Settlement Officer's Nazir proceeded to the house of Tafazzul [631] Ahmed. He was not at home at the time, and the Nazir stated the object of his visit to Abbas Ali, who described himself to be the house-muktear of Tafazzul. Abbas Ali being informed of the amount, asked for time, and went out, saying that he would collect the money and pay. The Nazir waited for about two hours, and when there was still no sign of the house-muktear's return, he made a list of the articles in the *boitokhana*, had them removed out of the house on to the road, and began despatching them by coolies to the Settlement Office record room. At this time Tafazzul Ahmed drove up, and having learnt the reason of the Nazir's visit, asked the Nazir to proceed with despatch, so that he might not be put to shame before the people. About this time Chunder Kumar Sen, who is called the estate-muktear of Tafazzul Ahmed, arrived at the place, and after reading the warrant and finding that Tafazzul was described in it as living at Bhattogram, he declared that the attachment of the property at Comilla was illegal. He then urged Tafazzul and others to resist the execution of the warrant. Abbas Ali appeared in front of the Nazir and pulled away a shawl and the warrant, and a list of the attached properties. The Nazir then ran away to the Settlement Officer, and complained of the treatment he had received.

The Deputy Magistrate convicted Tafazzul and Chunder Kumar under s. 379, s. 147 and s. 353 read with s. 34 of the Penal Code, and Abbas Ali under s. 379, s. 147 and s. 353 of the Penal Code.

The Sessions Judge, on appeal, altered the conviction of the first two accused into one under s. 353 read with s. 114 of the Penal Code, and that of Abbas Ali to one under s. 147 and s. 353 of the Penal Code, and reduced the sentences.

* Criminal Revision No. 253 of 1899, made against the order passed by B. G. Geidt, Esq., Sessions Judge of Tipperah, dated the 16th of March 1899, modifying the order of E. F. Ainslie, Esq., Deputy Magistrate of Comilla, dated the 3rd of March 1899.

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The accused, on application to the High Court, obtained a rule on the ground that the warrant was not a legal one, and therefore the conviction for forcibly resisting its execution could not be sustained. The warrant was not produced in the lower Court, but there was on the record another warrant issued on the failure of the first warrant, though there was nothing to show that the contents of the two warrants were the same, nor was there anything [632] to show what the contents of the first warrant were, to whom it was addressed, or for what period it was current.

Mr. *Jackson*, Moulvi *Serajul Islam*, and Babu *Gobinda Chundra Das*, for the petitioners.

The Officiating Deputy Legal Remembrancer (Mr. *Abdur Rahim*), for the Crown.

The judgment of the High Court (PRINSEP and HILL, JJ.) was as follows :—

JUDGMENT.

The petitioners have been convicted, one of them under ss. 353 and 147 of the Indian Penal Code, and the others of abetment of an offence under s. 353, that is, of assaulting or using criminal force to the complainant, a Nazir, in the execution of his duty as such, with the intention of preventing or deterring him from discharging his duty. The case for the prosecution is that the Nazir was executing a warrant for the attachment of certain property belonging to Tafazzul Ahmed in satisfaction of a certificate under the Public Demands Recovery Act for costs in certain proceedings. In the first instance, the attachment proceeded quietly, but, after a little while, a man who was the muktear of the debtor, appeared and required to see the warrant of attachment. He then declared that this warrant was an illegal warrant, which could not be properly executed, and he instigated the debtor and others forcibly to resist the execution. Thereupon the Nazir was assaulted, and he ran away to the Settlement Officer, by whom the warrant had been issued. Objections were raised in the trial in the lower Court, as well as before us, and it was upon this point that a rule was granted, that the warrant was not a legal one, and that, therefore, the conviction for forcibly resisting its execution could not be sustained.

It is very unfortunate that, after the lengthy proceedings that have been held, we should find at this stage of the case that the warrant has neither been produced in the lower Court, nor has secondary evidence been given, after proper steps taken to produce the original had failed, to show its contents. We have on the record only another warrant issued on the failure of the first warrant, but there is nothing to show that the contents of the two warrants were the same, nor is there any [633] thing to show what the contents of the first warrant were, to whom it was addressed, or for what period it was current. It is impossible, therefore, to say how far it was a valid warrant. The lower Court seems to have held that the warrant was for the attachment of whatever property the Nazir, the officer executing it, might find on search as belonging to the judgment-debtor. The area of the search is not described, and, if it were a valid warrant, it would be competent to the Nazir to seize any property that he believed belonged to the judgment-debtor at any place within the jurisdiction of the Court issuing it. It seems unnecessary to point out the serious objections that there would be to allowing such a warrant to be regarded as a valid warrant. It is different from the form

prescribed by the Code of Civil Procedure, sch. IV, No. 136, for warrants of this description, inasmuch as it does not fix any responsibility on any person for the attachment of any moveable property which may be found not to belong to the judgment-debtor; whereas the terms of the form, as given in the Code, are express in this respect. In the absence, therefore, of any evidence as to the terms of the warrant, either by the production of the original or in the form of secondary evidence, it is impossible for us to hold that the conviction is good and can be sustained. One of the petitioners has been convicted of rioting, and in respect of that conviction it is only necessary to say that the charge does not declare what was the common object of the assembly by which the riot was committed. It is impossible, therefore, to say that this petitioner has been properly convicted of that offence. The rule is made absolute, the conviction and sentence will be set aside in respect of all the petitioners, and the fine, if paid, will be refunded,

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S. C. B. *Conviction set aside.*

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[634] APPELLATE CIVIL.

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, and Mr. Justice Banerjee.

KEDAR NATH MITTER (*Defendant*) *v.* SAROJINI DASI (*Plaintiff*).*
[6th March, 1899.]

Probate—Probate of a part of a will—Probate and Administration Act (*V of* 1881), s. 25.

Probate can be granted of a portion only of a will to the extent to which the contents are proved where the other portion is lost; and there is nothing in s. 25 of the Probate and Administration Act (V of 1881) to prohibit such a grant of probate.

Sugden v. *Lord St. Leonards* (1), referred to.

[R., 1 C.L.J. 109 (113).]

THE facts of this case are shortly as follow: One Sarojini Dasi applied for the probate of a will left by her father's sister Thakomoni Dasi; she alleged that the testatrix died in the year 1898, executing a will long before her death, by which she bequeathed the major portion of her properties to the petitioner; that the said will was written on two sheets of paper and those two sheets were stitched together, but only the first sheet was found in spite of search having been made for the second sheet. In the second sheet, the petitioner alleged, it was written that Rs. 100 would have to be paid on the occasion of the marriage of her sister's son Monoranjan Mullick, and the balance should be spent on the testatrix's funeral rites and *sradh*; that she came to know that the said Monoranjan Mullick having been married during the lifetime of the testatrix, the said money was paid by her; and that inasmuch as assets to the extent of Rs. 1,295 would probably come into the hands of the petitioner, she made the present application.

One Kedar Nath Mitter, alleging himself to be the brother's son of the husband of the deceased Thakomoni Dasi, put in a petition of

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* Appeal from Original Decree No. 127 of 1898, against the decree of F. F. Handley, Esq., District Judge of 24-Pergunnahs, dated the 25th of February 1898.

(1) (1876) L. R. 1 P. D. 154.

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objection to the granting of the probate, on the [635] grounds that the will was a forgery, and that he being the legal heir of the deceased would be entitled to the properties left by her, and as such he prayed that letters of administration of the estate of the deceased might be granted to him.

The lower Court, upon the evidence holding that the will was executed by the testatrix, and that after her death search was made, but only the first sheet of it was found, allowed the petition and granted probate of the piece of the will produced.

Against this decision the objector appealed to the High Court.

Babu *Boidya Nath Dutt* and Babu *Mon Mohun Dutt*, for the appellant.

Babu *Bhowani Churn Dutt* and Babu *Lal Mohun Das*, for the respondent.

The following judgments were delivered by the High Court (MACLEAN, C.J., and BANERJEE, J.) :—

JUDGMENTS.

MACLEAN, C.J.—There cannot be any reasonable doubt that the testatrix, Thakomoni Dasi, did execute a will some time in the year 1894, nor any reasonable doubt that the sheet now produced, and of which probate is sought, formed a portion of that will. It appears from the evidence that the will was written upon two sheets of paper, and only one sheet, apparently the first sheet, was to be found, and was found after the testatrix's death amongst her depositories. The sheet we have practically disposes, by means of legacies, of the bulk, though not the whole, of her property. Application is now made for probate of that portion of the will and the application is resisted by the testatrix's heir. We have to consider whether probate of this portion of the will can be properly granted.

The heir contends that, inasmuch as the will remained in the custody of the testatrix, which is not disputed, and only a portion of it—the first sheet—has been found amongst her papers at her death, she must be presumed to have destroyed the second sheet, and that she did do so *animo revocandi.* But this presumption may be rebutted, and has, I think, been rebutted in the present case. Looking at the sheet we have, it would appear from the two small holes at the top left hand corner that it had been tied [636] to the other sheet—it is proved that the will was written on two sheets of paper—by a piece of string. It may be that the testatrix did tear off the second sheet, but the inference I am inclined to draw from the extrinsic evidence afforded by the appearance of the extant sheet is that, either from the string having become rotten—a not unlikely result in this climate—or from some other accidental cause, the second sheet became detached and lost, and that it was not either mutilated or destroyed by the testatrix herself. This view gains a little support from a passage in the evidence of the witness Atul Krishna Dutt, who says that the testatrix never told him before her death that the will had been damaged or destroyed, and the testatrix lived some four or five years after the execution of the will. No evidence is adduced by the heir to show that the testatrix ever spoke of having destroyed the will. It is a fair inference from the circumstances of the case that the sheet in question was lost and not destroyed. This disposes of the first point.

It is next contended for the appellant that under the law prevailing in this country probate cannot be granted of a portion only of a will, where the other portion is lost. It must, I consider, be taken as settled law in

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England [see *Sugden* v. *Lord St. Leonards* (1)] that probate can be granted of a portion of a will, though, if the extant portion be only the residuary clause, some question may arise, as was pointed out by Lord Herschell in the case of *Woodward* v. *Goulstone* (2). We are not, however, dealing with any such clause in the present case. It must be taken to be established by the English decisions that, where the contents of a lost will are not completely proved, probate can be granted to the extent to which they are proved. The present will is proved to the extent of the first sheet; but the appellant says that the law in England on this point does not apply to India; that the present case is governed by s. 25 of the Probate and Administration Act (V of 1881); and that that section only enables the Court to grant probate, when the contents, not of a part of the will, but of the whole will, are established [637] by evidence. In my opinion that contention is not well founded. There is no prohibitory, no negative, word in the section: it is an enabling section, and to place the narrow construction upon it for which the appellant contends, would lead to manifest absurdities. For instance, we might find a will written on half a dozen consecutive sheets of paper tied together by a piece of string; the first five sheets might dispose in a clear and specific manner of property valued at lakhs of rupees among named legatees, and all that was left to be disposed of by the remaining sixth sheet, might be a sum of perhaps Rs. 10 or 20. The sixth sheet becomes detached from the other and is lost. If the argument of the appellant is to prevail, probate cannot be granted of the first five sheets which dispose of the bulk of the property, and the testator's dispositions, though perfectly well known and proved, are thus rendered inoperative. I am not disposed to accept this view. There is to my mind nothing in the section in question to prevent us from following the rulings on this point of the Courts in England. The learned Judge in the Court below has not gone very fully into the matter, but I think that, save upon the question of costs, his conclusion is right.

With respect to the costs, there is force in the argument of the appellant that the costs in the Court below should have come out of the estate, and under the circumstances this would be right. It is not opposed by the respondents. Subject to this modification, the appeal must be dismissed with costs.

BANERJEE, J.—I am of the same opinion. I only wish to add a few words with reference to two points raised in the case, namely, first, that the fact of a part of the will being lost raises a presumption that the will had been destroyed or mutilated by the testatrix with intent to revoke it; and second, that no probate can be granted of a part of a will.

As to the first point, judging from the nature of the document, as it stood when complete, as deposed to by the witnesses examined in the case, and judging from the appearance of the part that has been preserved, I am of opinion that the fact of a part being wanting raises no presumption of the destruction [638] or mutilation of the will with intent to revoke it. All that we can say about the condition of the document is, that a part of it has been lost. The appearance and nature of the portion of the document that has been preserved constitute material evidence upon the question as to whether the loss of the remainder should raise any presumption of revocation or not. This stands to reason and common sense, and if authority were needed in support of the view I take, I may refer to the

(1) (1876) L.R. 1 P.D. 154.

(2) (1886) L.R. 11 App. Cas. 469.

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case of *In the goods of Woodward* (1) in which Lord Penzance, after quoting certain observations of Sir J. Dodson in the case of *Clarke* v. *Scripps* (2) observes: "I think that is a very good way of regarding the question, for it is obvious that the mutilation must be of such a part and in such a manner as to afford evidence that the deceased did not intend the document any longer to operate as his will. If, for instance, he should tear off the will or his own signature? Applying the reasoning to the present case, I have come to the conclusion that, in the absence of any evidence to the contrary, the mere cutting off of eight lines at the beginning of the document does not show any intention to revoke the whole will."

As to the second point, it is quite true that the Probate and Administration Act (V of 1881) does not contain any express provision for the granting of probate of a part of a will. Section 25 of the Act, which relates to the granting of probate of a lost or destroyed will, in terms relates to the grant of probate in respect of a will if its contents can be established by evidence. But then that is only an enabling section, and there is no prohibition in the Probate and Administration Act to the grant of probate of a part of a will, provided such grant is not in any way opposed to reason and justice, and therefore I see no objection to our following the rule laid down in *Sugden* v. *Lord St. Leonards* (3) subject of course to certain qualifications which have been indicated in the case of *Woodward* v. *Goulstone* (4). In the present **[639]** case the grant of probate of the portion of the will that has been preserved does not in any way infringe any of the qualifying rules subject to which such grants ought to be made. The bequest to the petitioner for probate, Sarojini, stands quite independently of the other provisions of the will whatever they might have been. There is nothing to show that those provisions would interfere with the bequest contained in the will in favour of Sarojini in the portion of the will which has been preserved. On the contrary, the evidence would indicate that the bequest to Sarojini was the primary object of the will and that it was intended to be an unqualified one.

S. C. G. *Appeal dismissed.*

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26 C. 639 = 3 C.W.N. 628.

APPELLATE CIVIL.

Before Mr. Justice Prinsep, Mr. Justice Banerjee, and Mr. Justice Rampini.

BODH NARAIN (*Plaintiff*) *v.* MAHOMED MOOSA (*Defendant*).*
[8th March, 1899.]

Bengal Tenancy Act (VIII of 1885), s. 66, cls. 2 and 3—Landlord and tenant—Suit for arrears of rent—Execution of decree for ejectment for arrears of rent—Extension of time for payment.

Per PRINSEP and BANERJEE, JJ.—The extension of time authorised by s. 66, cl. 3, of the Bengal Tenancy Act can be granted by the Court after the decree and not only when framing the decree under cl. 2 of that section.

Per RAMPINI, J.—*contra.*

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* Appeal from Order No. 353 of 1898, against the order of E.G.D. Brockman, Esq., District Judge of Gya, dated the 23rd of July 1898, affirming the order of N. N. Dhur, Esq., Munsif of Gya, dated the 26th of May 1898.

(1) (1871) L. R. 2 P. & D. 206 (208).
(2) (1852) 2 Rob. Ecc. 563.
(3) (1876) L. R. 1 P. D. 154.
(4) (1886) L.R 11 App. Cas. 469.

Per PRINSEP and BANERJEE, JJ.—The decree for ejectment passed under s. 66, cl. 2, of the Bengal Tenancy Act need not incorporate the terms as to the ejectment being avoided by payment within fifteen days from the date of the decree. These terms are rather in the nature of a direction to the Court of execution.

Per PRINSEP, J.—The application for such extension of time may therefore be made by the judgment-debtor on a mere petition, and not in the form of an application for review of judgment.

[R., 16 C.L.J. 520=16 C.W.N. 1090=15 Ind. Cas. 689 (690).]

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IN this case the plaintiff, Bodh Narain, obtained a decree for arrears of rent against Mahomed Moosa, under s. 66 of the Bengal Tenancy Act, in the Court of the Munsif of Gya. The decree was signed on the 17th May 1898, and directed that if [640] the decretal amount were not paid within 15 days from the date thereof, the plaintiff would be entitled to eject the defendant in execution of the decree. On the 25th of May, the defendant applied for two week's extension of time to pay off the decretal money. The Munsif granted extension of time till the 12th of June, under s. 66 (3) of the Bengal Tenancy Act. Against this order, the plaintiff decree-holder appealed to the District Judge, on the ground that the Court had no jurisdiction to extend the time subsequent to passing the decree, and that the extension could only be granted at the time of passing the decree. The District Judge, having affirmed the order of the Munsif and dismissed the appeal, the decree-holder appealed to the High Court. The appeal originally came on for hearing before BANERJEE and RAMPINI, JJ., who differed in opinion and the case was referred under s. 575 of the Code of Civil Procedure to PRINSEP, J., who agreed with BANERJEE, J.

The Advocate-General (Sir *Charles Paul*), and Babu *Karuna Sindhu Mukerjee*, for the appellant.

Dr. *Rash Behary Ghose* and Moulvi *Sirajul Islam*, for the respondent.

The following judgments were delivered by the High Court.

JUDGMENTS.

BANERJEE, J.— In this appeal, which arises out of an application for extension of time for the satisfaction of a decree in a suit for ejectment for arrears of rent under s. 66 of the Bengal Tenancy Act, the question for determination is, whether the extension of time authorized by sub-s. 3 of s. 66 can be granted by the Court after decree. The Courts below have answered it in the affirmative, and granted the judgment-debtor's application for extension of time, which was made before the expiry of fifteen days from the date of the decree; and hence this appeal by the decree-holder.

The contention on behalf of the appellant is that the extension of time authorized by s. 66 of the Bengal Tenancy Act can be granted by the Court only at the time of passing the decree, and that after the decree is passed, the Court has no power to extend the time within which it may be satisfied. On the other [641] hand, it is contended for the respondent that there is no such limitation on the Court's power to grant extension of time.

Section 66, after providing in sub-s. (1) for the institution of a suit for ejectment of certain classes of tenants for arrears of rent, enacts in sub-s. (2) that, " a decree passed in favour of the plaintiff shall specify the amount of the arrear and of the interest (if any) due thereon, and the decree shall not be executed if that amount and the costs of the suit are paid into Court within fifteen days from the date of the decree, or when the Court is closed on the fifteenth day, on the day upon which the Court

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re-opens." And sub-s. (3) which provides for extension of time runs in these words : "The Court may for special reasons extend the period of fifteen days mentioned in this section."

The main arguments in support of the respondent's contention are the following :—

In the first place, there is nothing in the language of s. 66 to limit the power of the Court in the manner contended for on behalf of the appellant, the section merely providing that the Court may for special reasons extend the period; and in order to give effect to the appellant's contention we must interpolate the words "at the time of passing the decree" after the word "may" in sub-s. (3). I may add that the word "extend," to use the language of Cotton, L. J., in *In re Yeadon Local Board* (1) "necessarily infers the existence of an originally limited time;" and I think it carries with it the idea of a subsequent enlargement of time.

In the second place, the general tenor of the section is opposed to any such interpolation. For sub-s. (2), while providing that the decree shall specify the amount of the arrear and the interest if any, does not require that the decree shall specify the time, whether it be fifteen days or more, within which it shall not be executed; and sub-s. (3) speaks of the period of fifteen days as "mentioned in the section," and not as "specified in the decree," and there is no good reason why when **[642]** the ordinary period of fifteen days for which execution must be stayed, is not required to be mentioned in the decree, any special and extended period for which the Court may think fit to stay execution should be specified in the decree.

In the third place, ejectment for non-payment of rent being in the nature of a penalty or forfeiture, the provision in sub-s. (3) of s. 66 for extension of time for payment to avoid the penalty of forfeiture is a remedial provision, and should be construed liberally, so as not to restrict the remedy and make it inapplicable to cases to which it ought obviously to extend, but which it would be prevented from reaching if the appellant's contention be given effect to. Thus, take a case in which the arrear due is a fairly large amount, but the tenant, when the decree is passed, has no special reason upon which he can ask for extension of time for payment. Suppose that he was coming to Court with the money due, in time to be able to deposit it in Court within fifteen days from the date of the decree, when he was robbed on the way, and so he finds himself unable to make the deposit in time. He has now a special reason for asking for extension of time, but the Court will have no power to grant such extension if the appellant's contention be correct. Such a result could not have been intended by the Legislature.

The only arguments urgedf for the appellant in support of the opposite view are : *First*, that the section contemplates the procedure prior to decree and not any matters subsequent to the decree; *second*, that if the Court be held authorized to extend the time after the decree, it may extend the time any number of times, and this indefinite extension of time might render the limitation of time in sub-s. (2) practically nugatory in many cases; and *third*, that the cases of *Sunkur Singh* v. *Huree Mohun Thakoor* (2)and *Nubo Kisto Mookerjee* v. *Ramessur Goopto* (3), go to show that the Court executing a decree for ejectment cannot modify the terms of the decree with regard to the time within which payment should be made.

Let us examine these arguments. As to the first, I do not **[643]**

(1) (1889) L.R. 41 Ch. D. 52 (58); 58 L.J.Ch. 563 (566).
(2) 22 W. R. 460. (3) 18 W. R. 412, note; 2 Wyman, 75.

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think it correct to say that s. 66 only contemplates the procedure prior to decree when sub-s. (2) expressly says: "The decree shall not be executed if that amount" (*i.e.*, the amount of the arrear of rent or interest) "and the costs of the suit are paid into Court within fifteen days from the date of the decree,"—that is, speaks of payment into Court which is to be after the decree.

As to the second argument, though upon the respondent's view there may be granted more extensions of time than one, it does not follow that the proceedings may be indefinitely protracted, when the extension is to be granted not as a matter of course, but only "for special reasons," and when the judicial discretion of the Court will be a sufficient safeguard against any unreasonable extension of time.

As to the third and last argument, the cases cited have no bearing upon the question now before us. They were decided under the former law (Act X of 1859, s. 78, and Bengal Act VIII of 1869. s. 52), under which the Court had no power to extend the period of fifteen days. In the earlier of the two cases cited, this Court nevertheless allowed a decree directing execution to be stayed for a longer period than fifteen days to stand, on the ground that the Court which had power to determine the matter on the merits might pass such a decree. And in the later case, namely, *Sunkur Singh* v. *Huree Mohun Thakoor* (1) the learned Judges of this Court, in distinguishing the earlier case from the one before them, observed: "But we do not think that either of the Judges who gave their opinion in that case intended to lay down that any other Court than the Court which had the merits of the case before it, and therefore was able to pass a sufficient and proper decree between the parties, could modify the terms of the decree with regard to the period within which the payment should be made, in order to save the judgment-debtor from the alternative consequences of the original decree." No doubt that was so under the old law; and as I understand the two cases cited, what they lay down is this, that though under the general power which the Court has to make a proper decree according to **[644]** the merits of the case, the Court may, when making its decree in a suit for ejectment for non-payment of arrears of rent, under s. 78 of Act X of 1859 or s. 52 of Bengal Act VIII of 1869, provide in the decree that it shall not be executed for any period exceeding fifteen days, yet, after the decree is once made, the Court has no power to extend the statutory period of fifteen days. But the reason of this was that the Court had no power to extend the time under the old law. The present law expressly gives the Court power to extend the time; and if this express provision is to be held to be limited to giving the Court power to extend time only when making the decree, a power which according to the cases cited it possessed under the old law, the express provision of sub-s. (3) of s. 66 would become mere matter of surplusage.

The cases cited do not, therefore, in my opinion lend any support to the appellant's contention.

Upon weighing the arguments on both sides, I am of opinion that the reasons in favour of the respondent's view far outweigh those on the opposite side; and I would therefore affirm the order of the lower appellate Court and dismiss this appeal with costs.

RAMPINI, J.—The question for determination in this appeal is whether, when, under the provisions of s. 66 (3) of the Bengal Tenancy Act, a Court for special reasons extends the period of fifteen days within which, on

(1) 22 W. R. 460.

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payment of the arrears due, a decree for ejectment can be stayed, it can do so subsequently to the framing of the decree, or can only do so when framing the decree. The Judge in the Court below has held that a Court may extend this period subsequently to the framing of the decree, and on behalf of the appellant it is contended that his view of the matter is erroneous.

It must be admitted that owing to the section containing no express provision on the point, the question is not free from doubt. But I am inclined to think for the following reasons that the Judge is in error, and that when for special reasons a Court extends the period mentioned in sub-s. (2) of the [645] section, it can only do so when framing the decree and not at any later time.

In the first place, the whole section deals with the framing of the decree and the terms in which it should be couched. It does not seem to me to contemplate any proceeding subsequent to the preparation of the decree. It seems to me to prescribe how a decree for ejectment is to be drawn up and what is to be contained in it. It goes on to lay down that a decree for ejectment is not to be executed if the arrears due are paid within fifteen days, and gives a Court power for special reasons only to extend that period. Surely the special reasons must be stated at the time of the preparation of the decree, and the period must be extended there and then. If it were contemplated by the section that the judgment-debtor might subsequently apply for an extension of the period mentioned in the section, would this not have been expressly prescribed, and would not this matter (an entirely separate and distinct matter from the framing of the decree) not have been dealt with in a separate section?

Then, if the period mentioned in the section can be extended subsequently, it can apparently be so extended at any subsequent time as long as the decree remains unexecuted. And, further, it can apparently be so extended repeatedly from time to time. So that it would be within the power of a Court to delay the payment of a landlord's arrears, and yet preclude him from ejecting his recusant tenant for years. I cannot think that the Legislature ever intended to give a Court so great a power and so wide a discretion as this, which would enable it to render the provisions of sub-s. (2) of the section entirely nugatory. It is to be remembered that one of the objects of the passing of the Bengal Tenancy Act was to give the landlords "reasonable facilities for the recovery of their rents."

Again, once a decree is framed, a Court is judicially *functus officio*. All subsequent proceedings, except applications for review, must relate to the execution of the decree. But if an order under sub-s. (3) can be passed subsequently to the preparation of the decree, then it would seem that in the case of a decree for ejectment the terms of the original decree can be modified in [646] execution, which would appear to me to be contrary to the usual course of judicial procedure.

The history of sub-s. (3) would also seem to me to support me in the conclusion I have come to with regard to this matter. The former law (*i.e.*, s. 78 of Act X of 1859 and s. 52 of Bengal Act VIII of 1869) contained no such provision as sub-s. (3) of s. 66 of the present Act. But in the rulings of the Courts, under those sections, it was held that the Court passing the decree, or the appellate Court, but not the Court executing the decree, had a discretion to extend the period of fifteen days by payment within which period execution could be stayed

(see *Nubo Kisto Mookerjee* v. *Ramessur Goopto* (1), *Sunkur Singh* v. *Huree Mohun Thakoor* (2) and *Puresh Nath Ghose* v. *Krishto Lall Dutt* (3)). Under the old law, then, the period of fifteen days could only be extended by the Court of first instance at the time of framing the decree, or by the appellate Court when disposing of the appeal from the decree. It could not be extended subsequently by the Court executing the decree. Sub-section (3) of s. 66 of the present Act is no doubt based on these rulings, and it is reasonable to suppose that it is intended to give a Court no further power than in these rulings it was ruled that it was advisable that a Court should have.

For these reasons I would decree the appeal.

PRINSEP, J.—In this case a decree for ejectment of a tenant was passed under s. 66 of the Bengal Tenancy Act. That s. (2) requires that in a decree for ejectment for an arrear of rent, the decree shall specify the amount of the arrear and of the interest, if any, due thereon. The decree would also specify the amount of costs, if any, when made payable under it. The object of this is made clear by the following part of that sub-section which declares that "the *decree* shall not be executed if that amount and the costs of the suit are paid into Court within fifteen days from the date of the decree, or, when the Court is [647] closed on the fifteenth day, on the day on which the Court re-opens."

Sub-section (3) further declares that "the Court may for special reasons extend the period of fifteen days mentioned in the section."

The tenant in this case, before the expiry of the period of fifteen days specified in sub-s. (2), applied under sub-s. (3) for an order to have that period extended.

The question raised is whether the application should be made to the Court of execution or to the Court which passed the decree.

The lower Court held that the application was properly made to the Court of execution.

The learned Judges who heard this second appeal have differed in their construction of this sub-section. Mr. Justice Banerjee is of opinion that the application should be made to the Court of execution, while Mr. Justice Rampini holds that, as it involves an alteration and a reconsideration of the decree for ejectment, the Court which passed the decree is alone competent to deal with the matter. The appeal has now been referred to me as the third Judge.

At the outset I would observe that the matter under consideration is purely a matter of form. The Court which passed the decree would ordinarily be the Court to execute it. No doubt decrees are occasionally transferred for execution to another Court (see s. 223 of the Code of Civil Procedure), but having regard to the character of a decree for ejectment of a tenant under s. 66 of the Bengal Tenancy Act, it is very difficult to conceive any case in which such a decree would not be executed by the Court which passed it.

In the present case, too, the application under sub-s. (3) to extend the period of fifteen days during which execution under sub-s. (2) could not be taken out, is made within that time and before proceedings had been, or indeed could have been, taken by a Court of execution. The application, therefore, could only be made to the Court which passed the

(1) 18 W. R. 412 note; 2 Wyman 75. (2) 22 W.R. 460. (3) 23 W.R. 50.

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decree. The question under consideration in [648] this case is, therefore, purely one of form rather than of substance. It has undoubtedly been made to the proper Court, but has it been made in a proper form? Can it be made, as it has been made, by a mere petition asking for an order under sub-s. (3) and setting out special reasons as valid grounds, or if it involves a reconsideration of the terms of the decree, should it not be made in the form of an application for review of judgment?

I propose to consider whether an extension of the term for which execution of a decree for ejectment is suspended is necessarily a modification of the decree. The decree is for ejectment. The law does not require, as in a decree for foreclosure or sale in a suit on a mortgage, that the decree shall specify the date on which the decree shall become absolute in regard to foreclosure or sale, and an order making it absolute. It merely requires that certain items shall be specified in it, and the object of this is to give information to the debtor, so that he may make the necessary payment, and thus avoid the ejectment; and the law then proceeds to declare that the decree shall not be executed, if the amount so specified and the costs of the suit are paid into Court within fifteen days from the date of the decree, or where the Court is closed on the fifteenth day, on the day on which the Court re-opens. That seems to me to be a direction to the Court of execution rather than to require a Court in passing a decree for ejectment to state these terms in its decree, and it is also a notice to the debtor how he may avoid the operation of the decree against him. Notwithstanding any order under sub-s. (3) the decree would remain unaffected in its terms. The object of the application is only to obtain suspension of its execution, so as to extend to the debtor further time to satisfy the demand of the landlord decree-holder. Probably, in respect of the procedure to be followed, there would be little difference in dealing with such an application, whether it be regarded as an application to the Court of execution or to the Court which passed the decree. But there would be a great difference in the Court-fees payable. Court-fees would be payable on an application to the Court of execution merely as on an ordinary petition, whereas on an application for review of judgment, the fee payable [649] would be that of one-half of the fee payable on the plaint. The difference would thus be very considerable. Such considerations would alone make me hesitate to hold that in such a matter the Legislature ever intended to impose such a heavy burden on a tenant to enable him for good cause or for special reasons as set out in s. 66 (3) to avert ejectment from the lands held by him, if for some unforeseen cause he was unable to liquidate within the prescribed time the arrears of rent for which the ejectment had been decreed.

Again, if we turn to s. 244 of the Code of Civil Procedure which applies to cases under the Bengal Tenancy Act, we find that questions arising between the parties to a suit in which a decree was passed and relating to the execution of the decree are to be determined by order of the Court executing the decree. It has been said that if an extension under sub-s. (3) be allowed in execution of a decree, it may be extended repeatedly from time to time, and that thus a Court will be able to delay payment of a landlord's arrears and also deprive him of the right to eject the tenant. I confess that I can see no hardship in so reading the law. The money due to the landlord will still bear interest, so that pecuniarily he will be protected, and the Court can grant an extension of time only *for special reasons*, which I understand to be that the tenant must show that he is, for some special

reason, entitled to ask for such an indulgence. One of the objects of the Bengal Tenancy Act may be to give landlords "reasonable facilities for the recovery of their rents," and this is not really defeated by an order under sub-s. (3). But another and an equally paramount object is not to allow the ejectment of a tenant except for cogent reasons. One of such reasons in the case of a tenant not having a saleable tenant-right is an arrear of rent at the end of a year, and, if this sum is paid within a time for special reasons fixed by the Court beyond the statutory period, I confess that I fail to see where an injustice is done to the interests of any party. The Act throughout is as much for the tenant as the landlord, and, within reasonable limits, it gives a discretion to the Courts under s. 66 (3) *for special reasons* to step in and avert the **[650]** termination of a tenancy by carrying into execution a decree for his ejectment.

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The reported cases on this subject are of little assistance. They were all decided under the now repealed Act X of 1859 and Bengal Act VIII of 1869, which were similar to s. 66 (2) of the Bengal Tenancy Act, but these Acts were without any such powers as now contained in s. 66 (3) of the Bengal Tenancy Act to mitigate the effect of the execution of a decree for ejectment. It was probably because the Courts held that under those laws a decree for ejectment was absolute, that this discretionary power has been given to be exercised for special reasons. I cannot agree that the exercise of such powers modifies the decree itself. It only suspends its execution, and, during this term, it gives the tenant power to prevent that execution by satisfying the claim of the landlord, and I can find no sufficient reason why such power should not be exercised under s. 244 of the Code of Civil Procedure, as in other matters, between the parties, relating to the execution of the decree.

For these reasons I agree with Mr. Justice Banerjee in dismissing this appeal with costs.

M. N. R. *Appeal dismissed.*

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26 C. 650 = 3 C.W.N. 751.

ORIGINAL CIVIL.

Before Mr. Justice Stanley.

MOHESH CHUNDER ADDY v. MANICK LALL ADDY.

[20th June, 1899.]

Practice—Commission, Right, of purdanashin *lady to be examined on—Civil Procedure Code (Act XIV of* 1882), s. 640.

The defendant applied for a commission to examine a Hindu *purdahnashin* lady. The plaintiff objected on the ground that the lady had prior to this appeared in public, and had also been examined in Court in a *palki*. *Held*, the lady being a *purdahnashin* she was entitled to be examined on commission.

In this case the defendant Manick Lall Addy applied in Chambers for issue of a commission to examine a Hindu *purdahnashin* lady, one Sarut Coomary Dassee. The plaintiff opposed the application.

[651] Mr. *Dunne*, for the plaintiff.

Mr. *W. C. Bonnerjee*, for the defendant Manick Lall Addy.

Mr. *Bonnerjee.*—Sarut Coomary Dassee is a Hindu *purdahnashin* lady and is entitled to be examined on commission. Counsel referred to

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the judgment of Trevelyan, J., in the case of *Chamatkar Mohiney Dabee v. Mohesh Chunder Bose* (1).

Mr. *Dunne contra.*—I submit the Court ought not to issue the commission. Sarut Coomary appeared in Court in 1884, and was examined in a *palki*; she also appeared in public on another [652] occasion. She ought to come to Court and be examined in a *palki*.

ORDER.

STANLEY, J.—I am quite averse to granting commissions for the examination of witnesses, not merely on account of the expense, but also of their unsatisfactoriness. The laws of evidence are often not adhered to, and the advantage of *viva voce* examination before the Court is lost. At the same time the Legislature has thought fit to determine that *purdahnashin* ladies shall not be obliged to appear in public. The question is, is this lady to be examined under commission. On one occasion she did appear in Court in a *palki*. For so doing she was outcasted. There is evidence that on another occasion mentioned in the affidavits she appeared in public. Undoubtedly on that occasion she did not observe the rules of the *purdah*, but the statement that she appeared in public is exaggerated. Whether she took a seat beside Mr. Rose as alleged is not very clear. She was however covered with a *chudder*, which shows that she was not openly defying the rules and customs so strictly observed by Hindu ladies. Even assuming that a *purdahnashin* lady does offend against the rules of her class, I do not think that that deprives her of her right to be examined under commission. I quite agree with Trevelyan, J., in the case to which I have been referred. That was a stronger case

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26 C. 651 N=3 C.W.N. 750.

(1) *Before Mr. Justice Trevelyan.*

CHAMATKAR MOHINEY DABEE *v.* MOHESH CHUNDER BOSE.
[1st February, 1892.]

The judgment in this case was as follows:—

JUDGMENT.

TREVELYAN, J.—This is an application for the examination of a Hindu lady, the plaintiff, under commission. It is opposed on the ground that she is not entitled to the benefit of s. 640 of the Code of Civil Procedure. In the first place charges of immorality are made against her. I do not think I need consider them. I don't think they are relevant. It may be Mr. Garth is right, and that they show she has appeared in public. It is then said that she has been in the habit of appearing in public and has no regard to the customs of her country and religion. Her denial is given in general terms, and though there are difficulties in the case I should be exceedingly careful before I forced into the public gaze a woman who may have gone outside the *purdah* either by way of experiment or otherwise. Many a woman may desire to taste the sweets of unsecluded life and have gone out of the *purdah*, and may desire to go back. Because a woman may once or twice have gone outside the *purdah* is the Court to keep her outside? The question is not whether this woman, who does more or less frequently go about in public, should be made to appear in Court, but whether I ought to compel her to appear in public. On the materials before me I think I shall be erring on the right side if I refuse to take away from her the privilege she is entitled to, and which but for the circumstances which have been stated, and which are denied, she would unquestionably have been entitled to. On the whole, it is safer to let the commission go. Costs of motion to be costs in the cause. Costs of examination of the lady to be reserved. With regard to the examination of the other witnesses Mr. Bonnerjee admits the evidence is what would be given on the account, not before the taking of the account. There will be liberty to renew this application as to them on notice. The commission to be executed in Calcutta. As this application is on summons in Chambers, I will certify for Counsel.

[This case is also followed in 26 C. 650=3 C.W.N. 751.]

than the present. For these reasons I shall issue a commission, and I shall reserve the costs. Commission to issue in terms of summons. Counsel certified for.

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Attorneys for the plaintiff: Messrs. *Banerjee & Halder.*

Attorney for the defendant Manick Lall Addy: Babu *Bhupendro Nath Bose.*

Attorney for the defendant Sarat Coomary Dassee: Mr. *Rose.*

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26 C. 653 (F.B.) = 3 C.W.N. 551.

[653] FULL BENCH.

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, Mr. Justice Macpherson, Mr. Justice Ghose, Mr. Justice Hill and Mr. Justice Jenkins.

GIRISH CHUNDER MITTER (*Plaintiff*) v. JATADHARI SADUKHAN (*Defendant*).* [11th April, 1899.]

Slander—Cause of action—Damages for insult, loss of reputation and mental pain by the use of abusive language—Suit for liabel and slander—Special damage.

Held by the majority of the Full Bench (MACLEAN, C. J., MACPHERSON, HILL, and JENKINS, JJ., GHOSE, J., dissenting) that mere use of abusive and insulting language, such as *sala* (wife's brother), *haramzada* (base born or bastard), *soor* (pig), *baper beta* (son of the father, that is, ironically, bastard) apart from defamation, is not actionable irrespective of any special damage.

Per GHOSE, J.—A case like the present should be decided according to the principle of justice, equity and good conscience, and therefore it is but just and right that a person thus vilified, who has suffered from insult and mental pain, should be entitled to maintain an action irrespective of any special damage.

[**F.**, 28 C. 452 (461); 4 L.B.R. 50; U.B.R. (1905) 1st Qr. Tort Defamation; **D.**, 34 C. 48 = 4 C.L.J. 388; 4 C.L.J. 390.]

THE facts of this case are shortly as follow:—

The plaintiff, Girish Chunder Mitter, who is a respectable gentleman and a *kaystha*, had erected a fence which the defendant, Jatadhari Sadukhan, who is a *kolu, i.e.*, an oilman, alleged had encroached on his land. Later on, the defendant sought out the plaintiff at his house. There it was alleged the defendant somehow got angry and began to abuse the plaintiff, using the following abusive epithets: *sala*, *haramsada*, *soor*, *baper beta*, &c. Thereupon the plaintiff instituted criminal proceedings against the defendant, and the latter was convicted and fined. The plaintiff then instituted an action, out of which the present appeal arose, to recover from the defendant Rs. 500 as damages for insult, loss of reputation, and mental pain, caused by the abusive words aforesaid.

The defendant denied having abused the plaintiff, and objected to the amount of the damages claimed.

[654] The Munsif held that the defendant had used to the plaintiff the abusive words complained of, and that in consequence thereof he was insulted and must have felt mental pain, and decreed Rs. 50 as damages with full costs of the suit.

On appeal, the District Judge held that what the defendant "indulged in was mere abuse and idle threatening. No one who heard him did or could imagine that he really meant to asperse the chastity of the plaintiff's sister or mother, or thought the plaintiff a pig. There was no defamation or intent to defame. What the defendant did was insulting

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* Reference to a Full Bench in Appeal from Appellate Decree No. 781 of 1897.

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to the plaintiff, but did not affect the plaintiff's reputation a whit." The District Judge also held upon an examination of the cases that mere angry or vulgar abuse was not actionable without proof of special damage. He accordingly dismissed the suit, but without costs.

The plaintiff thereupon appealed to the High Court, and the appeal came on for hearing before MACLEAN, C.J., and BANERJEE, J., who referred the case to a Full Bench with the following opinion :—

This appeal arises out of a suit brought by the plaintiff-appellant, to recover damages from defendant for insult, loss of reputation, and mental pain, caused by the defendant by the use of abusive language. The defendant denied using the alleged abusive language, and objected to the amount claimed as being excessive.

The first Court decreed the suit in part; but, on appeal by the defendant, the lower appellate Court has reversed the decision of the first Court, and dismissed the suit, on the ground that mere abusive and insulting language, which did not affect the plaintiff's reputation, was not actionable.

In second appeal it is contended for the plaintiff-appellant that the decision of the lower appellate Court is wrong in law, and that abusive and insulting language, such as was used in this case (the words used being *sala* (wife's brother) *haramzada* (baseborn or bastard) *soor* (pig), *baper beta* (son of the father, that is, ironically, bastard), which according to the finding of the first Court, not displaced by the appellate Court, must have outraged the feelings of the plaintiff and caused him mental pain, was **[655]** actionable, apart from any special damage or injury to reputation, and in support of this contention, the following cases are cited, namely, *Hossein* v. *Baker Ali*(1), *Kanoo Mundle* v. *Rahamoollah Mundle*(2), *Gholam Hossein* v. *Hur Gobind Dass*(3), *Tukee* v. *Khoshdel Biswas* (4), *Osseemooddeen* v. *Futteh Mahomed* (5), *Gour Chunder Puteedundee* v. *Clay* (6), *Sreenath Mookerjee* v. *Komul Kurmokar* (7), *Kali Kumar Mitter* v. *Ramgati Bhattacharjee* (8), *Srikant Roy* v. *Satcori Shaha* (9), *Ibin Hosein* v. *Haidar* (10), *Trailokhya Nath Ghose* v. *Chundra Nath Dutt* (11), *Kashiram* v. *Bhadu Bapuji* (12), *Parvathi* v. *Mannar*(13), and *Dawan Singh* v. *Mahip Singh* (14). The respondent, however, contends that some of the above cases support his view. On the other hand for the respondent, the cases of *Phoolbasee Koer* v. *Parjun Singh* (15), *Chunder Nath Dhur* v. *Issur Dossee* (16), and *Nil Madhub Mookerjee* v. *Dookeeram Khottah* (17), are relied upon as supporting the view taken by the Court of Appeal below.

The respondent further contends that this being a second appeal, the matter is disposed of by the findings of the Judge of the lower appellate Court.

The cases cited on each side more or less support the contention of that side. In this conflict of decisions, and regard being had to the importance of the question raised, we think it necessary **[656]** to refer the matter for decision to a Full Bench. The question, for decision of which the case is referred to a Full Bench, is, "Whether abusive and insulting language, such as that used in the present case, is actionable, irrespective of any special damage." And as that question arises in an appeal from an

(1) (1864) W.R. Gap. No. 302. (2) (1864) W.R. Gap. No. 269. (3) 1 W.R. 19. (4) 6 W.R. 151. (5) 7 W.R. 259. (6) 8 W.R. 256. (7) 16 W.R. 83. (8) 6 B.L.R. Ap. 99 = 16 W.R. 84. (9) 3 C.L.R. 181. (10) 12 C. 109. (11) 12 C. 424. (12) 7 Bom. H.C. A.C. 17. (13) 8 M. 175. (14) 10 A. 425. (15) 12 W.R. 369. (16) 18 W.R. 531. (17) 15 B.L.R. 161.

appellate decree, under rule 2 of the rules relating to References to a Full Bench, we must refer the appeal for the final decision of a Full Bench.

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Babu *Mahendra Nath Roy*, for the appellant submitted that the question should be answered in the affirmative. Although there is some conflict, the balance of Indian authorities is in the plaintiff's favour. The following authorities are in the plaintiff's favour: *Kanoo Mundle* v. *Rahamoollah Mundle* (1), *Hossein* v. *Baker Ali* (2), *Gholam Hossein* v. *Hur Gobind Dass* (3), *Tukee* v. *Khoshdel Biswas* (4), *Osseemooddeen* v. *Futteh Mahomed* (5), *Gourchunder Putcedundee* v. *Clay* (6), *Sreenath Mookerjee* v. *Komul Kurmokar* (7), *Kali Kumar Mitter* v. *Ramgati Bhattacharjee* (8), *Srikant Roy* v. *Satcori Shaha* (9), *Ibin Hossein* v. *Haidar* (10), *Jogeswar Sarma* v. *Dina Ram Sarma* (11), *Kashiram* v. *Bhadu Bapuji* (12), decided by Couch, C.J., *Parvathi* v. *Mannar* (13), and *Dawan Singh* v. *Mahip Singh* (14). The Calcutta cases cited amount to this, that *mental distress* caused by abusive words is sufficient to sustain an action for damages. With regard to the particular words used in this case, I submit that the case of *Ibin* **[657]** *Hossein* v. *Haidar* (10) is an authority for the proposition that the word *haramzada* is actionable *per se*, and that case is exactly in point. Regard must be had to the effect that the words were *calculated* to produce, and not to what the bystanders might have believed. *Chunder Nath Dhur* v. *Isurree Dossee* (15), and *Nil Madhub Mookerjee* v. *Dookeeram Khottah* (16), are apparently against the plaintiff. But in the former case it was not necessary to decide the point, and in the latter case, which was the decision of a single Judge, there was merely an opinion against encouraging actions for slander, the point really decided being quite different. *Trailokhya Nath Ghose* v. *Chundra Nath Dutt* (17), is not against the plaintiff, as it follows *Srikant Roy* v. *Satcori Shaha* (9).

My second point is that the view I am contending for is in accordance with the principles of "justice, equity and good conscience: " see Reg. VII of 1832, s. 9. It is in consonance with Hindu Law [see *Narada*, pp. 207—212, *Vrihaspati*, p. 355, *Vishnu*, pp. 27, 28, 36, &c.—Max Muller's Sacred Books of the East, and Mandlik's *Jajnavalka*, p. 232, s. 205 and with Roman Law, in which personal insult is made the basis of an action [See Sandars Institutes of Justinian, 4, 4, 1—p. 418.] I shall state my proposition thus: Every man has an absolute and positive right not to be so insulted as to cause him mental distress; therefore any act in violation of such a right is actionable *per se*, and *general* damage, as distinguished from *special* damage, is recoverable. See *Ratcliffe* v. *Evans* (18) and the Indian Penal Code, s. 44.

My next point is that my contention is in harmony with the Criminal law in this country as contained in the Indian Penal Code. Criminal liability furnishes a safe and proper test of civil liability: see *Abdul Hakim* v. *Tej Chandar Mukarji* (19), *Augada Ram Shaha* v. *Nemai Chand Shaha*(20), and ss. 499 and **[658]** 504 of Indian Penal Code. The present case comes under s. 499, or at any rate certainly under s. 504. No special damage need be proved when the wrong complained of is in violation of a statutory obligation

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(1) (1864) W.R. Gap. No. 269. (2) (1864) W.R. Gap. No. 302.
(3) 1 W.R. 19. (4) 6 W.R. 151. (5) 7 W.R. 259.
(6) 8 W.R. 256. (7) 16 W.R. 83. (8) 6 B.L.R. Ap. 99=16 W.R. 84.
(9) 3 C.L.R. 181. (10) 12 C. 109. (11) 2 C.W.N. cxxiii.
(12) 7 Bom. H.C.A.C 17. (13) 8 M. 175. (14) 10 A. 425.
(15) 18 W. R. 531. (16) 15 B.L.R. 161. (17) 12 C. 424.
(18) (1892) L.R. 2 Q.B. 524 (528). (19) 3 A. 815 (817).
(20) 23 C. 867 (871).

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imposed: see *Chamberlaine* v. *Chester and Birkenhead Railway Co.* (1). The criminal law abolishes the distinction between libel and slander.

Lastly, I submit that the distinction which obtains in the English law between libel and slander is based more on authority than on reason, and ought not to be introduced into this country, having regard to the social conditions which prevail here. If the words complained of in the present case were reduced to writing, an action would lie without proof of special damage, according to the English law. There is no reason, why there should be any difference, when the words are *spoken* and not *written*. The distinction has been condemned by English Judges: See *Thorley* v. *Lord Kerry* (2), [*per* Mansfield, C.J.] and *Allsop* v. *Allsop* (3).

Women could get no redress when slandered, a state of things which was characterised as barbarous in *Lynch* v. *Knight* (4). It grew so unsatisfactory that the Legislature was compelled to interfere and to pass the Slander of Women Act, only so late as in 1891. Even the word *bastard* is not actionable [see Folkard on Libel and Slander, p. 149], it being merely an ecclesiastical offence to call one by that name, unless the use of the word amounts to slander of title. See also Pollock on Torts, 2nd edition, ch. VII, pp. 220, 221.

Babu *Sharada Charan Mitra*, for the respondent, contended that the case was concluded by the findings of fact. As to the law, the appellant must make out a case of defamation before he can succeed. No hard and fast rule should be laid down. He referred to *Phoollbasee Koer* v. *Parjun Singh* (5), *Chunder Nath Dhur* v. *Issuree Dossee* (6) *Nil Madhab Mookerjee* v. *Dookeram* **[659]** *Khottah* (7), *Srikant Rai* v. *Satcori Shaha* (8), and *Trailokhya Nath Ghose* v. *Chundra Nath Dutt* (9), as supporting his contention. The words complained of are the common form of abuse in this country, and knowing how litigation was rampant here, if the question were answered in the affirmative, the result would be simply disastrous. See also *Baylis* v. *Lawrence* (10). [JENKINS, J.—*Komul Chunder Bose* v. *Nobin Chunder Ghose* (11), and *Mahomed Ismail Khan* v. *Mahomed Tahir* (12), are in your favour.] The Indian Penal Code satisfies the requirements of public policy.

Babu *Mahendra Nath Roy*, in reply, referred to the cases of *Parrat* v. *Carpenter* (13), *Baker* v. *Pierce* (14), and *Ayre* v. *Craven* (15), and to Bentham's Theory of Legislation, p. 299, in which it was shown that the absence of any relief granted by law in cases like the present, led to the practice of duelling.

The following opinions were delivered by the Full Bench (MACLEAN, C.J., MACPHERSON, GHOSE, HILL and JENKINS, JJ.)

OPINIONS.

MACLEAN, C.J. (MACPHERSON, HILL, and JENKINS, JJ., concurring). —This appeal arises out of a suit brought by the plaintiff to recover damages from the defendant for insult, loss of reputation, and mental pain, caused by the defendant by the use of abusive language. The

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(1) (1848) 18 L. J. Ex. 494 (496).
(2) (1812) 4 Taunt. 355 (363) = 13 Rev. Rep. 626 (634).
(3) (1860) 29 L. J. Ex. 315.
(4) (1861) 9 H. L. C. 577 (594).
(5) 12 W. R. 369.
(6) 18 W. R. 531.
(7) 15 B.L.R. 161.
(8) 3 C.L.R. 181.
(9) 12 C. 424.
(10) (1841) 11 A. & E. 920.
(11) 10 W.R. 184 = 1 B.L.R.S.N. 12.
(12) 6 N.W.P.H.C. 38.
(13) Croke's Rep. 502 [38 *Eliz.*].
(14) 6 Mod. Rep. 23 [2 *Anne.*].
(15) (1834) 2 A. & E. 2 (7).

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defendant denied using the alleged abusive language, and objected to the amount claimed as being excessive.

The first Court decreed the suit in part; but on appeal by the defendant the lower appellate Court has reversed the decision of the first Court and dismissed the suit, on the ground that mere abusive and insulting language, which did not affect the plaintiff's reputation, was not actionable.

[660] Against that decision of the lower appellate Court this appeal has been preferred, and the learned Judges before whom the appeal came on for hearing, in view of the conflict, or apparent conflict, of decisions, have referred the matter to a Full Bench.

The actual question referred is expressed in these terms:—

"Whether abusive and insulting language, such as that used in the present case, is actionable, irrespective of any special damage." But as the question referred arises in an appeal from an appellate decree, under rule 2 of the rules relating to References to a Full Bench, the whole appeal is referred.

It has been contended for the plaintiff before us that the decision of the lower appellate Court is wrong in law, and that abusive and insulting language, such as was used in this case, [the words used being *sala* (wife's brother), *haramzada* (base born or bastard), *soor* (pig), *baper beta* (son of the father, that is, ironically, bastard)], is actionable. In support of this contention, it has been argued that, in a suit for defamation, based on verbal slander, it is unnecessary to allege or prove such special damage as the English law requires, and that apart altogether from defamation a suit will lie for abuse which causes or is calculated to cause mental distress or pain. The tendency and probable effect of words must be determined in reference to the circumstances under which they are used, and thus in the judgment of the lower appellate Court it is said: "No one who heard him did or could imagine that he really meant to asperse the chastity of the plaintiff's sister or mother or thought the plaintiff a pig. There was no defamation or intent to defame. What the defendant did was insulting, but did not affect the plaintiff's reputation a whit."

This finding wholly excludes that which is an essential element of actionable defamation, and it therefore is outside the scope of our inquiry to determine whether or not the English rule which requires special damage to be established in an action for oral defamation should prevail in this country.

We therefore only have to consider whether an action will lie for insult or abuse, with resultant pain and distress of mind, **[661]** apart from defamation. The first question one naturally asks is what is the gist of this actionable wrong?

In the argument before us it was suggested that the cause of action was the injury to the abused man's feelings, his mental distress and pain.

It is difficult to suppose that the causing of mental distress and pain can *per se* be actionable. Mental condition of this sort may obviously arise from causes other than abuse or insult, and a moment's reflection makes it clear that the proposition thus widely expressed would lead to manifest absurdities. For instance if *A* and *B* are sitting in a room together, and *A* loses his temper, and uses insulting and abusive language towards *B*, whose feelings are wounded, *B* may bring an action against *A*, or if *A* uses such language of some relation or friend of *B*, which equally wounds *B's* feelings, an action will lie. Such a view does not commend itself to one's common sense, nor is it reasonable.

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It is said that the reported decisions of the Indian Courts, and in particular of this Court, support the position that, to cause mental pain and distress by insult or abuse, as distinct from defamation, is actionable, and a large number of authorities have been cited to us as establishing this. It appears to us, however, unnecessary to discuss these cases in detail. Many of them are so inadequately reported that it is impossible to discover what was the state of facts then under consideration.

This is so of the cases of *Kanoo Mundle* v. *Rahamoollah Mundle* (1), *Gholam Hossein* v. *Hur Gobind Dass* (2), *Tukee* v. *Khoshdel Biswas* (3), *Osseemooddeen* v. *Futteh Mahomed* (4), *Gour Chunder Puteedundee* v. *Clay* (5), and *Sreenath Mookerjee* v. *Komul Kurmokar* (6). From a perusal of those cases in which the facts are set out, it is apparent that in each there was sufficient to support a suit for defamation. In none of the cases on **[662]** which the plaintiff relies, as we read them, was the point raised or at any rate determined, whether abuse, as distinct from defamation, was actionable, the question rather being whether proof of special damage was an essential condition of the plaintiff's success. On the other hand, this precise point was clearly raised and determined adversely to the view now advanced by the present plaintiff in the case of *Komul Chunder Bose* v. *Nobin Chunder Ghose* (7) and that decision has been followed in the case of *Mahomed Ismail Khan* v. *Mahomed Tahir* (8). It will thus be seen that the weight of authority is not in the appellant's favour as he has urged.

Apart then from authority, ought mere personal insult or abuse, as distinct from defamation, and not touching the plaintiff's credit or reputation, to be actionable in this country, if it produce mental pain or distress? It has been urged that insult being punishable under the Penal Code, as it was under the old Hindu Penal system, it must be sufficient groundwork for a civil suit. But we think the assumption underlying this argument has no justification, for though the facts, which go to make a penal offence may, in general, suffice to constitute a civil wrong, it requires no exhaustive examination of the forms of civil and criminal liability to show that the latter is no infallible guide to the former. This appears to us to be made clear by the very section of the Penal Code which prescribes a punishment for insult, for the purpose of the penalty imposed is to prevent a breach of the peace.

Do then considerations of public policy demand that we should decide in favour of the proposition for which the appellant contends? We think not. If illustrations were needed of the mischief to which such a decision would lead, it is furnished by this present case. For words of idle abuse uttered in the heat of excitement, incapable of touching the plaintiff's reputation or credit, the defendant has been prosecuted and punished in the Criminal Courts: and then, as though that were not enough, the **[663]** plaintiff has sued him in the Civil Courts carrying the case for that purpose, through three separate Courts, though it has been found, as is obvious to anyone, that the words used "did not affect the plaintiff's reputation a whit." Section 504 of the Penal Code provides a remedy, and that an ample remedy, for conduct such as that of the defendant's; and in our opinion there is no principle of public policy which requires that, in addition, the party complaining should have a remedy by civil suit.

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(1) (1864) W. R. Gap. No. 269. (2) 1 W.R. 19. (3) 6 W. R. 151.
(4) 7 W. R. 259. (5) 8 W. R. 256. (6) 16 W.R. 83.
(7) 10 W.R. 184 = 1 B.L.R.S.N. 12. (8) 6 N.W.P.H.C. 38.

We would, therefore, answer the question embodied in the reference by expressing the view that abusive and insulting language, not amounting to defamation, is not actionable. Section 95 of the Penal Code indicates that harm of a trumpery nature, *i.e.*, "so slight that no person of ordinary sense and temper would complain of it," is not to be treated as an offence. If mere vulgar abuse, uttered in a moment of anger, abuse to which no person of ordinary sense and temper would attach the slightest importance, is, if it cause mental distress, to afford a ground of action, it is lamentable to think to what an alarming extent the floodgates of litigation would, in this country, become open. We are but little disposed to favour any such view. On the contrary we agree with the expression of opinion of Pontifex, J., in the case of *Nil Madhub Mookerjee* v. *Dookeeram Khottah* (1) that actions for verbal slander ought not to be encouraged.

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The appeal must be dismissed with costs.

GHOSE, J.—The question referred to the Full Bench in this case is "whether abusive and insulting language, such as that used in the present case, is actionable irrespective of any special damage."

The words of abuse used by the defendant towards the plaintiff were *sala* (wife's brother), *haramzada* (bastard), *soor* (pig), *baper beta* (son of father, ironically, bastard) which, according to the finding of the Court of first instance, not displaced by the appellate Court, must have caused mental pain to the plaintiff. It appears from the judgment of the Munsif that the plaintiff is a respectable person, and much above the defendant in social [664] position, and that there were several persons present on the occasion when the defendant thus abused the plaintiff.

The learned Judge of the Court below was, however, of opinion that "no one who heard him did or could imagine that he (the defendant) really meant to asperse the chastity of the plaintiff's mother or thought the plaintiff a pig. There was no defamation nor intent to defame: what the defendant did was insulting to the plaintiff, but did not affect the plaintiff's reputation a whit."

The circumstances under which the insult was offered to the plaintiff are thus described by the District Judge: "What happened in this case? The appellant believed or affected to believe that the plaintiff had encroached on his land and ought to retire a particular fence or hedge. Nothing happened when the fence was erected or repaired; but later the appellant sought out the plaintiff at home. He did not begin vilification at once. The plaintiff's witness, Tarini Kundu, says the defendant began by hailing the plaintiff as *kaka-babu* and *dada-babu*, but the plaintiff remaining indoors and preserving silence the defendant got angry and launched into abuse of the plaintiff. What the defendant's precise provocation was we don't know. He must have had or thought he had a grievance." According to the opinion of the learned Judge, the plaintiff did not suffer any special damage; but the fact remains that grave insult was offered to him in the presence of other people, and his feelings were outraged, and that the defendant, without any provocation that we know of, but apparently influenced by a desire to avenge the plaintiff for a supposed grievance, vilified him in the manner alleged. And the question is whether for this the plaintiff is entitled to maintain an action.

There is no written law on the subject either in this country or in England, except what is provided for in the Slander of Women's Act, 1891 (54 and 55 Vic., ch. 51). The law is to be gathered from the opinions

(1) 15 B. L. R. 161 (166).

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of Judges expressed in different cases from time to time, and from what may be the common law of the country. According to the English law "slander is an actionable wrong when special damage can be shown to [665] have followed from the utterance of the words complained of, and also in the following cases: Where the words impute a criminal offence; where they impute having a contagious disease, which would cause the person having it to be excluded from society; where they convey a charge of unfitness, dishonesty or incompetence in an office of profit, profession or trade; in short, where they manifestly tend to prejudice a man in his calling. This is not so in the case of libel, for it is enough to make a written statement *prima facie* libellous, that it is injurious to the character or credit (domestic, public or professional) of the person concerning whom it is uttered or in any way tends to cause men to shun his society or to bring him into hatred, contempt or ridicule." (See the Law of Torts by Pollock, p. 230, 5th edition).

This distinction, however, has been disapproved by several eminent Judges in England [see the Observations of Mansfield, C.J., in *Thorley* v. *Lord Kerry* (1); *Lynch* v. *Knight* (2); *Roberts* v. *Roberts* (3).] In the case of *Parvathi* v. *Mannar* (4) Turner, C.J., sitting with Muthusami Aiyar, J., condemned the distinction which exists under the English law between slander and libel. He thus expressed himself: " The difference between the extent of the publication of defamatory terms, according as to whether they are committed to print or uttered orally, is in reality accidental. Defamatory matter, when written, is frequently addressed only to a single person; when printed, its publication may be arrested immediately. The publication of a defamatory imputation in a newspaper circulated extensively in a place where the person defamed is unknown may cause him far less injury, whether pecuniary or sentimental, than its publication orally in the neighbourhood in which he resides, to his acquaintances or to persons who can influence his advancement in life. In this country we are not bound to adopt the rules regulating compensation for injuries which are recognised by the [666] English Courts, though it has been the practice of Judges in British India to regard the decisions of the English Courts with the highest respect as embodying the wisdom and experience of a judiciary, whose reputation is second to none for independence and ability. But the distinction drawn by the English law between written or printed and oral slander, which is said to have had its origin in the circumstance that the most frequent instances of oral slander were at one time punishable by Ecclesiastical Courts (2 Salkled, 694) has been condemned by many eminent English lawyers. Mr. Starkie observes that the distinction 'must be regarded as an absolute peremptory rule not founded in any obvious reason or principle.' In *Roberts* v. *Roberts* (3) Cockburn, C.J., and Crompton and Blackburn JJ., pronounced the law of England unsatisfactory and regretted they were bound by it. In *Lynch* v. *Knight* (2), the Lord Chancellor Campbell expressed the same views, and Lord Brougham, in the same case, declared that the English law was in this respect not only unsatisfactory but barbarous. The Indian Law Commission, of which Lord Macaulay was a member, in its report on the proposed Penal Code, demonstrated that the English law regarding defamation was inconsistent and unreasonable (Introductory Report, note, p. 7, Macaulay's Works, p. 546). The civil law does not recognise the

(1) (1812) 13 Rev. Rep. 635 = 4 Taunt. 355 (363).
(2) (1861) 9 H.L.C. 577 (594).
(3) (1864) 33 L.J.Q.B. 249.
(4) 8 M. 175.

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distinction, nor does the Law of Scotland, and the recommendations of Lord Macaulay's commission were approved and accepted by the British Indian Legislature. We, therefore, feel justified in giving effect to our conviction that the rule we are considering is not founded on natural justice, and should not be imported into the law of British India."

Later on, he observed: "Nevertheless, reason suggests that a distinction should be drawn between cases where the slanderer acts from mere carelessness or in an honest but mistaken belief as to his duty, and cases where the slanderer is insolent without any provocation or is influenced by a desire to gratify his enmity. The person defamed may be content to accept a sum sufficient to establish his innocence of the charges made in the former [667] case; in the latter he is entitled to full compensation for the pain inflicted on him."

It is, I think, a well-known maxim of law that all members of a community are under a general duty towards their neighbours to do them no hurt without lawful cause or excuse; and the question here arises whether the act of the defendant is not a violation of the personal right of the plaintiff—a right of protection against any outrage or affront by others, and whether it is not an injury to the plaintiff. Justinian thus defines the word "injury": *Injuria*, in its general sense, signifies every action contrary to law: in a special sense it means sometimes the same as *contumelia* (outrage), which is derived from *contemnere* the Greek ὕβρις sometimes the same as *culpa* (fault), in Greek ἀδικημα as in the *lex Aquilia*, which speaks of damage done *injuria*; sometimes it has the sense of iniquity, injustice, or in Greek ἀδικία; for a person against whom the proctor or judge pronounces an unjust sentence is said to have received an *injuria*. *Injuria*, then, is used in three senses—(1) a wrongful act, an act done *nullo jure*; (2) the fault committed by a judge who gives judgment not according to *ius*; (3) an outrage or affront. An injury is committed not only by striking with the fist, or striking with clubs or the lash, but also by shouting till a crowd gathers round anyone, by taking possession of anyone's goods, pretending that he is debtor to the inflictor of the injury, who knows he has no claim on him; by writing, composing, and publishing a libel or defamatory verses against any one; by maliciously contriving that another does any of these things; by following after an honest woman or a young boy or girl; by attempting the chastity of any one;" and, in short by numberless other acts. (See Institutes of Justinian by Sandars, p. 509). And in s. 44 of the Indian Penal Code we find the following definition: "The word 'injury' denotes any harm whatever illegally caused to any person, in body, mind, reputation or property." Though this definition is given with reference to a criminal offence, I think it may well be followed in determining the question, whether a civil action may be brought where the plaintiff has sustained an injury either in body, mind, reputation or property.

Bentham in his "Theory of Legislation," observes: To [668] perceive all the evil which may result from these offences, it is necessary to put all remedies out of view; it is necessary to suppose there are none. Upon this supposition, these offences may be repeated at will; an unlimited career is opened to insolence; the person insulted to-day may be insulted to-morrow, the next day, every day and every hour; each new affront facilitates another, and renders more probable a succession of injuries of the same kind. Now under the notion of a corporal *insult* is comprehended every act, offensive to the person which can be inflicted without

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causing a lasting physical evil, every act which produces a disagreeable sensation, inquietude or pain. But an act of this sort, which, if single, would be scarcely sensible, may produce, by force of repetition, a very painful degree of uneasiness or even intolerable torture;" and later on he said "what is signified by these verbal assaults is this that the person assailed is thought worthy of public contempt; but on what particular account is not specified. The probable evil which may result is the renewal of similar reproaches. We may fear too, lest a profession of contempt publicly made may invite other men to join in it. It is in fact an invitation which many will be ready to accept. The pride of censure, the pleasure of triumphing at another's expense the spirit of imitation, the inclination to believe all strong assertions, give weight to these sorts of injuries. But they seem to owe their principal importance to the negligence of the laws and to the usage of duling—that subsidiary remedy by which the popular sanction has attempted to supply the silence of the laws." And it seems to be obvious that for the peace and well-being of society, verbal abuse, if it is calculated to bring another into contempt ought to be discouraged.

The distinction between oral and written slander, as it exists in the English law, does not, as I understand it, obtain according to Scotch law, where any thing defamatory, which produces uneasiness of mind, is actionable; and so it is under the Roman Law, according to which a party is not only entitled to sustain an action for contumelious words spoken concerning himself, but also in respect of those spoken of others of his family, if they tend collaterally to subject him to degradation and contempt; [669] (see Starkie's Law of Slander and Libel by Folkard, 4th edition, p. 19).

If a man commits an assault upon another, though he may not actually touch him at all, or if he lifts up his cane or his fist in a threatening manner at another, or strikes him, however slightly, he is liable to an action for damage; and one fails to see what difference in principle exists between a case like this and a case where a man offers another gross insult in the presence of other people—insult calculated to bring him into contempt and to cause him mental torture.

According to the common law in this country, as expounded in the text of the sages, verbal abuses are punishable (see the Sacred Books of the East by Professor Max Muller, vol. 7, p. 27 and vol. 33, p. 207; Mandlik's Byabahara Mayukha, p. 232). And I find that ever since the establishment of the High Court in this province, it has almost invariably been held that verbal abuse, though no actual damage has been caused, is actionable. In the case of *Kanoo Mundle* v. *Rahamoollah Mundle* (1) Norman, C.J., expressed himself as follows: "The words, which are of the coarsest abuse, do undoubtedly impute that to the plaintiff which would, if believed, have been hurtful to the feelings of his family and have lowered his character in respect of his caste, and the uttering of them, therefore, amounts to an offence under s. 499 of the Penal Code. Applying the test familiar to English law, the uttering of the words in question, standing by itself, was a wrong, and therefore gave to the individual aggrieved by it a right of action independently of any proof of special damage or actual pecuniary injury;" and later on he observed: "No doubt actions for slander are often vexatious. But to prevent people from taking the law into their own hands, and for the preservation of peace and order, it

(1) (1864) W. R. Gap. No. 269.

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is a matter of the greatest importance that Courts of Justice should afford an effectual remedy to persons feeling themselves aggrieved by wanton and virulent abuse." The same view was adopted in the case of *Gholam Hossein* v. *Hur Gobind Dass* (1), in *Tukee* v. *Khoshdel* [670] *Biswas* (2), in *Osseemooddeen* v. *Futteh Mahomed* (3); *Gour Chunder Puteedundee* v. *Clay* (4); as also in the case of *Sreenath Mookerjee* v. *Komul Kurmokar* (5), where Mitter, J., in delivering the judgment of the Court, observed as follows: "We think that the Judge is wrong in holding that the abusive words complained of by the plaintiff in this case are not actionable. It is true that the plaintiff might have instituted proceedings against the defendant in the Criminal Court; but his failure to do so does not deprive him of his right to bring a suit in the Civil Court. The case is governed by the ruling of a Division Bench of this Court in the case of *Kali Kumar Mitter* v. *Ramgati Bhattacharjee* (6). The words alleged to have been used were certainly such as to wound the feelings of the plaintiff." And he remanded the case for the purpose of a finding upon the question whether the defendant did use the words imputed to him or not. In the case of *Srikant Roy* v. *Satcoori Shaha* (7), Mitter and Maclean, JJ., took the same view of the matter. I find also that in the case of *Ibin Hossein* v. *Haidar* (8), Field, J., sitting with O' Kinealy, J., took practically the same view of the law; and he observed: "We do not propose to lay down as a general rule that the use of every kind of abusive language is actionable. But we think that language, which, having regard to the definition of defamation in the Indian Penal Code, is calculated to injure the reputation, language which, having regard to the respectability and position of the person abused, is calculated to outrage his feelings, lower the estimation in which he is held by persons of his own class, and so bring him into disrepute, is actionable. We think there is no doubt that the language alleged to have been used in this case comes within this principle:" and in so deciding the learned Judges followed the rulings to which I have adverted. [671] In the case of *Trailokyanath Ghose* v. *Chundra Nath Dutt* (9) Prinsep and Macpherson, JJ., adopted the same view, and followed the case of *Srikant Roy* v. *Satcori Shaha* (7), and the opinion expressed in *Parvathi* v. *Mannar*(10) to which I have already referred. And, lastly, we have a very recent case decided by Banerjee and Wilkins, JJ., (unreported) where the learned Judges, upon the point whether slander is actionable in the absence of special damage, expressed themselves as follows: "Though the rule of English law requires proof of special damage to sustain an action for slander except in certain cases, and though there is some conflict of authority in this country, the later cases are in favour of the view that where the abusive language used is such that, having regard to the respectability and position of the person abused, it is calculated to outrage his feelings or lower the estimation in which he is held by persons of his own class, and so bring him into disrepute, it is actionable without proof of special damage." (*Dina Ram Sarma* v. *Jogeswar Sarma* (11).

In the other provinces also, very nearly the same view of the law has been adopted. In *Kashiram* v. *Bhadu Babuji* (12) Couch, C.J., followed the rulings of the Calcutta High Court, and he held that the case must be decided according to the principles of justice, equity and good conscience;

(1) 1 W. R. 19. (2) 6 W. R. 151. (3) 7 W. R. 259.
(4) 8 W. R. 256. (5) 16 W. R. 83.
(6) 16 W. R. 84, note = 6 B. L. R. Ap. 99. (7) 3 C. L. R. 181.
(8) 12 C. 109. (9) 12 C. 424. (10) 8 M. 175.
(11) 2 C. W. N. cxxiii. (12) 7 Bom. H. C. A. C. 17.

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and he was of opinion that mere verbal abuse without proof of actual damage was actionable. In the case of *Parvathi* v. *Mannar* (1) the learned Chief Justice, among other matters, observed: "It is often impossible to bring specific proof of the damage which a man may suffer in his business or in his friendships from such an injury. The injury may be occasioned before he has any opportunity of rebutting the slander, and the memory of the slander may survive its contradiction, and may at any time influence his [672] neighbours unconsciously to his disadvantage; nor is the suffering trivial which such a wrong may inflict on its victim." It will be observed that although Turner, C.J., in one portion of his judgment, expressed that "mere hasty expressions spoken in anger or vulgar abuse to which no hearer would attribute any set purpose to injure character would of course not be actionable," still he held that "the action should be allowed where the defamation is such as would cause substantial pain and annoyance to the person defamed, though actual proof of damage estimable in money may not be forthcoming," and that "a distinction should be drawn between cases where the slandorer acts from mere carelessness, or in an honest but mistaken belief as to his duty, and cases where the slanderer is insolent without any provocation, or is influenced by a desire to gratify his enmity." In the case of *Abdul Hakim* v. *Tej Chandra Mukarji* (2) Straight, J., held that the law of defamation, which should be applied in suits in India for defamation, is that laid down in the Penal Code, and not the English law of libel and slander, and he observed that "the state of society and the condition of things in the two countries is wholly dissimilar, and to lay it down as an inflexible rule that any false and malicious statements, no matter how defamatory, may be made with impunity if only embodied in a petition filed in reference to some pending case, could not but entail the most mischievous consequences."

In *Dawan Singh* v. *Mahip Singh* (3) where, upon the plaintiff being cited as a witness in a suit, and where after giving his evidence the defendant was examined by the Court and stated that there was enmity between him and the plaintiff, and upon the Court inquiring what the reason of this enmity was, he, the defendant, used words conveying the meaning that plaintiff's descent was illegitimate, it was held by Brodhurst, J., that under the circumstances the statement complained of had been made by defendant while deposing in the witness box, and therefore it was privileged. But Mahmood, J., took a very contrary view, and he discussed at length the law upon the subject, and held that the [673] statement was not privileged. He expressed the opinion that the law as laid down by the Calcutta High Court was correct, and he showed why the distinction which obtains in the English law between verbal and written slander should not be adopted in this country; and he observed as follows (at p. 444 of the report): "The reasons ordinarily employed against this view are that 'abusive, insulting and unmannerly language which affects not a man's liberty or estate are of too indefinite and uncertain a character to be the subject of an action for pecuniary damages. Such injuries, rather affronts to the feelings, are as incapable of definition as they are of admeasurement. They depend upon the rank, situation and condition of the parties, and on circumstances which may be felt but not defined; they may depend on the tone of voice, the gestures, even looks, by which they are accompanied, and in some instances, silence may be more contemptuous

(1) 8 M. 175. (2) 3 A. 815. (3) 10 A. 425.

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and insulting than direct expressions' (Starkie, p. 17). It is submitted that these objections apply equally to almost all personal injuries (such as assault, defamation, false imprisonment, &c.), in which mental suffering is recognized as an element of assessing damages; so much so that there is no fixed rule for estimating damages in such cases, and the matter is usually left to the discretion of the jury with reference to the circumstances of aggravation or mitigation as the case may be. In India such questions would have to be decided by the Judge, and I can anticipate no impossibility in arriving at a fair assessment of damages in cases of personal insult as distinguished from defamation." Later on (at p. 445) he observed: "Unadvanced countries like India present a state of society where personal insult needs more check than in more civilized countries like England." He also said (at page 446): "Another objection, so far as I can gather from the English text books to recognizing personal insult as a distinct tort, is that it would afford far too large a scope for vexatious litigation, and the ordinary intercourse of society would be impeded and fettered by the apprehension of vexatious and harassing suits for trifling causes. The answer to such an argument is, I think, furnished best by the celebrated dictum of Lord Hall in *Ashby* v. *White* (1): 'As in an action for slanderous words, though a man does not **[674]** lose a penny by reason of the speaking them; yet he shall have an action. So, if a man gives another a cuff on the ear, though it cost him nothing, no, not so much as a little diachylon, yet he shall have this action, for it is a personal injury. And it is no objection to say that it will occasion multiplicity of actions; for if men will multiply injuries, actions must be multiplied too, for every man that is injured ought to have his recompense."

Against this large array of cases in support of the plaintiff's contention, some cases have been quoted on the other side. In the case of *Komul Chunder Bose* v. *Nobin Chunder Ghose* (2), where a suit was brought to obtain damages for defamation contained in a letter written and sent by the defendant to plaintiff, and where the only damage alleged was the injury to plaintiff's feelings, it was held that such injury was not in itself a ground for awarding damages in a civil action. No authority is quoted for the decision, and the earlier rulings of this Court do not seem to have been brought to the notice of the learned Judges. In the case of *Phoolbasee Koer* v. *Parjun Singh* (3) it was held that mere verbal abuse without proof of actual damage is not actionable. Here also no authority is quoted and the earlier cases of this Court do not appear to have been considered. In the case of *Chunder Nath Dhur* v. *Isurree Dossee* (4) Kemp and Glover, JJ., held that though mere verbal abuse without consequent injury would give no claim for damages, yet where a person of some position had been assaulted and grossly abused, and where her reputation must have been injured and her feelings outraged, she was entitled to damages. In the case of *Nil Madhub Mookerjee* v. *Dookeeram Khottah*(5) where the question was raised whether an action for slander could be brought jointly against several defendants, it was held by Pontifex, J., that it could not be so brought, because each person sued for verbal slander was responsible only for what he himself had uttered. And leave was granted to the plaintiff **[675]** to elect any one of the defendants to sue. The learned Judge, however, seems to have then expressed a doubt whether the words

(1) 1 Smith L. C. (10th Ed.) 231 (268). (2) 10 W. R. 184.
(3) 12 W. R. 369. (4) 18 W. R. 531. (5) 15 B. L. R. 161.

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complained of were libellous *per se*; and it was thrown out that unless special damage was proved the Court would be very much reluctant to give any damage. I take it that the question which arises in this case was not really decided then. In the case of *Mahomed Ismail Khan* v. *Mahomed Tahir* (1) where an action was brought for damages for defamation contained in two letters written and sent by the defendant to the plaintiffs, but where no other publication was alleged and no other injury than the injury to the feelings was caused, Turner, J., followed the decision in the case of *Komul Chunder Bose* v. *Nobin Chunder Ghose*(2), and held that the suit was not maintainable. The earlier rulings of the Calcutta High Court do not seem to have been then brought to the learned Judge's notice, and I take it that he considerably modified his opinion when as Chief Justice of the Madras High Court he decided the case of *Parvathi* v. *Mannar* (3).

I have now referred to all the Indian authorities upon the subject that have been brought to our notice, and I have also referred to what is the common law in this country as expounded by sages; and it seems to me that the balance of authority is decidedly in favour of the proposition that the action does lie.

It may no doubt be said, as it has been said, that it is very difficult to measure the damage caused to a person's feelings by reason of insult offered to him, and that if the view I have expressed be adopted, it would lead to the logical result that an action may be brought for damage if a person defames another's nearest relations in his presence, causing thereby mental pain.

As regards the first mentioned matter, all that I desire to say is that the question of the amount of damage is always left to the judge of facts, and he has to consider with **[676]** reference to all the circumstances, under which the insult was offered, and the character thereof, whether any and what damages should be awarded.

The Indian Penal Code in s. 95 lays down "that nothing is an offence by reason that it causes, or that it is intended to cause, or that it is known to be likely to cause any harm, if that harm is so slight that no person of ordinary sense and temper would complain of such harm." This rule of law may, I think, well be adopted by the Civil Courts in determining suits for damages by reason of an insult offered. I do not myself apprehend that a judge of facts would be under any real difficulty in assessing damage in any given case. Indeed no such difficulty is said to have been experienced in any of the various cases that I have referred to.

As regards the other matter, it seems to me that in such a given case, an injury would be rather indirect or remote; and for my own part I should hesitate to hold that an action would lie for such an injury, though I find that according to the Roman law an action does lie, and so perhaps according to the Scotch Law, as expounded in the case of *Mackenzie* v. *Read* (4); for there, if there is any thing that produces uneasiness of mind, it is actionable. But it is not necessary to express any decisive opinion upon the point in this case, and I should prefer to confine myself to the facts of the case before us. I am bound, however, at the same time to say, having regard to the fact that other systems of law allow actions for verbal abuse, without any proof of special damage, that the contention raised on behalf of the plaintiff in this respect cannot be said to be unreasonable.

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(1) 6 N. W. P. H. C. 38.
(2) 10 W. R. 184.
(3) 8 M. 175.
(4) 2 Murray's Rep. 149.

As a consideration of public policy, it has been pointed out that s. 504 of the Indian Penal Code provides sufficient remedy for conduct such as the defendant's, and that it is not desirable that a party should have, in addition thereto, a remedy in the Civil Court. The Penal Code, however, affords a remedy to a person only where the slanderer intends or knows it to be likely that the insult offered will cause him to break the peace, or commit any other offence. But this does not cover other cases [677] of the kind that may arise, and where the slanderer without any justifiable cause grossly vilifies another. I may add that where the person abused is known to the slanderer to be a person of meek and quiet disposition—one who would not under any circumstance break the peace—he would be left without any remedy, because in that case the wrong-doer could not be punished under s. 504 of the Penal Code. And yet this would be a case which stands most in need of remedy. A case like this, as it seems to me, should be decided according to the principle of justice, equity and good conscience (See s. 37, Act XII of 1887). And, having this principle in view, I am of opinion that it is but just and right that a person thus vilified should be entitled to maintain an action.

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I would answer the question referred to the Full Bench in the affirmative.

S. C. G. *Appeal dismissed.*

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Before Mr. Justice Banerjee, Mr. Justice Hill and Mr. Justice Rampini.

NITAYI BEHARI SAHA PARAMANICK AND OTHERS (*Plaintiffs*) *v.* HARI GOVINDA SAHA AND OTHERS (*Defendants*).*
[17th March, 1899.]

Sale for arrears of rent—Sale of right, title and interest, of a registered tenant—Effect of sale of a tenure in execution of a decree for arrears of rent obtained by a co-sharer landlord against the registered tenant alone.

In a suit brought by the plaintiffs to set aside the sale of a *shikmi taluk*, or in the alternative for a declaration that the sale did not affect their rights, on the allegation that defendants Nos. 3 and 4 who were the proprietors of a certain share of the estate under which the said *taluk* was held, having obtained a collusive decree for arrears of rent for the years 1298 and 1299 (B. S.) against defendant No. 1 who was a joint owner of the *taluk* with the plaintiffs, in execution thereof fraudulently caused the disputed property to be sold, and defendant No. 1 purchased it in the *benami* of [678] defendant No. 2. the defence (*inter alia*) was that the sale was not brought about by fraud or collusion, and that the rent suit having been brought against the registered tenant defendant No. 1, the whole tenure passed by the sale.

Held, by BANERJEE and HILL, JJ. (RAMPINI, J., dissenting) that inasmuch as it appeared that the share sold away stood in the name of defendant No. 1 alone; that the zemindar used to sue defendant No. 1 for rent for the said share; that the defendant No. 1 used to realize a rateable share of costs, road cesses, &c., which he was bound to pay under rent decrees obtained against him, from the plaintiffs sometimes amicably and generally by contribution suits; and that the defendants Nos. 3 and 4 who were the fractional shareholders of the zemindari sued the defendant No. 1 as usual for rent for the years 1298 and 1299 B.S., and

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* Appeal from Appellate Decree No. 1587 of 1897, against the decree of Babu Amrita Lal Pal, Additional Subordinate Judge of Dacca, dated the 7th of August 1897, reversing the decree of Babu Sarat Chunder Ghose, Munsif at Manickgunge, in that District, dated the 27th of June 1896.

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obtained a decree, the sale though in terms only a sale of the right, title, and interest of the judgment-debtor, really passed the right, title and interest, not only of the registered tenant, but also of the unregistered co-owners whom he represented.

Jeo Lal Singh v. *Gunga Pershad* (1) followed.

[F., 25 A. 57=22 A W.N. 190; 2 N.L.R. 101 (104); R., 29 C. 813 (819); 37 C. 75 (77)=13 C.W.N. 1110=2 Ind.Cas. 695; 16 C.L J. 271=17 Ind. Cas. 227 (231); 16 C.P L R. 19 (2?); 18 Ind. Cas. 632 (633)=24 M.L J. 228=13 M.L.T. 95=(1913) M.W N. 93; 20 C.L.J. 196=18 C.W.N. 1308=24 Ind. Cas. 259; D., 27 C. 545 (550); 1 C.L.J. 500; 4 C.L.J. 68=10 C.W.N. 176; 6 C.W.N. 302; 9 C.W.N. 843 (844); 9 C.L.J. 479=13 C.W.N. 746=1 Ind. Cas. 539.]

THE facts of the case are shortly these: The plaintiffs and the defendant No. 1 were joint owners of a certain share of a *shikmi taluk*. This share stood in the name of defendant No. 1 alone in the zemindar's *sheristha*. Rent for the years 1298-1299 B. S., having fallen in to arrears from defendant No. 1 on account of the share standing in his name, defendants Nos. 3 and 4, two of the landlords, instituted a suit for rent against him, making the other co-sharer landlords *pro forma* defendants, and obtained a decree. The plaintiffs' allegation was that defendants Nos. 3 and 4 in collusion with defendant No. 1 got this decree, executed it, and in execution thereof fraudulently, without getting the sale proclamation properly served, had the said *taluk* sold, and defendant No. 1 purchased it at an inadequate price in the *benami* of his servant defendant No. 2. They further alleged that they knew nothing about the decree, attachment, sale proclamation, sale, or taking possession of the disputed property by defendant No. 2 till October 1895. They, therefore, prayed that the said sale be set aside, or in case the sale could not upon evidence be legally set aside, for a declaration that their right and possession were not affected and injured in any way, and they also prayed for confirmation of possession.

[679] Defendant No. 2, the auction-purchaser, who alone appeared, pleaded (*inter alia*) that the sale was not brought about by fraud or collusion; that he was a *bona fide* purchaser and not a *benamidar* for defendant No. 1; that he having purchased the property at a sale in execution of a decree for arrears of rent his title was complete; that the whole property standing in the name of defendant No. 1 alone having been sold the plaintiffs had no cause of action; and that the plaintiffs, having neglected to register their names in the *sheristha* of the zemindar, and having waived their rights to be parties in all suits for rent for the share standing in the name of defendant No. 1, could not now set up their title against a *bona fide* purchaser.

The Court of first instance decreed the plaintiffs' suit holding that defendant No. 2 was a *benamidar* for defendant No. 1, and that the sale in execution of the decree passed only the right, title, and interest of the judgment-debtor defendant No. 1.

On appeal the lower appellate Court reversed the decision of the first Court, and dismissed the suit.

Against this decision the plaintiffs appealed to the High Court.

Dr. Rash Behari Ghose, and Babu *Saroda Churn Mitter*, for the appellants.

Babu *Srinath Das*, Babu *Dwarka Nath Chuckerbutty*, and Babu *Taruck Nath Chakrabarti*, for the respondents.

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The High Court (HILL and RAMPINI, JJ.) delivered the following

JUDGMENTS.

HILL, J.—The question raised by this appeal is one of some importance. It is not, so far as I am aware, met precisely by any direct authority, but its solution depends, as it appears to me, on the application of principles which have been recognized in analogous cases.

The facts are sufficiently simple. The plaintiffs and the first defendant are co-tenants of a 2 annas 13 gundas 1 cowri 1 krant share in a certain *shikmi taluk*, the name of the first defendant alone being registered in respect of the share in the zemindar's *sheristha*. The other shareholders in the *taluk* have opened separate accounts with the zemindar. The third and fourth defendants, who [680] are fractional shareholders in the zemindari, sued the first defendant alone for the entire rent due in respect of the 2 annas 13 gundas 1 cowri 1 krant share of the *taluk* for the years 1298 and 1299, and obtained a decree in execution of which the share in question was brought to sale and purchased by the second defendant on the 11th December 1894. The plaintiffs now sued to set aside this sale, alleging fraud and collusion between the first defendant and the third and fourth defendants, and contending further that all that could, according to law, pass to the purchaser by the sale of the 11th December was the interest in the *taluk* of the first defendant, on which footing they also ask for relief. It is only with the latter contention that we are now concerned, the former having been negatived by the findings of the Courts below, and the sole question for our determination is whether the plaintiffs are entitled to the extent of their own interest in the *taluk* to have the sale in execution set aside.

The suit was dismissed by the lower appellate Court, the learned Subordinate Judge being of opinion that the case fell within the principles laid down by this Court in *Jeo Lal Singh* v. *Gunga Pershad* (1). He quotes with approval from the judgment of the Munsif the following passage: "The defendant has proved, and it is to a certain extent admitted by the plaintiffs, that the share sold away (*i.e.*, 2 annas 13 gundas 1 cowri 1 krant share) stood in the name of the defendant No. 1 alone; that the zemindar used to sue defendant No. 1, for rent for the share; that the defendant No. 1 used to realize a rateable share of costs, rent, cesses, etc., which he was bound to pay under the rent decree from the plaintiffs sometimes amicably and generally by contribution suits; and that such was the state of affairs for many years." He further finds specifically that it is proved that "the said *taluk* (comprising the 2 annas 13 gundas 1 cowri 1 krant share) was sold and purchased by the defendant No. 2." Under those circumstances, and in view of the consideration that the third and fourth defendants had sued the first defendant as representing the ownership of the whole tenure, he considered that the sale ought to operate as a sale of the plaintiffs' interest as well as of those of the first defendant and he accordingly dismissed the suit.

[681] It may be added that there was no question before us, or, indeed, throughout the suit, but that the plaintiffs were jointly interested with the first defendant in the *taluk*, and liable equally with him in respect of the rent. Further, it was admitted that the proceedings in execution under which the second defendant purchased were bad under

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the provisions of the Code of Civil Procedure. But I may point out with advertence to a consideration to which some weight appears to have been given by Garth, C.J., in the case of *Jeo Lal Singh* v. *Gunga Pershad* (1) that the third and fourth defendants being merely fractional shareholders in the zemindari had no option but to proceed with the execution of their decree under that Code. I may say also that after a careful examination of the documents bearing upon the sale of the tenure, I think the Subordinate Judge was right in holding that what was sold was the entirety of 2 annas 13 gundas 1 cowri 1 krant share in the *taluk*. I do not think it necessary in order to support this view to refer now to these documents in detail, more particularly as the finding of the Subordinate Judge on the point was not, as I understood, contested before us. The appellants contented themselves here with the assertion of the principles that a person, who is not a party to a suit, cannot be affected in person or property by anything that is done in the suit, and that a sale in execution of a decree held under the provisions of the Code of Civil Procedure cannot pass anything beyond the right and interest of the judgment-debtor in the property sold. These they relied upon as general and indisputable propositions which needed no authority in support of them; and they also placed reliance in particular upon the cases of *Kristo Chunder Ghose* v. *Rajkristo Bandyopadhya* (2), and *Beni Madhub Roy* v. *Jaod Ali Sircar* (3), as well as on certain remarks made by the learned Judges who decided the case of *Radha Pershad Singh* v. *Ram Khelawan Singh* (4).

The first of these cases, however, does not appear to me [682] to help the appellants or to be in point. What happened there was, that one of two shareholders in a zemindari brought a suit for rent against the person recorded as tenure-holder. He obtained a decree, and under the provisions of the Code of Civil Procedure the interest of the judgment-debtor in the tenure was brought to sale. Prior to the institution of the suit, however, the tenure-holder had transferred the tenure to certain persons from whom it devolved upon the plaintiffs. The plaintiffs had frequently sought to compel the landlords to register their names as transferees of the tenure, but without success, and it was decided under these circumstances, *firstly*, that the plaintiffs might, notwithstanding the non-registration of their names, make a good title to the tenure under the transfer; and *secondly* that, if in point of fact, the decree under which the sale in execution took place had been obtained by a person who was interested in the zemindari only to the extent of 8 annas, the sale would pass only the rights and interests of the judgment-debtor. That was, it seems to me, a wholly different case from the present. There, if the plaintiffs' case were true, the rights and interests of the judgment-debtor at the time when the sale took place were *nil*, while the plaintiffs were, to the knowledge of the landlord when he brought the suit (for that must be taken to be so), exclusively entitled to the tenure. There was no question of representation in the case, or of any of the equities upon which the decision of the lower appellate Court has proceeded in the present case.

Then, the case of *Beni Madhub Roy* v. *Jaod Ali Sircar* (3) merely affirms the principle which is not disputed, that an attachment of a tenure or holding in execution of a decree obtained by a fractional co-sharer for arrears of rent of his separate share is not such an attachment as is

(1) 10 C. 996. (2) 12 C. 24. (3) 17 C. 390. (4) 23 C. 302.

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contemplated by s. 170 of the Bengal Tenancy Act; and it seems to me to be unnecessary to say anything more about it.

Lastly, there is the case of *Radha Pershad Singh* v. *Ram Khelawan Singh* (1), which, however, I venture to think, is quite as helpful to the case of the respondents as it is to that of [683] the appellants. Briefly stated, the facts there were that the Maharajah of Dumraon granted a *ticca* lease to two persons, Nowrong and Ramanund, of a certain village. These two persons belonged to different families, but Ramanund was a member of a family consisting of several persons. The Maharaja obtained a decree for rent against Nowrong and Ramanund alone, and in execution of his decree he attached certain properties (other than those affected by the lease) which belonged to Ramanund and the other members of his family. Upon this a claim was preferred by the other members of Ramanund's family to the property attached, on the ground that they were separate in estate from Ramanund, and that they were in separate possession of the attached property according to their respective shares. The claim was allowed; and then a suit was brought by the decree-holder to have it declared that the other members of Ramanund's family were joint with him and participated in the benefits of the leasehold property; that they were, therefore, liable to pay the amount covered by the decree for rent; and that the properties which had been attached were consequently liable to be sold in execution of that decree. The first question to which the learned Judges addressed themselves was whether such a suit would lie. That question they answered in the affirmative. They then went on to consider whether the plaintiff was entitled to succeed on the merits and held that he was not. When introducing the discussion of the latter branch of the case it is observed by Ghose, J.: "The success of the plaintiff's suit depends upon proof that the defendants were members of a joint undivided family with Ramanund, and that the decree was obtained against Ramanund in his representative capacity." The finding of the learned Judge on one of the questions thus proposed, as well as his discussion of the evidence, have unfortunately been left out of the report; but he sums up in these terms: "Upon all these grounds I am unable to say that the decree obtained by the Maharaja against Ramanund was in the latter's representative character, and that for satisfaction of that decree the property of the other defendants is liable to be sold." Prinsep, J., was, moreover, of opinion that the Subordinate Judge had rightly characterized the evidence brought [684] to show the existence of a joint Hindu family as "vague, conflicting and unsatisfactory." The remarks of Mr. Justice Ghose have, however, been seized upon by the appellants as indicating that it is only in the case of members of a joint undivided Hindu family that the doctrine of representation can come in. But I venture to think that they cannot have been intended to convey such a meaning. The suit was based wholly on the assertion of the principle that, in consequence of the fact of Ramanund and the other members of his family constituting a joint undivided family, they, as well as he, were interested in and took the benefits of the lease which stood in his name, and were represented by him, and the only questions, therefore, which arose for decision were whether, in point of fact, the family was joint and was represented by Ramanund. It was only in so far as it bore on the case set up by the plaintiff that it was necessary to lay down the law, and the remarks of the

(1) 23 C. 302.

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learned Judge must be taken and understood in relation to the facts of the case then before him. It would have been going far beyond the scope of the case to pronounce any opinion upon the general question whether the doctrines of representation are inapplicable in the case of persons who are not members of a joint Hindu family. The judgment of Prinsep, J., to which also reference was made, appears to me to carry the matter no further than that of Ghose, J. The case, however, appears to me to be of importance as recognizing the principle which, indeed, had often been recognized before, that a decree-holder may sue to have it declared that the interests of third persons may be made liable for the satisfaction of a decree made in a suit to which they were not parties, although the decree was one in execution of which ordinarily the rights and interests of the judgment debtor alone could be disposed of; and I think that, if such a suit will lie at the instance of a decree-holder, it must be open to the defendant in a suit brought, as in the present case, to impugn a sale in execution, to avail himself in defending the sale, of grounds similar to those upon which a decree-holder might rely in the converse case. Indeed, it was laid down by the Privy Council in *Nanomi Babuasin* v. *Modhun Mohun* (1) that a purchaser [685] at a sale in execution, if he has bought the entirety, may defend his title on any ground which would have justified the sale. That case was no doubt in its facts somewhat different from the present, but the principle is, I think, equally applicable here.

I now pass to the case made by the respondents. It is no part of their case, I may observe, to controvert either of the rules, regarding them as general propositions, upon which, as I have said, the appellants rely; and their case is, in effect, that the appellants were in fact co-sharers with the first defendant in the tenure and were only, as such, interested in the share of the *taluk* which was sold; that they were equally liable with the first defendant for the rent in respect of which the sale took place; that the first defendant, being the only registered tenant, represented the other co-sharers in the tenure; that the landlord was entitled to look to him alone as tenant; that the share of the *taluk* was sold in respect of the entirety of the rent; and that what was sold was the entirety of the share. And they contend that it would be unjust and inequitable, under these circumstances, to allow the sale now to be set aside at the instance of the appellants.

I think that this contention ought to prevail. The cases shew clearly that the fact that a sale in execution has been had under the provisions of the Code of Civil Procedure is not in itself conclusive of the question whether the interests of persons other than the judgment-debtor have passed under the sale. It is sufficient to mention the cases of *Radha Pershad Singh* v. *Ram Khelawan Singh* (2) and *Jeo Lal Singh* v. *Gunga Pershad* (3) to both of which reference has already been made, and the case of *Jotendro Mohun Tagore* v. *Jogul Kishore* (4), for the purpose of showing this. In the last mentioned case it is said at p. 364 of the report: "It has been held over and over again, not only in this Court, but by the Privy Council, that the words 'right, title and interest' of the execution-debtor must not be construed strictly, [686] but with reference to the circumstances under which the suit is brought, and the true meaning of the decree under which the sale takes place. And this was the more necessary in the case of sales which took place under the old Civil Procedure Code, because by

(1) 13 C. 21=13 I.A. 1. (2) 23 C. 302. (3) 10 C. 996. (4) 7 C. 357.

s. 249 of that Code the proclamation in every case was for the sale only of the interests of the execution debtor. And as a matter of form and practice all sales under that Act were of the right, title and interest of the execution-debtor. It is, therefore, the duty of the Court in each case to ascertain carefully what was intended to be sold," and this I think embodies the rule by which I ought to be guided in the present case.

The case of *Jeo Lal Singh* v. *Gunga Pershad* (1) was strongly relied upon by the respondents in support of their case generally; and unless it is distinguishable on the ground urged by the appellant it certainly appears to me to be conclusive in their favour. It was a case in which a fractional sharer in a zemindari estate brought a suit against one Gupta Lal, the sole registered tenure-holder, for rent due in respect of the tenure. It appeared that Gupta Lal had two brothers who, along with him, constituted a joint family, and that Gupta Lal being the eldest brother was the manager of the joint property. The tenure was ancestral. The landlord having obtained a decree brought to sale the rights and interests of Gupta Lal in the tenure, and the purchaser having taken possession of the whole tenure, the brothers of Gupta Lal sued to recover their shares on the ground that nothing passed by the sale beyond Gupta Lal's interest. In delivering the judgment of the Court Garth, C.J., after discussing and distinguishing the cases of *Doolar Chand Sahoo* v. *Lalla Chabeel Chand* (2) and *Bissessur Lall Sahoo* v. *Luchmessur Singh* (3) deduced from them these two general propositions: (1) "When it is clear from the proceedings that what is sold, and intended to be sold, is the interest of the judgment-debtor only, the sale must be confined to that interest, although the decree-holder might have sold the whole tenure if he had taken proper steps [687] to do so, or although the purchasers may have obtained possession of the whole tenure under the sale; (2) but if, on the other hand, it appears that the judgment-debtor has been sued *as representing the ownership of the whole tenure*, and that the sale, though purporting to be of the right and interest of the judgment-debtor only, was intended to be, and in justice and equity ought to operate as, a sale of the tenure, the whole tenure then must be considered as having passed by the sale, and if the question is a doubtful one on the face of the proceedings, or one part of these proceedings may appear inconsistent with another, the Court must look to the substance of the matter and not to the form or language of the proceedings." The latter branch of this proposition, it may be mentioned, is founded on a passage in the judgment of the Privy Council in the case of *Bissessur Lall Sahoo* v. *Luchmessur Singh* (3), where it is said "in execution proceedings the Court will look at the substance of the transaction and will not be disposed to set aside an execution on mere technical grounds when they find that it is substantially right." Having laid down these two propositions the learned Chief Justice then proceeds to apply the law to the case before him. He remarks that Gupta Lal was not only the manager but also the sole registered owner of the tenure, and that the fractional sharer in the zemindari took the ordinary and proper course of suing the tenant who in the zemindar's *sheristha* represented the entire tenure. The judgment then proceeds: "Moreover, when she had obtained her decree, she was unable, as she only owned a share in the zemindari interest, to sell the whole tenure under s. 59. She could only obtain her execution in the way she proceeded to enforce it, namely, by selling the

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(1) 10 C. 996. (2) 6 I.A. 47. (3) 6 I.A. 233.

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right and interest of the judgment-debtor under s. 64. But as between her and the persons interested in the tenure she had a right to treat Gupta Lal as the sole owner of the tenure, and when she sold his right and interest for the rent due she was in our opinion selling the tenure itself. As his name was registered as the sole owner of the tenure he represented his brothers' interests in it as well as his own. The rent was due [688] from them all, though he alone was sued for it, and as they were equitably liable to pay the amount of the decree it was only just that their interest as well as his should be sold to satisfy it."

Now with the one exception, that the first defendant in the present case was not the manager of a joint Hindu family, it appears to me that it is incapable of being distinguished from the case before Garth, C.J. But it is said that that fact in itself involves a vital distinction. I confess I am unable, on a very careful consideration of Sir Richard Garth's judgment, to discover that he laid any particular stress upon that consideration. It is certainly not referred to in the second of the two general propositions quoted above—the particular proposition which he thought applicable to the case before him; and it is only referred to once in the latter part of the judgment where, so far as I am able to perceive, it occupies a very subordinate place. What the learned Chief Justice does appear to me to insist upon are the considerations that Gupta Lal was properly sued as the registered tenant; that the person who sued him was incapable of obtaining relief otherwise than by selling the right and interest of Gupta Lal; that she was entitled as between herself and the persons interested in the tenure to treat Gupta Lal as the sole owner of the tenure; that by virtue of his being the sole registered owner he represented the interests of his brothers; and that as the latter were equitably liable to pay the amount of the decree it was only just that their interests as well as those of Gupta Lal should be sold to satisfy it. All these considerations are directly applicable to the state of things existing in the case now before us, and are in my opinion sufficient to dispose of it.

Is there, however, the vital distinction contended for between the case of the members of a joint Hindu family who have put forward or allowed one of their members to represent them, and that of a group of joint tenants who not being so connected have done the same? Without entering upon the question of the position and authority of the manager of a joint Hindu family, it would seem that the ultimate ground upon which the property of the remaining co-sharers may be made available for [689] the satisfaction of a decree obtained against him alone is simply their liability for the debt upon which the decree is founded, and that liability arises in the case of a lease from the fact that they as well as the manager are interested in and take the benefit of the lease. Garth, C. J., in the case of *Jeo Lal Singh* v. *Gunga Pershad* held that the fact of the eldest brother alone being registered as tenant was sufficient to establish his representative character, there being in that case no question of the interest of the remaining brothers in the tenure, which was ancestral. In *Radha Pershad Singh* v. *Ram Khelawan Singh*, Ghose, J., held that it lay on the plaintiff only to show that the defendants were members of a joint undivided family with Ramanund, for the purpose presumably of establishing the necessary community of interest; and that Ramanund was sued in his representative capacity. Given, in other words, the community of interest and the

necessary representation, and that is all that is required. These principles do not appear to me to be peculiar to the Hindu law or to be restricted in their application to cases in which one has to do with a joint undivided Hindu family. It seems to me that any group of persons might by their action place themselves in such a situation as to bring themselves within the sphere of their application. Thus in *Nobin Chandra Roy* v. *Magantara Dassya* (1) for example, Garth, C.J., said: "It is clear that if two out of three partners are sued for a debt due from the partnership and a decree is obtained against those two and execution issues against the partnership property, if the third partner should apply successfully in the execution proceedings to have his share in the property released, the plaintiff's only remedy would be a regular suit, not for the purpose of making the third partner personally liable for the debts, but for the *purpose of making the share of the third partner available to satisfy the decree.*" This was said not with advertence to any doctrine peculiar to Hindu law, but, as I understand it, generally; and if a decree-holder may in such a case show that the property of the third partner is available for the satisfaction of the decree then, on the principle to which I have referred in an earlier part of my judgment, when [690] the sale has actually taken place, the purchaser at an execution sale, if he be sued by the third partner, may defend his title on similar grounds.

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As to the equities, I am unable to perceive any material distinction between the case of persons subject to the Hindu law and of those who are not; or why if the property of a Hindu may be made available under the circumstances now in contemplation that of other persons should be exempt. Now in the present case the liability of the plaintiffs for the rent of the share of the tenure in question, as a consequence of their community of interest in it with the first defendant, is not disputed, and the learned Subordinate Judge has found for the same reason as that upon which Garth, C.J., proceeded in *Jeo Lal Singh* v. *Gunga Pershad* that the appellants were represented as between them and the landlord by the first defendant. In this I certainly consider that he was right. He has not, it is true, found in specific terms that the first defendant was sued in a representative capacity. But I take it he intended so to find, and looking at the substance of the matter I myself entertain no doubt on the question. The first defendant was to the landlord the sole representative of the tenure, and as such was sued in respect of the entire rent; and it is found as a fact that on previous occasions "the zemindars used to sue defendant No. 1 for rent for the share," and that he was in the habit of afterwards realizing their proportion of what he was compelled to pay from the plaintiffs, sometimes amicably, but generally by means of contribution suits—a state of things which had gone on for many years." In no case does it appear that the plaintiffs disputed, at all events successfully, their liability along with the first defendant for the sums recovered as against him alone as the person representing the tenure; and it is only now, when the sale of the tenure has been brought about, that they seek to repudiate him as their representative. It certainly appears to me that there are ample grounds here for holding that the first defendant was treated by his co-sharers as their representative, and that he was sued in that character, and it appears to me that one of the primary objects which the rules in relation to the registration of tenants is intended to subserve, which is, I think, to protect landlords from difficulties of the kind [691] raised by the

(1) 10 C. 924.

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plaintiffs in this suit, would be defeated if it were to be held otherwise. In the case of *Bissessur Lall Sahco* v. *Luchmessur Singh* (1), the Privy Council "assumed" the representative character of the defendant, although there was nothing to show that he was the "manager" of the family which he was held to represent,—at least no reference is made by the Privy Council to that consideration; and it was in that case that their Lordships laid down the principle to which I have already referred that "in execution proceedings the Court will look at the substance of the transaction and will not be disposed to set aside an execution upon merely technical grounds when they find that it is substantially right."

Having regard to all the facts and circumstances of the case, I think it would be inequitable and would work manifest injustice if we were now to set aside the sale in question at the suit of persons who admittedly were liable for the rent decreed against the first defendant, and who, as it appears to me, were duly represented as between themselves and their landlord by the first defendant, not only *qua* the lease, but also in all the proceedings taken by the landlord to secure the recovery of the rent—persons, moreover, who make no offer, but take their stand simply on what they assert to be their legal right.

The further question was raised whether the Subordinate Judge was right in his finding that the purchase by the second defendant was not *benami* for the first defendant. But I see no reason for differing from the learned Subordinate Judge on this point. I have not thought it necessary, I may add, to say anything specifically as regards the position of the second defendant as a *bona fide* purchaser without notice, as the case was placed before us simply on the grounds indicated above.

I would dismiss the appeal; but as my brother Rampini differs from me in this respect, the case must be submitted to the Chief Justice in order that he may appoint a Judge to decide it. Our difference of opinion, as I understand, relates to the effect to be given to the documents of sale—a matter which, for [692] reasons that I have already indicated, I do not, however, regard as conclusive of the case, and to the representation of the plaintiff by the first defendant.

Let the case be laid before the Chief Justice for orders.

RAMPINI, J.—In this suit the plaintiffs sue to have the sale of a certain *shikmi taluk*, in which they have a share, set aside so far as they are concerned, and to have it declared that the sale in question did not affect their interests in the *taluk*. The plaintiffs and the defendant No. 1 are admittedly the owners of this *shikmi taluk*. It was sold on the 11th December 1894 in execution of a decree for rent obtained by the defendants Nos. 3 and 4, who are fractional shareholders of the zemindari, against the defendant No. 1. The *taluk* was purchased at the sale by the defendant No. 2, who contends that he purchased the whole *taluk*, and that the right of the plaintiffs as well as of the defendant No. 1 passed to him at this sale. The Subordinate Judge found against the plaintiffs and dismissed their suit. They now appeal and contend on various grounds that his judgment is wrong.

It is sufficient, I think, for the purposes of this appeal to confine our attention to the question whether the right of the plaintiffs can be regarded as having passed at the sale held in execution of a decree given in a suit to which they were no parties, and in my opinion this question must be answered in the negative. The Subordinate Judge admits that the sale

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(1) 6 I. A. 233.

having taken place in execution of a decree obtained by fractional shareholders in the zemindari cannot be regarded as a sale under the provisions of the Bengal Tenancy Act. It must have been, he admits, a sale held under the provisions of the Civil Procedure Code. This is also conceded by the learned pleader for the respondents in this case. The learned Subordinate Judge, however, considers on the authority of the case of *Jeo Lal Singh* v. *Gunga Pershad* (1) that the defendant No. 1, who was the only tenant of the *shikmi taluk* recognized by the landlord, must be held to have represented the plaintiffs to the [693] zemindar, and that being so, that their rights may be considered to have been affected by the decree in the suit against the defendant No. 1, and the sale held in execution of the decree. The learned pleader for the respondents adopts the same line of argument, and in support of the view taken by the lower appellate Court, the following cases have been cited, *viz.*, *Jotendro Mohun Tagore* v. *Jogul Kishore* (2), *Daulat Ram* v. *Mehr Chand* (3), *Hari Saran Moitra* v. *Bhubaniswari Debi* (4), *Radha Pershad Singh* v. *Ram Khelawan Singh* (5), and *Hari Vithal* v. *Jairam Vithal* (6). In all these cases, however, the registered tenant or person held to represent the unregistered tenants or others were held to represent the others under some doctrine of Hindu law. Thus, in the case of *Jeo Lal Singh* v. *Gunga Pershad* (1) the joint holders of the tenure were all members of a joint Hindu family, governed by the Mitakshara law, and the registered tenant, who was held to represent the others, was the managing member of the family. This was pointed out by Ghose, J., in the case of *Radha Pershad Singh* v. *Ram Khelawan Singh* (5) at p. 317 of the report. In that case, *i.e.*, *Radha Pershad Singh* v. *Ram Khelawan Singh*, the persons interested in the lease were also members of a joint Hindu family governed by the Mitakshara law, but as it was held that the ostensible lessee was not sued in his representative capacity, the other persons interested in the lease were not found to be bound by the sale which took place in execution of the decree obtained against him. The facts of *Daulat Ram* v. *Mehr Chand* (3) are similar. In the cases of *Jotendro Mohun Tagore* v. *Jogul Kishore* (2), and *Hari Saran Moitra* v. *Bhubaneswari Debi* (4), the defendant was a Hindu widow, who was on this ground held to represent the others interested in the property.

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But these cases seem to me to be no authority for holding that [694] the plaintiffs in this case are bound by the sale held in execution of the decree obtained against the defendant No. 1 for (1) it does not appear that the plaintiffs and the defendant No. 1 are members of a joint Hindu family: (2) they are not said to be governed by the Mitakshara law; (3) there is nothing to lead to the conclusion that the defendant No. 1 was sued as representing them; and (4) it does not appear that what was sold was the *shikmi taluk*. On the contrary, from the proclamation of sale (Ex. C) the sale certificate (Ex. D), and the order confirming the sale (Ex. 15), it is clear, I consider, that the sale which took place under s. 316 of the Code of Civil Procedure purported to convey only the right, title and interest of the judgment-debtor, defendant No. 1 in the *shikmi taluk*. A consideration of these documents in detail seems to me to put this matter beyond a doubt. The first of them, the proclamation of sale (Ex. C) issued under s. 287 of the Code of Civil Procedure proclaims that "*the*

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(1) 10 C. 996. (2) 7 C. 357. (3) 15 C. 70 = 14 I. A. 187.
(4) 16 C. 40 = 15 I. A. 195. (5) 23 C. 302. (6) 14 B. 597.

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property of the aforesaid judgment-debtor" (*i.e.*, defendant No. 1) "as mentioned in the following schedule shall be sold." The sale certificate (Ex. D.) declares that what was sold was "*the judgment-debtor's right* to the 2 annas 13 gandas 1 cowri 1 krant share in the said *taluk*." The order confirming the sale (Ex 15), commences with the preamble that "whereas the following *title, ownership and interest* were on the 11th day of December 1894 sold by the Nazir," and concludes by certifying that "the sale-proceeds of the *judgment-debtor's right* to the 2 annas 13 gandas 1 cowri 1 krant share in the *taluk* amounted to Rs. 160."

Further, both the lower Courts have, I think, found as a fact that what was sold was the right, title and interest of the judgment-debtor, defendant No. 1. Thus, the Munsif at p. 11 of the paper book says: "It appears moreover, from Ex. C, Ex. D, Ex. 12, and Ex. 15, that the interest only of defendant No. 1 in the property purchased in the name of the defendant No. 2 was sold at the execution of the rent decree. Consequently, on that ground also the sale does not and did not affect the right and interest of the plaintiffs in the property sold and purchased in the name of the defendant No. 2 by defendant No. 1." The Subordinate Judge does not displace [695] this finding of fact of the Munsif. On the contrary, he seems to accept it, for at p. 16 he says: "It was contended that in the sale notification, the right, title and interest of the judgment-debtor was advertized for sale. But that does not confine the property to be sold to the interest of the defendant No. 1 alone. *By right, title and interest of the judgment-debtor it means* the right, title and interest of all the co-sharers of the *taluk*, *i.e.*, plaintiffs and defendant No. 1, the former being as much judgment-debtors of the decree as the latter who had been sued as representing all the holders of the *shikmi taluk*." I cannot, however, agree to the interpretation put by the Subordinate Judge on the terms of the proclamation of sale, there being nothing, as already said, on the record, as far as I can see, to show why the defendant No. 1 should or could represent the plaintiffs in the rent suit, or that he did do so, and therefore I can see no reason why the plaintiffs' property should be held to have passed at the sale of the right, title and interest of the judgment-debtor, defendant No. 1 in the *taluk*—a sale held in execution of a decree obtained in a suit in which they were not parties. This sale was certainly not one under the Bengal Tenancy Act, and the purchaser, defendant No. 2, cannot have purchased the whole tenure, nor can the plaintiffs' right be affected by it. In support of this view, I would cite the cases of *Kristo Chunder Ghose* v. *Raj Kristo Bandyopadhya* (1), *Beni Madhub Roy* v. *Jaod Ali Sircar* (2), and *Jagon Nath Goral* v. *Watson & Co.* (3). These cases seem to me to be ample authority for the view taken by me. It would indeed be impossible, I think, for defendants Nos. 3 and 4, by suing under the Civil Procedure Code, to proceed to attach and sell the property of persons no parties to the suit brought by them and in no way shown to have been represented in it.

I would accordingly set aside the judgment of the Subordinate Judge and restore that of the Munsif.

There being a difference of opinion between the two learned Judges, the case was referred, under s. 575 of the Civil [696] Procedure Code, to Mr. Justice Banerjee, who delivered the following judgment:—

BANERJEE, J.—This appeal arises out of a suit which, after the amendment of the plaint allowed by the first Court, must be taken to have

(1) 12 C. 24. (2) 17 C. 390. (3) 19 C. 341.

been brought by the plaintiffs, appellants, for setting aside the sale of a *shikmi taluk* sold in execution of a decree as fraudulent and collusive, or in the alternative, for obtaining a declaration that the sale did not affect the rights of the plaintiff; and for recovering possession of the plaintiffs' shares in the *shikmi taluk*.

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The main allegations upon which the suit was brought were, that the plaintiffs and defendant No. 1 were owners of a two annas thirteen gandas one cowrie one krant share, bearing a separate rent, of a *shikmi taluk* named Kanai Balai; that defendants Nos. 3 and 4, the proprietors of a certain share of the estate under which the *shikmi taluk* was held, brought a suit for arrears of rent due to them in respect of that share of the *shikmi taluk* and obtained a collusive decree; and in execution of that decree the defendants 3 and 4 fraudulently suppressing the usual sale proclamation brought about a sale, at which defendant No. 1 purchased the said share of the *taluk benami* in the name of defendant No. 2.

The defendant No. 2, who alone contested the suit, denied the allegations of collusion, fraud and *benami*, and urged that the rent suit had been rightly brought against defendant No. 1, who was the sole person registered in the landlord's *sheristha* as the holder of the share of the *taluk* in question; that the sale in execution of the rent decree was properly held; and that he was a *bona fide* purchaser of the *shikmi taluk* on his own behalf and not as *benamidar* for any one.

The first Court held the defendant No. 2 had purchased *benami* for defendant No. 1, and that the sale in execution of the decree passed only the right, title and interest of the judgment-debtor, defendant No. 1, and it accordingly gave the plaintiffs a decree.

On appeal, the lower appellate Court has reversed that decree and dismissed the suit, holding that the allegation of fraud was not [697] made out; that defendant No. 2 had purchased on his own behalf, and that defendant No. 1 being the only person registered in the zemindar's *sheristha* in respect of the share of the *shikmi taluk* in question, the sale in execution of the decree for rent against him passed not only his own share but that of the plaintiffs as well.

Against that decision the plaintiffs have preferred this appeal on the ground that the sale in question could not pass anything more than the share of defendant No. 1. And as the two learned Judges before whom the appeal was heard have differed in opinion, the case has been referred to me under s. 575 of the Code of Civil Procedure.

The contention on behalf of the appellants is that a sale in execution of a decree cannot affect the interest of any person who is not a party to the suit, and that the case of *Jeo Lal Singh* v. *Gunga Pershad* (1), upon the authority of which the lower appellate Court has dismissed this suit, is distinguishable from the present case, as the decree in that case was against a person who was not only the registered tenant in respect of the tenure for which the rent was claimed, but was also the managing member of a joint Hindu family governed by the Mitakshara law, and was therefore rightly held to represent the other members of the family who brought the suit for reversal of the execution sale. On the other hand, it is contended for the respondents that, though the person against whom the rent decree was passed in the case of *Jeo Lal Singh* v. *Gunga Pershad* was a managing member of a Hindu family, the decision of this Court is based, not upon that fact

(1) 10 C. 996.

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but upon the fact of his having been the registered tenant in respect of the tenure for which rent was claimed.

Mr. Justice Rampini accepts the appellants' contention as correct, while Mr. Justice Hill takes the view contended for on the other side.

After considering the arguments on both sides, I agree with Mr. Justice Hill in thinking that this case must be governed by that of *Jeo Lal Singh* v. *Gunga Pershad* (1), and that the decision of the lower appellate Court is correct.

[698] The general rule, no doubt, is that a sale in execution of a decree cannot affect the interest of any one who is not a party to the decree. But the rule is subject to certain exceptions ; and upon the facts found by the lower appellate Court the present case comes under one of these exceptions, namely, the one enunciated by Garth, C. J., in *Jeo Lal Singh* v. *Gunga Pershad* in the following manner : "But if on the other hand it appears that the judgment-debtor has been sued *as representing the ownership of the whole tenure*, and that the sale, although purporting to be of the right and interest of the judgment-debtor only, was intended to be, and in justice, and equity ought to operate as, a sale of the tenure, the whole tenure then must be considered as having passed by the sale. And if the question is a doubtful one on the face of the proceedings, or one part of those proceedings may appear inconsistent with another, the Court must look to the substance of the matter and not the form or language of the proceedings."

And a little further on Sir Richard Garth adds : "Now in the present case, Gupta Lal, the defendant No. 4, was not only the manager but the sole registered owner of the tenure, and Adhikari Koer in claiming against him the entirety of her share of the rent, took the ordinary and proper course of suing the tenant who in the zemindar's *sheristha* represented the entire tenure."

The facts found in the present case are, "that the share sold away (that is 2 annas 13 gandas 1 cowri 1 krant share) stood in the name of defendant No. 1 alone ; that the zemindars used to sue defendant No. 1 for rent for the share ; that the defendant No. 1 used to realise a rateable share of costs, road cesses, &c., which he was bound to pay under the rent decree from the plaintiffs, sometimes amicably and generally by contribution suits, and that such was the state of affairs for many years," and "that the defendants Nos. 3 and 4, who are fractional shareholders of the zemindari, sued the defendant No. 1 as usual, for rent of 1298 and 1299 and obtained a decree in execution of which the said *taluk* (comprising the 2 annas 13 gandas 1 cowri 1 krant share) was sold and purchased by defendant No. 2 on 11th December 1894."

[699] It is clear, therefore that here, as in the case of *Jeo Lal* v. *Gunga Pershad* (1) the person sued for rent was the sole registered holder of the tenure in question, and that the persons who brought the rent suit and caused the sale of right, title and interest of the judgment-debtor in the tenure were some of the shareholders in the zemindari and sued the registered tenant as usual. It is true that in the case cited, the persons sued for rent was also the manager of the joint family that owned the tenure, but that circumstance is only incidentally noticed, and does not form any ground for the decision arrived at.

The reason for the decision is that, as the law required tenants to register their names in the landlord's office, unregistered co-owners of

(1) 10 C. 996.

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a tenure by their omitting to have their names registered, must be taken to have acquiesced in the registered tenant representing them in their dealings with the landlord; that in a suit for rent against the registered tenant, he must be taken to have been sued as representing the ownership of the whole tenure; and that a sale in execution of the decree obtained in such a suit, though in terms only a sale of the right, title and interest of the judgment-debtor, must be held really to pass the right, title and interest, not only of the registered tenant, but also of the unregistered co-owners whom he represents; and that reason holds good quite as much in this case as in the case relied upon.

The principle enunciated by Sir Richard Garth in the case of *Jeo Lal Singh* v. *Gunga Pershad* (1) in the passage, quoted above, no doubt contains an important condition which must be satisfied, namely, that the sale in question must be one which "in justice and equity ought to operate as a sale of the tenure." Having regard to the facts found in this case, namely, that the position of affairs for many years was for the defendants 3 and 4 to sue defendant No. 1 alone for the rent and for defendant No. 1 to realise from the plaintiffs the amount payable by them; that the amount covered by the decree in execution of which the sale took place, was really due, and that the plaintiffs took no steps to pay [700] the amount of rent due in respect of their share, I think the above condition is fully satisfied.

It was contended by the learned vakil for the appellants that as the plaint in the rent suit brought against defendant No. 1 did not state that he was the sole registered tenant, there was nothing on the face of the execution proceedings to shew that the decree was made against defendant No. 1 as representing the ownership of the whole tenure, and so defendant No. 2 could not have bid for and purchased anything more than the share of defendant No. 1. I do not consider this contention valid. The defendant No. 1 was sued as the person representing the ownership of the whole tenure for the whole rent due on account of the same in respect of the shares of defendants Nos. 3 and 4; and intending purchasers could, and in all likelihood did, ascertain what was the fact, namely, that the defendant No. 1 was the sole registered tenant in respect of that tenure.

It was then contended for the appellants that the lower appellate Court was wrong in dismissing the suit without coming to any finding upon the question of value which had an important bearing upon the question whether the sale was intended to be, and ought in justice and equity to operate as, a sale of the whole tenure and not merely of the right, title and interest of defendant No. 1. The question of value may have some bearing upon the last mentioned question; but the plaintiffs do not appear to have raised the question in that form in either of the Courts below. It is true they said in their plaint (para. 4) that the property was sold for an inadequate price; but they said so only to support the allegation that the sale was fraudulently brought about by suppressing the issue of the sale proclamation, and their allegation of fraud has been found by the lower appellate Court not established.

As for the cases of *Kristo Chunder Ghose* v. *Raj Kristo Bandyopadhya*(2), *Beni Madhub Roy* v. *Jaod Ali Sircar* (3) and *Radha* [701] *Pershad Singh* v. *Ram Khelawan Singh* (4) relied upon in support of the appeal,

(1) 10 C. 996. (2) 12 C. 24. (3) 17 C. 390. (4) 23 C. 302.

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I think they are quite distinguishable from the present case as Mr. Justice Hill has shewn.

I, therefore, agree with Mr. Justice Hill in thinking that the decision of the lower appellate Court is right, and that this appeal ought to be dismissed with costs.

S. C. G. *Appeal dismissed.*

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26 C. 701 (P.C.)=3 C.W N. 313=7 Sar. P.C.J. 455.

PRIVY COUNCIL.

PRESENT:

Lords Ashbourne, Hobhouse and Macnaghten, and Sir R. Couch.

[*On appeal from the High Court at Fort William in Bengal.*]

RAM PERTAB AND OTHERS (*Plaintiffs*) *v.* G. MARSHALL (*Defendant*). [15th November and 10th December, 1898.]

Principal and Agent—Holding out, by the principal, of the agent's authority.

The right of a third party against the principal on the contract of his agent, though made in excess of the agent's actual authority, was nevertheless enforced where the evidence showed that the contracting party had been led into an honest belief in the existence of the authority to the extent apparent to him.

APPEAL from a decree (16th April 1896) of the High Court, reversing a decree (14th December 1893) of the Subordinate Judge at Mozufferpur.

The appellant was the son and representative of Girdhari Lal, whose firm, styled Jit Mal Girdhari Lal, carried on a Bank at Mozufferpur, and who commenced this suit on the 27th May 1892 against Mr. G. Marshall, proprietor of the Meah Chapra Indigo Factory, the Honourable F. R. Byng, and Mr. C. Amman. The two last-named were defendants only in the Court of first instance, where a decree was made against Mr. Marshall alone.

In 1890 Mr. Marshall purchased the interest of Mr. Byng in the factory, who till then managed it on his account, and continued to manage it on behalf of the new proprietor from the 1st November 1890, when the indigo season, 1890-91, [702] commenced, till March 1891, when he left and was succeeded in the management by Mr. Amman.

The plaintiffs' firm, after the transfer, continued to supply cash for the management upon the manager's order. From time to time in payment of advances, *hundis* were drawn by him on a Calcutta firm, which financed the indigo concern, and were handed over by him to the Bank. Copies of the accounts were interchanged between the Bank and the manager.

This suit was for the balance alleged to be due to the Bank on the accounts as they stood at the end of the indigo season on the 31st October 1891. That debit balance on that date against the factory was alleged by the defendant to have been increased unduly by a debit which had been carried into the accounts of November and December 1890, and which had been paid off in January 1891 by *hundis* delivered to the Bank in the course of business as above stated. The Bank's right to appropriate the payment in this latter month to a debt not incurred by the defendant was disputed as unauthorized.

1898 DEC. 10. — PRIVY COUNCIL. — 26 C. 701 (P.C.) = 3 C.W.N. 313 = 7 Sar. P.C.J. 455.

The facts are stated in their Lordships' judgment.

The question in the suit now raised on this appeal was whether the Bank was justified in appropriating the money which they received in January 1891 to payment of the advance which had been antecedent to the transfer of the factory. On this the Courts below had differed.

The Subordinate Judge upheld that appropriation. He considered that the mode in which the business was conducted justified the Bank in believing that the defendant, Mr. Marshall, merely stepped into the place of his predecessor, Mr. Byng. The plaintiffs' claim was accordingly decreed against Mr. Marshall, and dismissed as against the other defendants.

The High Court reversed that decree.

The Judges were of opinion that there was no evidence to show that Mr. Marshall had agreed to take over the liabilities of the factory as they stood on the 31st October 1890; and no evidence that Mr. Byng, as manager for Mr Marshall, had authority to consent to the appropriation of payment made by the Bank in January 1891.

[703] On the defendant's appeal,—

Mr. *H. H. Asquith* and Mr. *W. Whateley*, for the appellant.—The Bank took the *hundis* in January 1891 in good faith, believing the payment to be made by a manager having authority to allow the amount to be credited against the debit then existing. The transfer of the ownership of the factory was not even known to the Bank till the latter days of December. The error of the High Court was in taking the question between the parties to be one of the actual authority of the manager; while the real point was whether or not the Bank had reasonable grounds for believing, and in good faith believed, that he had authority.

That the accounts had remained at the disposal of the defendant to examine, was referred to; and it was argued that the accounts had virtually been settled, and that no sufficient ground for re-opening them had been shown. *The London Joint Stock Bank* v. *Simmons* (1) was referred to.

Mr. *A. Cohen*, Q.C., and Mr. *J. H. A. Branson*, for the respondents.—The High Court had rightly held that the appellants were not authorized to make appropriation of the payment in January to a debt owed by the proprietor at a date anterior to the transfer. There had been no such course of dealing as would preclude the principal from showing that his agent had exceeded his authority, as, in fact, he had. The payment made in July by the defendant would have been sufficient to cover any balance on the present accounts if the unauthorized appropriation in January had not been made.

Counsel for the appellant was not called upon to reply.

JUDGMENT.

On a subsequent day, 10th December 1898, their Lordships' judgment was delivered by

SIR R. COUCH.—The appellant, Ram Pertab, is the son and legal representative of Babu Girdhari Lal, a banker, deceased, carrying on business at Mozufferpur in Behar. In January 1890 Girdhari Lal began to act as banker to the Meah Chapra Indigo Factory in Tirhoot. In the accounts it is called Indigo Concern. At that time the Honourable Francis Russell Byng was the proprietor and manager of the factory, having an absolute right [704] to a half-share in it, and being the lessee of the remaining half-share. The respondent, Mr. Marshall, is the brother-in-law of Mr. Byng, and he held a mortgage of the half-share of which

(1) (1892) L.R.A.C. 201.

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Mr. Byng was the owner. From the 7th January 1890 to the 31st October 1891 Girdhari Lal, whom it will be convenient to call the Bank, supplied funds for carrying on the factory upon *tankhas* (orders) drawn by the manager on the Bank. The concern was financed by Messrs. Gisborne & Co., Calcutta. Mr. Byng used to draw *hundis* upon them, and these were made over to the Bank, which obtained the proceeds of them and credited them in the account with the concern. Monthly accounts of receipts and disbursements used to be sent by the Bank to the indigo factory in duplicate. One of these used to be signed by the *gomastha* of the Bank; this used to be retained in the factory, and the other, sent without any signature, used to be signed by the manager and sent back to the Bank. These accounts were put in evidence. The first relied on at the hearing of the appeal is for February 1890 and is headed "*Jumma-kuruch* account of money of the Meah Chapra Concern, pergunnah Bisara, as per *tankhas* signed by Mr. Francis Russell Byng, manager and proprietor of the said concern through the banking firm of Babus Jit Mal and Girdhari Lal, mahajuns of Mozufferpur." It shows a balance due from the concern to the Bank of Rs. 11,395-12-6, and at the end there is a statement signed by Mr. Byng that this is correct. Their Lordships observe that the account begins with a balance of Rs. 7,975-5 due to the Bank on an account for January 1890, headed in the same manner, but not signed by Mr. Byng as correct. For this reason apparently, their attention was not called to it in the argument. The accounts continued to be headed and attested by Mr. Byng in this way up to and including that for December 1890. The headings of the accounts for January, February and March 1891 are altered, Mr. Byng being no longer called proprietor, but only manager of the Meah Chapra Concern. He ceased to be the manager about the end of March 1891, and Mr. Amman became the manager, his name appearing in the accounts, which were attested by him down to and including October 1891.

[705] Mr. Marshall was examined upon interrogatories under a commission, and in answer to the 7th interrogatory he said: "My connection with the concern after the 1st November 1890 was that of proprietor of Mr. Byng's 8 annas (half share), and I leased the other 8 annas . . I acquired Byng's 8 annas through an agreement made on my behalf by Messrs. Gisborne & Co., of Calcutta . . The agreement was made in January 1891 and dated back to 1st November 1890. By the same agreement I became lessee of the other 8 annas." In his answer to another interrogatory he said that he acquired Byng's 8 annas by obtaining a release of his equity of redemption under the mortgage to him. Gisborne & Co., who held a second mortgage, joined in the deed for the purpose of completing his title

The first debit item in the account for January 1891, in which Mr. Byng is for the first time only described as manager, is a balance of Rs. 19,897-15-9, brought forward from the account for December 1890 On the credit side there is, under the date 10th January 1891, "five *hundis* for Rs. 25,000 drawn on Gisborne & Co. by Mr. Byng in favour of the Bank." As to this entry Ram Sahai said that the *munib-gomastha* (principal clerk) of the Bank deposed that he applied about the account to Mr. Byng, personally and by letters. Mr. Byng replied that arrangements were being made for the outlay of the year following, and that the Bank's money would be repaid when the arrangements were completed; that on the 7th January 1891 he got five *hundis* for Rs. 25,000 from Rasdhari Lal, a clerk of the factory, who gave them, saying "Mr. Byng has given

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these *hundis* to you, saying, *mahajun* was getting alarmed. Now there will be a balance in my favour." Rasdhari Lal deposed that he was a clerk in the Meah Chapra Indigo Factory from 1883 to 16th September 1893; that in January 1891, he took *hundis* for Rs. 25,000 from the factory by order of Mr. Byng and gave them to Ram Sahai; that Ram Sahai asked for what these *hundis* had been given, and he said: "You have old balance due to you; deduct it and give me what I want." Mr. Byng had directed him to say he wanted Rs. 8,000. Ram Sahai gave him that sum, and he took it to the factory. The money was mostly required to pay rent to the maliks, also for [706] other expenses. Mr. Byng, who was examined by interrogatories, deposed that he did not give authority to the Bank to take any of the proceeds of the *hundis* for Rs. 25,000 in payment of any money due by him in respect of prior season's operations or borrowings by him on account of working previous to 31st October 1890.

The account for October 1891 showed a balance due to the Bank for principal and interest of Rs. 25,058 11-1½, and on the 27th May 1892 Girdhari Lal brought a suit against Mr. Marshall to recover Rs. 19,179-8-0, the balance after giving credit for Rs. 7,348-3-7½ received on the 1st May 1892. The defence was that the Rs. 7,385-2-4½ was the balance due on account of the concern for advances and payments from 31st October 1890 to 31st October 1891, and the defendants had paid that on the 1st May 1892; that the plaintiff had wrongfully appropriated part of the Rs. 25,000 to the payment and satisfaction of the balance of Rs. 17,673-8-9; and that Byng had no authority from the defendant to permit the plaintiff to make that appropriation.

Now the real case is not, as is said in the defendant's written statement, that the claim in the suit is in fact for that balance. It is for the sum due on the whole account from February 1890, and the defendant is seeking to set aside the appropriation and to apply the amount of that balance in satisfaction of what would be due on the accounts from 31st October 1890 after the payment of the Rs. 7,385 2-4½. If the Bank was not entitled to make the appropriation, the Rs. 17,673-8-9 remained the money of Marshall, and should be applied towards payment of what was due from him on the accounts from October 1890. If nothing had been due on those accounts he would have had to sue to recover back the money. This may be important in considering the evidence in the case. It was admitted that the *munib-gomastha*, who conducted the business of the Bank, acted in good faith. He might honestly and reasonably have believed from the previous transactions that the Rs. 25,000 were intended to be applied in the same manner as the payments had been applied in the previous accounts. The course of business was rather between the Bank and the indigo [707] factory than between it and the actual proprietor. It was not proved that the Bank had any intimation of the change of the proprietorship, except what appeared in the heading of the accounts. Nor was there any evidence of the terms of the agreement under which Marshall became the proprietor. There may have been, probably was, some notice of the debts or liabilities of the concern. Their Lordships cannot agree with the High Court when they say that the burden was on the plaintiff to prove this agreement by obtaining discovery and inspection of documents. If Mr. Byng was careless, as he said in his evidence he was, in signing the accounts as correct, and Mr. Marshall was negligent in not examining the accounts, copies of which were at the factory, the loss ought not to fall on the Bank. Having

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regard to the nature of the transactions between the Bank and the indigo factory, and to the only information which the Bank had of the change of proprietorship (Mr. Byng continuing to be manager) their Lordships think the *munib-gomastha* might reasonably suppose that Mr. Byng had authority, and that in the honest belief of that fact he continued to make the advances. They will humbly advise Her Majesty to reverse the decree of the High Court, to dismiss the appeal to the High Court with costs, and to affirm the decree of the first Court. The respondent will pay the costs of the appeal.

Appeal allowed.

Solicitors for the appellants : Messrs. *Rooper and Whateley.*
Solicitors for the respondents : Messrs. *Sanderson, Adkin & Lee.*

C. B.

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26 C. 707 (P.C.)=26 I.A. 97=3 C.W.N. 573=1 Bom.L.R. 692=7 Sar. P.C.J. 520.

PRIVY COUNCIL.

PRESENT:

Lords Watson, Hobhouse and Macnaghten and Sir R. Couch.

[*On appeal from the Court of the Judicial Commissioner of Oudh.*]

TIKA RAM (*Plaintiff*) *v.* THE DEPUTY COMMISSIONER OF BARA BANKI (*Defendant*). [15th February and 11th March, 1899.]

Hindu law, Alienation—Alienation by widow—Mortgage taken from Hindu widow—Unpaid interest claimed on her deceased husband's mortgages—Will, Construction of.

A *pardanashin* widow executed a mortgage of part of the family estate to secure payment of the balance of interest alleged to be due on three [708] previous mortgages, which had been executed by her husband in his lifetime. Justifying necessity for her to encumber was not shown, nor enquiry by the mortgagee as to her authority. Even if the transaction had been properly explained to her, as a Hindu widow she would have exceeded her powers.

By his will her husband had declared that his widow should have full powers, but that, during the life of his minor son, she should not have power to transfer without legal necessity; and that she should have power to mortgage to pay revenue and other debts.

Held. that the will conferred on her no greater power of alienating the family estate than she had under the Hindu law ; and that, under the circumstances, the mortgage executed by her was invalid.

Notes promising to pay interest, additional to that contracted for in the mortgages had been signed by the husband, which it was held could not affect the right to redeem, being unregistered.

[R., 37 C. 293 (302)=10 C L.J. 570=4 Ind. Cas. 713 (716); 78 P.R. 1904.]

APPEAL from a decree (25th February 1895) of the Court of the Judicial Commissioner, modifying a decree (11th April 1892) of the District Judge of Fyzabad.

The plaintiff, appellant, claimed on the liabilities alleged to arise upon the execution of four registered mortgage bonds, of which three were executed by Raja Mehpal Singh, *talukdar* of Surajpur, who died on the 8th October 1892. He left a widow Rani Chabraj Kunwar, the first defendant, who had executed on the 18th March 1885, the fourth mortgage. This mortgaged a village in the estate to secure Rs. 8,000 alleged to be due for interest on the three previous mortgages.

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The defendant, now respondent, was the Deputy Commissioner of Bara Banki, the agent of the Court of Wards, who defended on behalf of the minor son of the deceased Raja.

The claim, filed on the 22nd October 1889, was for Rs. 14,336. An addition had been made to the interest originally fixed in the Raja's mortgages, by unregistered *rukkas*, or notes, signed by the Raja, one of which followed upon each of these mortgages.

The principal issue, and the only question now material was whether the widow's charge on the family estate was, under the circumstances, binding thereon.

The facts of the case, including a provision made in the Raja's will, dated 27th April 1882, which purported to declare the [709] authority of the widow in the matter of her alienation of the estate, are stated in their Lordships' judgment.

The District Judge decreed the claim. On appeal the Judicial Commissioner, and the Additional Commissioner, concluded that the mortgage by the widow had been beyond her powers, and was invalid; and that so much only of the claim as consisted of a sum of unpaid principal, Rs. 2,000, due on the Raja's mortgages with interest thereon at the rate agreed upon in his registered deeds should have been decreed; but not upon the widow's mortgage.

On the plaintiff's appeal,—

Mr. *C. W. Arathoon* appeared for the appellant.

Mr. *A. Cohen*, Q. C., and Mr. *J. H. A. Branson*, for the respondent.

JUDGMENT.

Their Lordships' judgment was afterwards, on the 11th March, delivered by

LORD MACNAGHTEN.—This is an appeal against a decree of the Court of the Judicial Commissioner of Oudh varying an order of the District Judge of Fyzabad. The suit in which the decree was pronounced was brought to enforce a claim under four deeds of mortgage, three of which were executed by the late Raja Mehpal Singh, *talukdar* of Surajpur, and one by the Rani his widow after his death. The appellant Tika Ram, who represents the mortgagee, was plaintiff. The defendant in the suit was the present respondent, the Deputy Commissioner of Bara Banki, who is now, under the Court of Wards, manager of the Surajpur estate on behalf of the minor son of the late Raja.

The only question argued at the Bar which, in their Lordships' opinion it was competent for the appellant to raise was, whether the circumstances under which the fourth mortgage was executed by the Rani were such as to make it binding on the minor's estate.

The three mortgages executed by the Raja were:—

(1) A mortgage of the village of Baghora to secure Rs. 10,000, dated 15th January 1880.

[710] (2) A mortgage of the village of Mau to secure Rs. 6,000, dated 30th November 1880.

(3) A further charge by way of mortgage on the village of Mau to secure Rs. 8,000, dated 30th May 1882.

The rate of interest specified in each of these mortgages was 15 per cent. per annum, but with each mortgage the borrower gave the lender a *rukka* or written promise to pay 6 per cent. more bringing the rate of interest in respect of each mortgage up to 21 per cent. per annum. These

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rukkas were not registered, and it seems to have been the intention of the parties that they should be kept off the Register.

On the 8th of October 1882 the Raja died. By his will he declared that the Rani should have full powers, but that during the lifetime of his son, the minor on whose behalf the respondent is manager, the Rani should not have power to transfer without any legal necessity any portion of his property ; but that to pay off the Government revenue and to liquidate other debts payable by him, the Rani should have power to mortgage the property. It was held by the Court of the Judicial Commissioner, and as their Lordships think rightly held, that this will "conferred on the 'Rani no greater power of alienating her minor son's estate than she had under Hindu law' as its manager on her minor son's behalf."

The circumstances under which the fourth mortgage was executed are not in dispute. In March 1885, two years and a half after the Raja's death and before the Court of Wards assumed the management of the estate, one Beni Ram, an accountant acting on behalf of Tika Ram, settled up accounts with the karinda of the Rani. The balance due for interest calculated at 21 per cent. per annum was found to be Rs. 9,228-14-3. It was arranged that a mortgage should be given for Rs. 8,000 and that the balance should be paid in cash. The arrangement was carried out by the payment of Rs. 1,228-14-3 in cash and the execution of the fourth mortgage on the 18th of March 1885.

Their Lordships agree with the Judicial Commissioner's Court in thinking that the mortgage cannot stand. It seems to be open to every possible objection. It turned interest into principal [711] without any apparent reason. No enquiry was made into the means and circumstances of the widow. The widow, who was a *pardanashin* lady, stated in her deposition taken by commission that the account had never been put before her or settled by her, and that she did not know the mortgage was on account of interest—a statement not improbable in itself and certainly not contradicted by any evidence, while there is evidence to the effect that on the 18th of March 1885 there was a cash balance to the credit of the estate of Rs. 14,000.

Mr. Arathoon who argued the case strenuously on behalf of his client insisted that their Lordships ought to infer that extreme pressure was being put on the Rani, that the estate was in immediate peril of being sold up unless the Rani submitted to the mortgagee's demands, while by submission she gained the advantage of extension of time and reduction of the rate of interest from 21 per cent. per annum to 15 per cent. in future. It is enough to say that there is no evidence whatever in support of any one of these suggestions. Neither in the fourth mortgage-deed nor in any other document, nor even in the oral evidence is there any trace of any agreement or any understanding that there should be any time given or any reduction of interest allowed. It was as much open to the mortgagee immediately after the execution of the fourth mortgage, as it was before, to enforce his rights without forbearance or allowance of any kind.

One proposition was advanced in the course of the argument which perhaps ought to be noticed. It was urged that the *rukkas*, though not registered, fettered the equity of redemption. The learned District Judge was of that opinion clearly. But their Lordships have a difficulty in understanding how an unregistered instrument, which the statute declares is not to affect the mortgaged property, can fetter the equity of redemption in that property. It seems to be a contradiction in terms.

Their Lordships were asked to give the appellant a decree against the estate of the deceased Raja based on his personal liability under the *rukkas*. The learned Commissioners expressed their opinion on the matter as if it were properly before them. But the truth is that this question was not raised in the [712] plaint or referred to in the pleadings or issues. In their Lordships' opinion it was not competent for the Court in this suit to deal with it.

The result is that the appeal fails, and their Lordships will humbly advise Her Majesty that it ought to be dismissed.

The appellant will pay the costs of the appeal.

Appeal dismissed.

Solicitors for the appellant; Messrs. *T. L. Wilson & Co.*
Solicitor for the respondent: The *Solicitor, India Office.*

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26 C. 712.

APPELLATE CIVIL.

Before Mr. Justice Macpherson and Mr. Justice Stevens.

ABUL KHAIR (*Plaintiff*) v. MEHER ALI (*Defendant*).*
[15th March, 1899.]

Land Registration Act (*Bengal Act VII of* 1876), *ss*, 78, 79—*Bengal Tenancy Act* (*VIII of* 1885), *s.* 60—*Suit for rent—Unregistered proprietor.*

There is nothing in s. 60 of the Bengal Tenancy Act to render a suit for rent by an unregistered proprietor unmaintainable, it being sufficient, if during the pendency of the suit and prior to decree, his name is registered.

Dhoronidhur Sen v. *Wajidunnissa Khatoon* (1), dissented from.
Alimuddin Khan v. *Hira Lall Sen* (2), explained and followed.
Belchambers v. *Hussan Alli Mirza Bahadur* (3), followed.

[Appr., 8 C.L.J. 299 (300).]

THE plaintiff, Moulvie Abul Khair, was originally the *malik* of *taluk* Ram Dass No. 6662 of the *noabad mehal* of Mouza Baraduara, Chaklay Satkania, in the District of Chittagong, and had his name registered as proprietor under Bengal Act VII of 1876. The defendant, Meher Ali, held an *etmam* under [713] the plaintiff in the said *taluk*. After some rapid changes of hand, brought about by a revenue sale, the said *taluk* came back to the plaintiff, who purchased it in the *benami* of one Mahomed Ismail, whose name was registered as proprietor. A suit brought for possession by Mahomed Ismail against the present defendant was dismissed on the ground that Mahomed Ismail was a *benamdar* for the plaintiff. Thereupon the plaintiff brought the present suit for rent.

The defendant contended, among other things, that the name of the plaintiff not having been registered under Bengal Act VII of 1876, he was not competent to bring the suit, under s. 78 of the said Act, and that the defendant was not bound to pay the rent to the plaintiff. The plaintiff got his name registered during the pendency of the suit, but subsequent to its institution. The Munsif decreed the suit, but on appeal the Subordinate Judge reversed the decision, and dismissed the suit on the ground

* Appeal from Appellate Decree No. 2325 of 1897, against the decree of Babu Jadu Nath Dass, Subordinate Judge of Chittagong, dated the 14th of September 1897, reversing the decree of Babu Pankaja Kumar Chatterjee, Munsif of Satkania, dated the 4th of January 1897.

(1) 16 C. 708. (2) 23 C. 87. (3) 2 C.W.N. 493.

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that the suit was not maintainable by the plaintiff, who was not the registered proprietor at the time when the suit was brought.

The plaintiff appealed to the High Court.

Moulvie *Sirajul Islam*, for the appellant.

Babu *Jatra Mohan Sen*, for the respondent.

The judgment of the High Court (MACPHERSON and STEVENS, JJ.) was as follows :—

JUDGMENT.

The Subordinate Judge has reversed the decree of the Munsif and dismissed the plaintiff's suit on the sole ground that the plaintiff's name not having been registered as proprietor at the time when the suit was brought, although it was registered while the suit was pending, the plaintiff, under the provisions of s. 78 of the Land Registration Act and s. 60 of the Bengal Tenancy Act, could not maintain a suit for arrears of rent. In so deciding the Subordinate Judge has cited the decisions in the cases of *Dhoronidhur Sen* v. *Wajidunnissa* (1), and *Surja Kant Acharya Bahadur* v. *Hemant Kumari Devi* (2). He considered that the decision in the case of *Dhoronidhur Sen* v. *Wajidunnissa*, so far [714] from being overruled, was considered to be correct by a majority of the Judges of the Full Bench in the case of *Alimuddin Khan* v. *Hira Lall Sen* (3).

We are unable to adopt this view. In the Full Bench case it was decided that ss. 78 and 79 of the Registration Act, Bengal Act VII of 1876, offered no bar to a person whose name was not registered, as proprietor or manager, bringing a suit for arrears of rent, and that it was sufficient if, during the pendency of the suit and prior to decree, his name was registered. That was a suit instituted in the Small Cause Court in Calcutta, and the majority of the Judges, who took the view expressed above, thought it was unnecessary to consider whether or not the case of *Dhoronidhur* v. *Wajidunnissa* was rightly decided, as it might have been affected by the provisions of s. 60 of the Bengal Tenancy Act. Norris, J., one of the Judges who formed the majority, alone said that he thought the case of *Dhoronidhur* v. *Wajidunnissa* was wrongly decided. Certainly the Subordinate Judge is not right in saying that the case of *Dhoronidhur* v. *Wajidunnissa* was approved of. The most that can be said is that it was distinguished from the case before the Full Bench, and that the majority of the Judges thought it unnecessary to say whether the decision was or was not right. The effect of the decision of the majority of the Judges was, we think, clearly this : that apart from the provisions of s. 60 of the Bengal Tenancy Act, ss. 78 and 79 of the Land Registration Act did not prevent an unregistered proprietor from bringing a suit for arrears of rent. What we have, therefore, to consider in the present case is whether the provisions of s. 60 of the Bengal Tenancy Act render a suit by an unregistered proprietor unmaintainable. It seems to us that that section has no such effect. It provides that when rent is due to the properietor, manager, or mortgagee of an estate, the receipt of the person registered as proprietor, manager or mortgagee of that estate, shall be a sufficient discharge for the rent, and that the person liable for the rent shall not be entitled to plead in defence to a claim by the person so registered that the rent is due to any third person. It follows that the receipt of an [715] unregistered proprietor would not prevail against the claim of the registered proprietor; nor would it do so under the provisions of s. 79, Bengal Act VII of 1876.

(1) 16 C. 708. (2) 16 C. 706. (3) 23 C. 87.

If the suit is maintainable, notwithstanding the provisions of ss. 78 and 79 of Bengal Act VII of 1876, we do not see anything in the provisions of s. 60 which renders it unmaintainable; and although the case of *Dhoronidhur* v. *Wajidunnissa* is not expressly overruled by the decision of the Full Bench to which I have referred, we think we must apply the principle on which the majority of the Judges acted, and following that principle, we think the Subordinate Judge was wrong.

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I would also point out that in the case of *Belchambers* v. *Hussan Alli Mirza Bahadur* (1), it was held that the mere non-registration of the name of the plaintiff at the time that the rent suit was instituted, furnished no ground for the dismissal of the suit.

The decree of the Subordinate Judge is set aside, and the case must be sent back in order that any questions arising in the appeal may be disposed of.

The appellant will get his costs in this Court.

M. N. R. *Appeal decreed; case remanded.*

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26 C. 715=3 C.W.N. 524.

ORIGINAL CIVIL.

Before Mr. Justice Stanley.

W.R. FINK *v.* BULDEO DASS AND OTHERS.* [15th May, 1899.]

Jurisdiction—Evidence as to jurisdiction at hearing—Letters Patent, High Court, cl. 12—Agreement to pay as per account—Acknowledgment of debt—Limitation Act (XV of 1877), s. 19—Agency, Termination of—Accounting agents—Limitation Act (XV of 1877), sch. II, art. 89—Contract Act (IX of 1872), ss. 201 and 218.

The plaintiff as Receiver to the estate of *S* instituted a suit on the 11th July 1898 against the defendants to recover the sum of Rs. 2,808-13-2, a portion of the said sum being the rent of a house occupied by the [716] defendants at Mandalay since January 1894 till the 11th July 1898, the remaining portion being the price of goods sold by the defendants as agents of S. The plaintiff at the institution of the suit obtained leave under cl. 12 of the Charter. The defendant contended that the Court had no jurisdiction, inasmuch as the plaint on its face did not shew that the cause of action or any part of it arose in Calcutta; that the cause title alone represented the defendants as carrying on business in Calcutta, and that portion of the plaint was not verified; nor could the plaintiff give evidence to prove that his cause of action arose in Calcutta, as it would be varying the cause of action and that fresh leave would have to be granted, which could not be done in this suit. *Held*, that the Court had jurisdiction, and the plaintiff was entitled to give evidence at the hearing to show that his cause of action arose in Calcutta. To admit evidence of that fact, and if necessary amend the plaint by adding a statement that part of the cause of action did arise in Calcutta, does not cause a variance in the original cause of action. It is sufficient to show that the cause of action or part of it arises in Calcutta when the suit comes on for hearing.

It was also contended by the defendants that the plaintiff's claim to rent prior to July 1894 was barred, and that as the sale of the piece-goods was completed by the defendants in June 1894, that claim was also barred. The plaintiff submitted that the letters written by the defendants to the plaintiff within three years of the institution of the suit agreeing to pay as per account enclosed by them to the plaintiff was a sufficient acknowledgment to save the claim for rent from being barred. Further, that although the sale of the goods was completed in June 1894, the defendants did not cease to be the plaintiff's agents until they had accounted to him for the price of the goods which had not yet been done.

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* Original Civil Suit No. 522 of 1898.

(1) 2 C. W. N. 493.

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Held, that the plaintiff's claim for the portion of rent claimed beyond three years was not barred; the defendant's letters were a sufficient acknowledgment to save limitation; there being an admission that there was an open account between the parties, and that there was a right to have it taken, implied a promise to pay. *Prance* v. *Sympson* (1) and *Banner* v. *Berridge* (2) referred to.

Held, also, that the defendants were liable to the plaintiff as agents until they had accounted to him, and therefore his claim as to the piece goods was not barred. *Babu Ram* v. *Ram Dayal* (3) followed.

[Rel., 6 Ind. Cas. 948 (952)=55 P R. 1910=136 P.L.R. 1910; R., 34 C. 305 (318)=5 C.L J. 270; 13 C.W.N. 212=4 Ind. Cas 556 (557); 2 Ind Cas 370=3 S.L.R. 53 (54); D., 30 C. 699=7 C.W.N. 651; 31 C. 195=8 C.W.N. 168.]

THIS was a suit brought by the plaintiff as Receiver to the estate of Sewbux Sureka against the defendants to recover the sum of Rs. 2,803-13-2.

[717] The plaintiff alleged that the defendants were partners in a business which was carried on at Mandalay on behalf of the estate of Sewbux Sureka under the name and style of Sewbux Soorujmull, and in Rangoon and Calcutta under the name and style of Buldeo Dass Jowala Persaud, and as such partners were in occupation of a house in the Chane Thazin quarter in Mandalay belonging to the said estate. The business at Mandalay having come to an end the defendants entered into a written agreement which was signed by Buldeo Dass, the first defendant, to vacate the house on or before the 21st January 1894, and if they failed to do so to pay rent at the rate of Rs. 35 per month. The defendants failed to vacate the house, and a sum of Rs. 2,047-14-4 became due from them to the said estate as rent up to the 30th June 1898. There was also a sum of Rs. 587-8 due by the defendants to the said estate on account of piece goods sold by them in Rangoon. The plaintiff also claimed interest on the above sums. On 1st April 1897 the plaintiff as Receiver wrote to the first defendant demanding payment of the said amount. On the 17th April 1897 the defendants caused their attorneys, Messrs. Cowasjee and Cowasjee, to write the following letter to the plaintiff admitting the defendants' liability to the estate of the deceased in the sum of Rs. 320-13 and enclosing an account in the hand-writing of the first defendant.

"Our client Buldeo Dass has put into our hands your two letters addressed to him and dated the 1st instant, with his instruction to reply that the accounts closed in your letter under reply are not correct. We hereby furnish you with copies of our client's accounts which show that our client is indebted to the estate of the said deceased in the sum of Rs. 320-13 only; our client denies his liability to pay interest. You have evidently failed to give credit to ours for the various items shown in our client's accounts. Our client is willing to furnish you with further particulars that you may deem necessary."

The plaintiff relied upon this and two other letters as an acknowledgment under s. 19 of the Limitation Act, which prevented his claim as to the rent from January to June 30th, 1894, from being barred by lapse of time. The other letters were one of the 5th April 1896 from Buldeo Jowala Persaud as follows:—

"You have written to this effect; you said at the time of your departure [718] that, after looking into our rent account, you would send us hundi *Bhaiji*, that is right. We will make no objection with regard to what may be found as per account, to be receivable by and due to you for rent,"

(1) (1854) 1 Kay. 678. (2) (1881) L.R. 18 Ch. D. 254. (3) 12 A. 541.

and another dated 8th September 1897 written by Buldeo Jowala Persaud in which he said :—

"We have been earning our livelihood honestly; we have not committed any act of dishonesty towards Sewbuksh Ji Soorujmull; nor have we misappropriated any money belonging to Sewbuksh Ji Soorujmull. We will not at all deviate from what you may say with regard to anything that may be (found) receivable and payable as per account. We will not in any way refuse to accept what may be (found) receivable and payable as per account. But for the last twelve months or two years, our business is not going on (well), in consequence of which we have been in difficulties, and we have not been able to make any profit, hence the delay."

The defendants having failed to pay the amount claimed the plaintiff brought this suit, having obtained leave under cl. 12 of the Charter and under s. 44 Rule A of the Civil Procedure Code, to institute it.

The defendants pleaded want of jurisdiction and denied that they ever resided or carried on business in Calcutta, and alleged that the second defendant was not a partner in the business carried on at Mandalay. They also stated that there was no agreement that the rent should be payable at Calcutta, and that the plaintiff could only claim rent for a period of three years prior to the filing of the suit which was on the 11th July 1898, and not as alleged by them from the 21st January 1894. The defendants further stated that the sale of the piece-goods was completed by June 1894, and that the plaintiff's claim thereto was barred.

Mr. *Dunne*, and Mr. *J. G. Woodroffe*, for the plaintiff.

Mr. *Mitter*, and Mr. *Chowdhry*, for the first defendant.

Mr. *Sinha*, and Mr. *Monnier*, for the second defendant.

Mr. *Chowdhry*.—I submit the Court has no jurisdiction to try this case. There is nothing on the face of the plaint to show that the cause of action arose in Calcutta; the cause title alone represents the defendants as carrying on business in Calcutta, but that portion of the plaint is not verified; that allegation is also denied by the defendants. It must be shewn that [719] the defendants do in fact carry on business in Calcutta. As to carrying on business see *Subbaraya Mudali* v. *The Government* (1); *Emrit Lall* v. *Kid* (2), *Chinnammal* v. *Tulukannatammal* (3). It is not sufficient that one of the defendants should carry on business in Calcutta. The word "defendants" in cl. 12 of the Charter means all the defendants—*Ismail Hadjee Hubbeb* v. *Mahomed Hadjee Joosub* (4).

The grant of leave under cl. 12 of the Charter must be held to relate only to the cause of action contained in the plaint as presented to the Court at the time of the grant. To allow the defendants to give evidence that the agreements were signed in Calcutta is a variance of the original cause of action, and leave as to that varied cause of action cannot be granted after the institution of the suit—*Rampurtab Samruthroy* v. *Premsukh Chandamal* (5). The defendants owe the plaintiff rent for three years prior to the institution of the suit in July 1898, that is, from July 1894 and not from January 1894; the claim for rent from January to July 1894 is barred. The sale of the piece goods was completed by the defendants in June 1894, and their agency must be taken to have terminated then, and therefore the plaintiff's claim to that is also barred.

Mr. *Dunne, contra*.—The Court, I submit, has jurisdiction. The plaint clearly states in the cause title that the defendants carry on business in

(1) 1 M. H. C 296. (2) (1864) 2 Hyde 117. (3) 3 M. H. C. 146.
(4) 13 B. L.R. 91. (5) 15 B. 93.

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Calcutta. If the plaintiff is permitted to give evidence on that point it cannot be said that it would be a variance of the cause of action. The cause of action remains the same. There is no additional cause of action disclosed for the first time.

Nor is any portion of the rent claimed by the plaintiff barred. The letters written by the defendants to the plaintiff are a sufficient acknowledgment under s. 19 of the Limitation Act. They send the plaintiff accounts and agree to pay what should be found due to him as per the accounts. It has been [720] held that where there was an admission of the existence of an open account between the parties an undertaking to pay was thereby implied—*Prance* v. *Sympson* (1). I further submit that the claim to the price of piece goods sold for the plaintiff by the defendants is not barred. Taking it that the sale of the goods was completed in June 1894 that does not terminate the agency which continues until the defendants have fully accounted to the plaintiff—*Babu Ram* v. *Ram Dayal* (2).

JUDGMENT.

STANLEY, J.—The action was brought in this case by Mr. Fink as Receiver of the estate of Sewbux Sureka, deceased, against the two defendants carrying on business in co-partnership as merchants at Mandalay, Rangoon and Calcutta, and at the time the writ was issued, in Rangoon and Calcutta, under the name and style of Buldeo Dass Jowala Persaud, for the recovery of a sum of Rs. 1,780 4-2 in respect of the rent of a house in Mandalay, and for recovery of a sum of Rs. 587-8, being the price of goods sold by the defendants for Sewbux Sureka and also for interest on these respective sums.

Neither of the defendants has appeared to give evidence, but in their statement of defence they rely upon the Statute of Limitation, and they also say that this Court has no jurisdiction to entertain the suit on the ground which I shall presently refer to. The defendant Jowala Persaud, who is a son of the defendant Buldeo Dass, also alleges in his statement of defence that he is not and never was a partner with Buldeo Dass in any business in Calcutta.

The first question for determination is the question of jurisdiction. In the statement of claim there is no averment that the agreements, in respect of which the action is brought, or either of them, was executed in Calcutta, and there is nothing otherwise to show jurisdiction save it be in the title of the action in which the defendants are represented as carrying on business in Calcutta.

The learned Judge before whom the application for admission of the plaint was made was satisfied that there was jurisdiction, [721] and he allowed the writ to be issued under cl. 12 of the Charter. Now, it has been proved that the contracts sued upon were as a matter of fact executed in Calcutta. I am asked to hold that, allowing proof of the signing of the agreements in Calcutta is a variance of the original cause of action, and that consequently it would be necessary to have the leave of the Court before I could make such an amendment or allow the action to proceed, and therefore I am asked to hold that the Court has no jurisdiction to entertain this suit. If I did so hold, the result would be that I should have to dismiss the action, and the following day an application might be made to me for liberty to issue a writ in respect of the very same cause of action, the only difference being that in the

(1) (1854) 1 Kay, 678.

(2) 12 A. 541.

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statement of claim it would appear that the agreements were entered into in Calcutta. I am of opinion that it does not in any way cause a variance in the cause of action to admit evidence of the fact, and if necessary amend the plaint by adding a statement, that the contracts were entered into in Calcutta; and moreover I am of opinion that it is quite sufficient if, upon the hearing of the action, it is established to the satisfaction of the Court that the cause of action or part of the cause of action did arise in Calcutta. The authorities to which I have been referred do not seem to me to carry the defendants' contention far enough. They only establish that where there is an additional cause of action for the first time brought to light at the trial, the Court has no jurisdiction to entertain the suit, inasmuch as it is a materially different cause of action from that originally sued on. This applies to the case of both defendants.

The next defence is a defence under the Statute of Limitation, and is common to both statements of defence. I deal with it treating both defendants as being partners. The rent claimed is rent which accrued from the 21st January 1894 to the 30th June 1898 under an agreement of the 7th December 1893. In that agreement, which is signed by the defendant Buldeo Dass, he states that Sewbux Sureka has a house in Mandalay in which he has been living, and he says as follows:—

"I shall vacate the same to you on or before th 15th day light side in Pous. If I make delay (in doing so) I shall pay [722] you rent (at) Rs. 35, in letters thirty-five, per month for the upper and lower (storey). I shall pay, if I occupy (the same), otherwise not."

Now it appears that he did occupy the house and is occupying it up to the present time, and the rent sought to be recovered is the rent due up to the 30th June 1898. There was an agreement that the rates and taxes and repairs were to be defrayed by the landlord, and as a matter of fact an allowance has been made by the plaintiff in respect of all rates, taxes and repairs which have been proved to have been paid by the defendants, and the sum of Rs. 1,780-4-2 sued for represents the balance.

The plaintiff relies upon an acknowledgment as taking the case out of the Statute of Limitation, namely, a letter of the 8th September 1897 written by Buldeo Jowala Persaud, as follows:—(reads letter of 8th September, 26 C. p. 718).

The account referred to in this letter included the rent of the house at Mandalay.

In addition to this there is a letter of the 5th April 1896 from Buldeo Jowala Persaud, as follows:—(reads letter of 5th April 1896, 26 C. p. 717.)

This is a clear admission by Buldeo Das Jowala Persaud, whoever were the members of that firm, that they would pay this rent as per account, and the account rendered by both defendants sets forth accurately the rent claimed. There is also a letter from the defendant Buldeo Dass' solicitors, dated the 17th April 1897, in which they state to the effect that the defendant Buldeo Dass does not dispute the amount of the rent due, but they say that he claims to set-off certain items as against it which would reduce the amount due:—(reads letter of 17th April 1897, 26 C. p. 717).

These letters constitute in my opinion a sufficient acknowledgment of the debt to take the case out of the statute.

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Mr. Dunne referred to the old case of *Prance* v. *Sympson* (1), in which it was held that where there was an admission that there was an open account between parties an undertaking to pay was to be implied. I find that the case is commented upon in a [723] more recent case by Mr. Justice Kay, *viz.*, in the case of *Banner* v. *Berridge* (2). Mr. Justice Kay refers to *Prance* v. *Sympson* (1), and at page 273 he says: "But be that as it may, *Mitchell's Claim* (3) certainly shews in the plainest possible manner that it was Lord Justice Mellish's opinion that if there was an admission that an account must be taken, and that there was a right to have it taken, it would be consistent with principle, and with the previously decided cases, that you must infer from that a promise to pay. If I may venture to express my own opinion upon the subject, that seems to me to be quite reasonable. I suppose there is no doubt at all about the law that, if there be an unqualified admission of a debt, that acknowledgment implies a promise to pay; and surely it seems quite as reasonable that if there is an unqualified admission that there is a pending account between two parties which has to be examined, that is, pending in the sense that it is not a settled account binding upon them, but is an account which either party is at liberty to examine, surely it is reasonable to say that the admission that there was such a pending account is an admission from which you may infer a promise that when the account is settled the balance shall be paid." It seems to me that here the principle is carried a little further than in the case of *Prance* v. *Sympson* (1).

These letters satisfy me that there was a sufficient acknowledgment of this debt in respect of rent to take the case out of the statute.

Now I come to the question of the Statute of Limitation in regard to the sale of the goods. In this case the statement of claim inaccurately describes the cause of action as for the price of goods sold by the plaintiff to the defendants, but the parties understood perfectly well that it was in respect of the goods entrusted to the defendants for sale that the action was brought. The error in the claim is trivial, and may properly I think be rectified. The goods being entrusted to [724] the defendants for sale on behalf of Sewbux Sureka they became the agents of Sewbux Sureka for the sale of the goods and liable to account as such. That being so, the contention of Mr. Chowdhry that the Statute of Limitation would run the moment any particular item of the goods was sold is unsustainable. The law is very clearly laid down in the case of *Babu Ram* v. *Ram Dyal* (4), and it seems to me that that case governs the present. In that case the plaintiffs were merchants trading at Agra and they consigned at different dates in 1881, 152 bags of jeera or cummin seeds to the defendants on commission sale. On the 8th December 1881, the defendants sent the plaintiffs an account of 119 out of the 152 bags. No account was ever rendered of the 33 bags which were sold in January 1882, and the plaintiffs made no inquiry and took no action regarding these bags until the 27th December 1886, when they demanded from the defendants the price realised on sale of the 33 bags, the demand being refused. The suit was instituted, and in the Munsif's Court, as also in the Court of the District Judge, who agreed with the Munsif, the action was dismissed on the ground that it was barred by the Statute of Limitation, the Court holding that on the sale of each bag of the cummin seed the statute began to run,

(1) (1854) 1 Kay 678.
(2) (1881) L.R. 18 Ch. D. 254.
(3) (1871) L.R. 6 Ch. 822.
(4) 12 A. 541.

and also on the ground that the plaintiffs were guilty of laches and delay in not prosecuting their claim until after the lapse of six years. 1899 MAY 15.

On appeal, the decision of the lower appellate Court was reversed by Mr. Justice Brodhurst and Mr. Justice Tyrrell, and at p. 545 they say as follows: "It was argued with much ingenuity that under s. 201 of the Contract Act the agency had terminated immediately on the sale of the goods by the business of the agency being completed. But s. 218 of the same statute provides that an agent is bound to pay to his principal all sums received on his account. Clearly then the business does not terminate on receipt of the money by the agent, inasmuch as there is a subsequent obligation to account for the sums and to pay them. Moreover, there was no allegation that their business relation had terminated when the action was brought in the Court [725] below, and there was no justification in law or in fact for holding that the agency terminated as soon as the defendants sold the property. Applying, therefore, art. 89 of the Limitation Act, the suit is not barred and the case must go back to the Court of first instance." The head-note of the case is as follows: "Where an agent for the sale of goods receives the price thereof, the agency does not terminate, with reference to ss. 201 and 218 of the Contract Act (IX of 1872), until he has paid the price to the principal; and a demand made by the principal for an account of the price is made 'during the continuance of the agency' within the meaning of sch. II, art. 89 of the Limitation Act (XV of 1877); and a suit by the principal to recover the price is, therefore, within time if brought within three years from the date of such demand. The agency does not terminate immediately on the sale of the goods. It does not terminate at the time when the plaintiff obtained knowledge of the defendants' breach of duty."

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That decision seems to me to govern the present case; according to it the Statute of Limitation will not begin to run until the agency is determined. As a matter of fact the agency does not appear to be determined in this case as yet, because until the defendants have fully accounted the agency is still subsisting.

This being so it is unnecessary for me to refer to the letters which have been relied upon by the plaintiff as in any case taking the case out of the statute as amounting to acknowledgment in writing, signed by the defendants, or their agent, of the existence of this agency debt.

The only other point in the case is that raised by Mr. Sinha on behalf of his client, namely, that he never was a partner in the firm of Buldeo Dass Jowala Persaud. The evidence is altogether one way. Jowala Persaud has not come forward to give evidence and to deny that he was a partner in this firm. The clearest evidence is given by Heera Lall that Jowala Persaud carried on business here in Calcutta, that he paid money for the firm, that he attended to the business and wrote letters in reference to the business, and I see no reason to doubt that that evidence is truthful. I do not think he took as prominent a part [726] in the Calcutta business as Buldeo Dass, but the evidence satisfies me that he did take a part as a partner, and held himself out to the public as being a partner with Buldeo Dass his father. But if there were any doubt as to the truth of the oral evidence which has been given, it seems to me that the letters which were written by Jowala Persaud himself would clear away such doubt. Amongst others there is a letter, Ex. IV, written by Jowala Persaud, in which towards the end he refers to certain rubies which were in the custody of the present plaintiff and he says as regards these particular rubies: "The rubies belonging to you and ourselves in

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partnership must be sold either at a high or a low price." Jowala Persaud treats himself in this letter as being a partner with his father Buldeo Dass, and refers to these rubies as being property belonging to himself and his father as partners. Again in the letter, Ex. K, which letter is signed by Buldeo Dass Jowala Persaud, and in the letter, Ex. M, which is written by Buldeo Dass Jowala Persaud, there is an acknowledgment that there is as account outstanding between the plaintiff and defendants; in the letter, Ex. O, written by Buldeo Dass Jowala Persaud, the defendants refer to this account as an account for which they were both liable.

Upon this evidence I can only come to one conclusion, and that is that Jowala Persaud was a partner in this firm, and on all grounds, therefore, I decide in favour of the plaintiff for the amount of principal proved to be due, namely, in respect of rent Rs. 1,780-4 2 and in respect of the goods Rs. 587-8-0. The interest I disallow because the custom to pay interest which is alleged by the plaintiff has not been established. I may state as regards the rates and taxes which I was asked at all events to set off against this debt, that there is no evidence whatever that any rates and taxes have been paid by the defendants, except a sum of Rs. 86 and some annas which had been allowed, and is credited in the accounts of the plaintiff. If additional rates and taxes have been paid the defendants will have an opportunity of setting off the sum paid against the rent which has accrued since this action was instituted. I decree, therefore, the amounts I have mentioned with costs on scale No. 2.

[727] Attorneys for the plaintiff; Messrs. *Kally Nath Mitter & Sarbadhicary.*

Attorney for the first defendant : Babu *A. N. Ghose.*

Attorney for the second defendant : Babu *A. O. Bose.*

D. S.

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26 C. 727=3 C.W.N. 586.

APPELLATE CIVIL.

Before Mr. Justice Ghose and Mr. Justice Banerjee.

DURGA CHARAN MANDAL AND ANOTHER (*Judgment-debtors*) *v.* KALI PRASANNA SARKAR AND ANOTHER (*Decree-holders and Auction-purchasers*).* [19th April, 1899.]

Civil Procedure Code (Act XIV of 1882), *ss.* 244, 266 *and* 318—*Questions for Court executing decree—Sale of an occupancy holding not transferable by custom, in execution of a decree for arrears of rent obtained by a co-sharer landlord—Effect of such a sale—Bengal Tenancy Act (VIII of* 1885), *ss.* 22, 65, 73 *and* 188.

A decree for rent obtained by some of certain co-sharer landlords and not by the whole body of them, is not a decree under the Bengal Tenancy Act.

Prem Chand Nuskur v. *Mokshoda Debi* (1), and *Jugobundhu Pattuck* v. *Jadu Ghose Alkushi* (2), referred to.

An occupancy holding which is not transferable by custom, as also the interest of the judgment-debtor in the said holding, are not saleable in execution of such a decree.

Bhiram Ali Shaik Shikdar v. *Gopi Kanth Shaha* (3), referred to.

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* Appeal from Order No. 447 of 1898, against the order of Babu Debendra Lal Shome, Subordinate Judge of Backergunge, dated the 29th of September 1898, reversing the order of Babu Govinda Gopal Gupta, Munsif of Perozepur, dated the 27th of May 1898.

(1) 14 C. 201. (2) 15 C. 47. (3) 24 C. 355.

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A judgment-debtor, whose occupancy holding, which was not transferable by custom, had been sold in execution of a decree for rent obtained by some of the co-sharer landlords, objected to the application made by the auction purchaser after the confirmation of the sale for delivery of possession of the said holding, on the ground that the sale was illegal.

[728] *Held*, that the confirmation of sale was no bar to the application that was made by the judgment-debtor to have it declared that in execution of such a decree the holding could not be sold, the question being one which related to the execution, discharge, and satisfaction of the decree.

Basti Ram v. *Fattu* (1), referred to.

[**F.**, 27 A. 702=2 A.L.J 469=A.W.N. (1905) 162; 29 A. 612=4 A.L.J. 519=A.W.N. (1907) 193; 7 Ind. Cas. 48; 10 M.L J. 110 (111); **Rel.**, 4 C.W.N. 571 (572); **Appl.**, 27 C. 187 (189); **Appr.**, 35 C. 61 (67)=6 C.L.J. 320=11 C.W.N. 1011; U.B.R. (1897–1901) 258; **R.**, 30 A. 146 (149)=5 A.L J. 121= A.W.N. (1908) 49; 27 C. 415 (416)=4 C.W.N. 557; 27 C. 810=4 C.W.N. 692; 29 C. 54=5 C.W.N. 763; 34 C. 199=5 C.L J. 294=11 C.W.N. 513; 35 C. 331 (335) (**P.C.**)=10 Bom. L.R. 66=7 C.L J. 139=12 C.W.N. 249=18 M.L.J. 43=3 M.L.T. 151; 37 C. 687 (691)=12 C.L.J. 169=14 C.W.N. 779=6 Ind. Cas. 452; 4 C.L J. 68 (72)= 10 C.W.N. 176; 5 C.L.J. 235=2 M L.T. 155; 11 C.L.J 489 (498)=14 C.W.N. 560=5 Ind. Cas. 390; 13 C.L J 404=16 C.W.N. 805 (809)=10 Ind. Cas. 90; 18 C.L.J. 564=20 Ind. Cas. 273; 7 C.W.N. 572; 8 C.W.N. 472; 9 C.W.N. 34 (40); 9 C.W.N. 972 (973); 11 C.W.N. 83 (85); 2 Ind. Cas. 96; 5 Ind. Cas 385; 14 Ind. Cas. 49 (50); 15 Ind. Cas. 255; 1 N.L.R. 167 (168); 23 Ind. Cas. 939; **D.**, 38 C. 448 (451)=15 C.W.N. 795=10 Ind. Cas. 305; 14 C.L J. 620 (626)=10 Ind. Cas. 417; 2 P.R. 1907=157 P.L.R. 1906=(1906) P.W.R. p. 27.]

THE facts of the case are shortly these: The judgment-debtors were two brothers, whose property, an occupancy holding, was sold in execution of a decree for rent obtained by some of the co-sharer landlords. The decree-holders purchased the holding. After the purchase one of the brothers applied to have the sale set aside under s. 311 of the Code of Civil Procedure, but that application was rejected. The sale was in due course confirmed and a certificate of sale was granted to the auction-purchasers. An application was made by them under s. 318 of the Code of Civil Procedure for delivery of possession, whereupon the other brother put in a petition, objecting to the sale on the ground that there was no saleable interest in the property, and also opposing the application of the decree-holders under s. 318 of Civil Procedure Code.

The Munsif, upon the evidence, held that the occupancy holding of the judgment-debtor was not transferable by custom and therefore not saleable, and rejected the decree-holder's application for delivery of possession.

On appeal the Subordinate Judge set aside the decision of the first Court, disallowed the objections of the judgment-debtors, and ordered the sale to be confirmed.

Against this decision the judgment-debtors appealed to the High Court.

Babu *Chunder Kant Sen*, for the appellants.

Babu *Joy Gopal Ghosha*, for the respondents.

The judgment of the High Court (GHOSE and BANERJEE, JJ.) was as follows:—

JUDGMENT.

This is an appeal which arises out of two applications, one made by the judgment-creditors, who are also the auction-purchasers **[729]** at a sale in execution of the decree under s. 318 of the Code of Civil Procedure, for an order for delivery of possession of the property purchased by them, and the other by the judgment-debtors under s. 244 of the Code,

(1) 8 A. 146.

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objecting to the propriety of the sale, and asking, in effect, that the sale be set aside.

The decree in question was obtained on the 24th April 1894. It purports to be a decree for rent, and it was made in a suit instituted by certain fractional shareholders of a zemindari. Having obtained this decree in respect of their share of the rent they brought the property in the occupation of the defendants, the judgment-debtors, and in respect of which the rent was claimed, to sale on the 5th of June 1896, and purchased it themselves. The sale seems to have been confirmed on the 14th July 1896. They then applied for an order under s. 318 of the Code for delivery of possession. Thereupon, as already indicated, the judgment-debtors came in, in the first place, opposing the application of the decree-holder under s. 318, and secondly insisting that the sale itself was bad and should, therefore, be set aside.

It is unnecessary to refer to the earlier stages of the proceedings in the Courts below in connection with this matter. It is sufficient to say that the last order that was made by the Court of first instance on the 27th May 1898 was to the effect that the sale being a sale of a *kursa* holding was not a good sale, for the *raiyat* had no disposing power in it, and accordingly set aside the sale, though the actual words used in the judgment were to the effect that the property was not saleable, but which, we understand, really amounted to an order setting aside the sale.

On appeal against this order by the purchasers, the Subordinate Judge has held, having regard to the provisions of ss. 22, 65 and 73 of the Bengal Tenancy Act, that, in execution of a decree for rent, the occupancy right possessed by the defendants, judgment-debtors, was capable of being sold, though the decree itself was obtained by certain co-sharers in the zemindari. He has, however, observed that the other co-sharers might refuse to recognise the purchase on the part of the decree-holders; but that so far as the judgment-debtors [730] are concerned, it is not open to them to contest the right of the decree-holders to bring to sale the holding in question. Accordingly he has ordered that the sale be confirmed, and that the objection of the judgment-debtors be disallowed.

It seems to us that the initial mistake that the learnd Subordinate Judge has fallen into is this: He has regarded the decree in execution of which the property was sold as a decree under the Bengal Tenancy Act. The decree no doubt was a decree for rent, but it was obtained by some of the co-sharers in the zemindari, and not by the whole body of zemindars; and therefore it could not be regarded as a decree under the Bengal Tenancy Act (See in this connection s. 188 of the Bengal Tenancy Act and the cases of *Prem Chand Nuskur* v. *Mookshoda Debi* (1), and *Jugobundhu Pattuck* v. *Jadu Ghose Alkushi* (2)).

If it was not a decree under the Bengal Tenancy Act, it is obvious that the proceedings in execution thereof could only be in accordance with the provisions of the Code of Civil Procedure, and not with those of the Bengal Tenancy Act. The decree may well be regarded as a decree for money, in execution of which the property or rather the right, title and interest of the *raiyat* defendant in it were sold, if such right, title and interest in the holding were saleable under the law. The question that here arises is whether, having regard to the provisions of s. 266 of the Code of Civil Procedure, the holding was saleable; whether the *raiyat* had a

(1) 14 C. 201. (2) 15 C. 47.

disposing power in it. If he had not, it is obvious that it could not be sold in execution of the decree obtained by certain fractional shareholders in the zemindari. 1899 APRIL 19.

The Court of first instance, in the judgment to which we have already adverted, held that the holding was not saleable by custom or otherwise, but the Subordinate Judge has rather assumed than found that it was saleable. It has, however, been contended before us by the learned vakil for the respondent that the sale having already been confirmed the question is no longer an open question between the parties, but it seems to us that the confirmation [731] of sale is no bar to the application that has been made by the judgment-debtors to have it declared that in execution of the decree obtained by certain co-sharers in the zemindari the holding could not be sold; that he had no disposing power in it; and that therefore the sale has passed no interest whatever to the purchaser. The enquiry which should have to be made upon an application like this would be an enquiry under the provisions of s. 244 of the Code of Civil Procedure, uncontrolled by the provisions of ss. 311 and 312, which deal with irregularities in the conduct of sale and the confirmation of sale where such irregularities are not made out. In the case of *Basti Ram* v. *Fattu* (1) decided by a Full Bench of the Allahabad High Court, where a judgment-debtor, whose occupancy tenure had been sold in execution of a decree for money, brought a suit against the purchaser for recovery of the property, on the ground that the sale of the occupancy right in execution of the decree was illegal and void, being in contravention of the provision of the Rent Act which obtains in the North-West Provinces, it was held that the question involved in the suit was one of the nature referred to in s. 244 (*c*) of the Code of Civil Procedure as determinable only by order of the Court executing the decree, and that the suit was, therefore, not maintainable. In delivering the judgment of the Court Mr. Justice Oldfield made the following observations, which are pertinent to the present enquiry: "In the case before us, the judgment-debtor has sued the auction-purchaser to recover the property sold in execution of the decree, on the ground that the property, which is a tenant's right in land, is not by law saleable in execution of decree. This question is one which arose between the plaintiff judgment-debtor and the decree-holder, who is also the purchaser, and was determined against the former by the Court which executed the decree prior to the sale, and it is a question which must be considered to relate to the execution, discharge, or satisfaction of the decree. It is in effect whether any property was liable to attachment and sale to satisfy the decree. Certain things are by s. 266 of the Code of Civil Procedure not liable to attachment and sale. The question regarding liability to attachment and sale arising out of the [732] provisions of s. 266 of the Code of Civil Procedure would clearly be questions within the meaning of s. 244 of the Code of Civil Procedure. The question of the liability of the property, the subject of this suit, to attachment and sale, arises out of a provision in the Rent Act; but equally with questions under s. 266 of the Code of Civil Procedure, it is one which falls within the meaning of s. 244 of the Code of Civil Procedure." We concur in these observations.

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26 C 727=3 C.W.N. 586.

But then a difficulty arises in this wise: An order for sale was made, and in furtherance of that order, the property was sold, whatever may be the effect of that sale. If the judgment-debtors were parties to

(1) 8 A. 146.

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26 C. 727=
3 C.W.N.
586.

that order, or were aware of it, and did not appeal against it, they are now precluded from questioning the propriety of that order, and consequently of the sale that has taken place under that order. They say, however, in their application, to which we have already referred, that they were not aware of the proceedings in attachment of this property, nor of the proceedings in connection with the sale thereof, clearly indicating that they were not parties to the order for sale; and they say that this was owing to the fraud on the part of the decree-holders. The Courts below have not gone into this question. In the view we take of this case it would be necessary to enquire into the matter and determine whether the judgment-debtors were parties to the order for sale or were aware of it. If this question be answered in the affirmative, then we are clearly of opinion that it is not open to them now to question the propriety of the sale that has already taken place.

The learned vakil for the respondent has, however, argued that, assuming that, by custom or usage, the holding in question is not saleable, yet the interest of the judgment-debtors, whatever that might be worth, is saleable, and that it is certainly saleable at the instance of an execution-creditor, the contention being that the sale would be a sale only of the right, title and interest of the judgment-debtors in the property in question. In the case of *Bhiram Ali Shaik Shikdar* v. *Gopi Kanth Shaha*(1), decided by Mr. Justice Banerjee and Mr. Justice Rampini, where a question somewhat similar to the one now before us was raised and discussed, the following [733] observations, occurring in the judgment, are pertinent to the question now before us. After referring to the provisions of some of the sections of the Bengal Tenancy Act, which have been quoted in the judgment of the Court of appeal below in this case, those learned Judges said as follows: "That no doubt makes an occupancy holding saleable at the instance of the landlord in execution of a decree for rent; but though that is so, it does not follow from that that an occupancy holding is saleable at the instance of the occupancy *raiyat* or of any creditor of his other than his landlord seeking to obtain satisfaction of his decree for arrears of rent" (the word "landlord" here used we take to refer to the whole body of landlords) "such an inference is, in our opinion, clearly negatived by the absence in chap. V of any provision relating to the transferability of occupancy holdings. Nor does s. 73 warrant any contrary conclusion, seeing that there are cases in which occupancy *raiyats* may transfer their holdings without the consent of the landlord; we mean cases in which such holdings are transferable by custom or local usage" and so on.

We think, having regard to the observations we have just referred to, that if the holding was not saleable according to custom or usage, it was not open to the creditors (for we cannot regard the decree-holders in this case in any other light than mere creditors) to bring to sale the interest of the occupancy *raiyat* in this holding, that it is open to the latter, having regard to the provisions of s. 266 of the Code of Civil Procedure, to raise the objection which they did raise in the Court below, namely, that the holding was not a saleable property.

We observe that the Court of appeal below has come to no decision or finding upon the question, whether the holding was saleable either according to custom or usage. When this case is taken up again under the

(1) 24 C. 355.

order of remand that we propose to make, this matter will also have to be gone into. 1899 APRIL 19.

Upon these grounds we think that the order of the Court below should be set aside and the case sent back to that Court for retrial with reference to the foregoing observations. Costs will abide the result. APPELLATE CIVIL.

S. C. G. *Appeal allowed; case remanded.*

26 C. 727 = 3 C.W.N. 586.

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26 C. 734.

[734] APPELLATE CIVIL.

Before Mr. Justice Banerjee and Mr. Justice Rampini.

MUKHODA DASSI (*Defendant No.* 1) *v.* GOPAL CHUNDER DUTTA (*Plaintiff*) AND OTHERS (*Defendants Nos.* 2 *and* 3).* [22nd March, 1899.]

Sale in execution of decree—Mortgage decree, Sale in execution of—Purchase by a third party, while the decree and the order for sale are valid—Effect on sale of reversal of ex parte *decree—Right of redemption of mortgagor.*

A mortgagor is not entitled to redeem the property which was purchased by a third party at a sale held in execution of an *ex parte* mortgage decree and confirmed whilst the *ex parte* decree was still in force, though the said decree was set aside and subsequently reaffirmed after trial.

[Rel., 12 C.L J. 357 = 7 Ind. Cas. 166 (172); R., 22 A. 377 (379); 23 A. 25 (30); 37 C. 107 = 11 C.L.J. 254 (259) = 13 C.W.N. 710 = 1 Ind. Cas. 871.]

THE plaintiff brought a suit upon a registered mortgage bond executed by defendant No. 1 for a consideration of Rs. 100. This suit was heard and decided *ex parte* against defendant No. 1 alone, and in execution of that decree the mortgaged property was sold and purchased by a third party. The whole of the decretal amount not having been realized by the sale, the plaintiff followed some other property of defendant No. 1, whereupon she appeared and applied to set aside the *ex parte* decree, and the application was granted. On the case coming on for trial again she pleaded that defendant No. 2 was the rightful owner of the property in suit; that she was *benamidar* for defendant No. 2 by whom she was prevailed upon to execute the mortgage in suit; that no consideration-money was paid for the mortgage bond; and that therefore she was not liable for the debt due thereunder. It was also urged by her that the auction-purchaser defendant No. 3 was not a *bona fide* purchaser, but was a *benamidar* for the plaintiff.

The Munsif, upon the evidence, held that the defendant failed to substantiate her pleas, and passed a personal decree against defendant No. 1 for the sum remaining due after part satisfaction of the debt realized by the sale proceeds of the mortgaged property.

On appeal to the Subordinate Judge, a new point was taken by the defendant No. 1, that the *ex parte* mortgage decree having [735] been set aside, the sale which took place in accordance with that decree could not stand, and that an opportunity should be given to her to redeem the mortgaged property by paying to the auction-purchaser the amount of the purchase money. The Subordinate Judge decided against it and dismissed the appeal.

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* Appeal from Appellate Decree No. 1751 of 1897, against the decree of Babu Rajendra Kumar Bose, Subordinate Judge of 24-Pergunnahs, dated the 17th of August 1897, confirming the decree of Babu Jadupati Banerjee, Munsif of Alipur in that District, dated the 4th of March 1897.

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Against this decision the defendant No. 1 appealed to the High Court.

Dr. *Ashutosh Mookerjee*, for the appellant.

Babu *Jagat Chunder Banerjee*. for the respondents.

The judgment of the High Court (BANERJEE and RAMPINI, JJ.) was as follows:—

JUDGMENT.

BANERJEE, J.— The question raised in this appeal, which arises out of a suit to enforce a mortgage, is, whether upon an *ex parte* decree made in a mortgage suit being set aside, and subsequently reaffirmed after trial, the mortgagor becomes entitled to redeem the property, not only as against the mortgagee, but also as against a third party who purchased it at a sale held in execution of the *ex parte* mortgage decree and confirmed whilst the *ex parte* decree was still in force.

The Court of appeal below has answered this question in the negative, relying upon the cases of *Rewa Mahton* v. *Ram Kishen Singh* (1), and *Zain-ul-Abdin Khan* v. *Muhammad Asghar Ali Khan* (2).

In second appeal it is contended on behalf of the defendant, mortgagor, that the decree of the lower appellate Court is wrong in law, and that the cases relied upon in the judgment of the Court below, which are cases of sale in execution of money-decrees, are distinguishable from a case like the present, in which the auction-purchaser, whose rights have been held to remain unaffected by the subsequent reversal of the decree in execution of which he made his purchase, was an auction-purchaser in execution of a mortgage decree.

We are of opinion that so far as the present question is concerned, there is no real distinction between an auction-purchaser [736] at a sale in execution of a money decree and an auction-purchaser at a sale in execution of a mortgage decree. The way in which the learned vakil for the appellant sought to distinguish this case from the cases relied upon by the lower appellate Court was this: He contended in the first place that the reason of the rule in the cases of *Rewa Mahton* v. *Ram Kishen Singh* (1) and *Zain-ul-Abdin Khan* v. *Muhammad Ashgar Ali Khan* (2) was the same as the reason for the decision in the case of *Jan Ali* v. *Jan Ali Chowdry* (3), which is stated in the following passage in the judgment in the last-mentioned case: "If the sale of the chattel should be avoided the vendee would lose his chattel and his money too and thereupon great inconvenience would follow;" and he argued that that was a reason which could not hold good in the case of a sale in execution of a decree in a mortgage suit, as the mortgagor being required to redeem the property the mortgage money will always go to recoup the auction-purchaser. He also argued that in the case of a sale in execution of an ordinary money decree, the reversal of the decree does not amount to a reversal of the order for sale, under which the sale in execution was held, but that the reversal of a decree in a mortgage suit means, and, in terms carries with it, a reversal of the order for sale which is part and parcel of the decree itself. In the second place it was argued that as a purchaser at a sale in execution of a mortgage decree acquires all the interest that the mortgagor and mortgagee can jointly transfer, and that as, if the decree-holder had been the auction-purchaser, the reversal of the decree would result in the reversal of the sale, the purchaser at a sale in

(1) 14 C. 18=13 I.A. 106. (2) 10 A. 166=15 I.A. 12.
(3) 1 B.L.R.A.C. 56=10 W.R. 154.

execution of a mortgage decree being, in part at least, the representative in interest of the mortgagee decree-holder, the purchase by him would become inoperative upon the reversal of the mortgage decree. 1899 MARCH 22.

We are of opinion that these contentions ought not to prevail. With reference to the first contention, we would observe that the real reason for upholding a sale, notwithstanding the subsequent reversal of the decree, in execution of [737] which it takes place, is stated in the judgment of the Privy Council in the case of *Rewa Mahton* v. *Ram Kishen Singh* (1) in these words: "To hold that a purchaser at a sale in execution is bound to inquire into such matters would throw a great impediment in the way of purchases under executions. If the Court has jurisdiction, a purchaser is no more bound to inquire into the correctness of an order for execution than he has as to the correctness of the judgment upon which the execution issues." In other words, a sale in execution of a decree at which a third party becomes the purchaser is upheld, notwithstanding the subsequent reversal of the decree, because otherwise there will be less inducement to intending purchasers to buy at an execution sale, and consequently less chance of property fetching proper value at such sales. So again in the case of *Zain-ul-Abdin Khan* v. *Muhammad Ashgar Ali Khan* (2) their Lordships of the Privy Council observe: "It appears to their Lordships that there is a great distinction between the decree-holders who came in and purchased under their own decree, which was afterwards reversed on appeal, and the *bona fide* purchasers who came in and bought at the sale in execution of the decree to which they were no parties, and at a time when that decree was a valid decree and when the order for the sale was a valid order."

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There is no real distinction between the two cases, namely, the case in which a sale takes place in execution of a money decree and that in which a sale takes place in execution of a decree on a mortgage, by reason of the order for sale in the one case being distinct from the decree and in the other case being part of the decree itself. In both cases, the order is a valid order as long as the decree remains unreversed, and in both cases it would lose its force upon reversal of the decree. Nor is there any real distinction between the two classes of cases by reason of the money paid by the auction-purchaser being irrecoverable in the one case and recoverable in the other, as will appear from the following considerations.

[738] The property sold in execution of a mortgage decree would not necessarily sell for exactly the amount of the mortgage debt. In many cases it may sell for more, and the difference between the amount of the mortgage debt, which will go to the decree-holder, and the purchase-money, might, before the decree is reversed, be seized and taken out of Court by any creditor of the mortgagor, in which case the mere fact of any subsequent decree ordering redemption of the mortgaged property may not be sufficient to reimburse the auction-purchaser.

Then, again it may be that the decree made after the reversal of the decree, in execution of which the sale took place, may be for a very much smaller amount, in which case also an order for the redemption of the mortgaged property would not reimburse the auction-purchaser. It was argued that in such cases the Court might put the judgment-debtor to terms. So might the Court do in any case in which a sale in execution of a money decree takes place; but that has not been considered a sufficient reason for holding that, after the reversal of the decree, the sale ought

(1) 14 C. 18=13 I. A. 106. (2) 10 A. 166=15 I. A. 12.

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to be held liable to reversal when a third party was the auction-purchaser.

Then as to the second branch of the appellant's contention, although it is true that the purchaser at a sale in execution of a mortgage decree may avail himself of the rights of the mortgagee, for certain purposes such as to meet the claim of any subsequent mortgagee, or other person claiming any right to the property created after the date of the mortgage, still it could not be said that he was for all purposes a representative of the mortgagee decree-holder; and in so far as the rights claimed by the auction-purchaser, are derivable from the mortgagee decree-holder, those rights will be available or not, according as the mortgage decree stands or not. In the present case no such question arises.

We should add that though the *ex parte* decree was set aside it has subsequently been practically re-affirmed; in other words, according to the facts found, it appears that the same decree that was originally made would have been made if the suit had been a contested suit from the beginning. We should also add that the [739] defendant No. 1 who is the sole appellant before us, in her defence disclaimed all interest in the property sold.

We are unable on the grounds suggested in the argument for the appellant to distinguish this case from the class of cases in which the rule has been laid down that where a third party purchases in execution of a decree whilst that decree is in force, the subsequent reversal of that decree cannot affect his rights. The fact that the decree in execution of which a sale took place was an *ex parte* decree subsequently set aside, might perhaps under certain circumstances form a ground for distinguishing the case of such a sale from the cases cited. But it is unnecessary to consider this point, as it was not raised in this Court or in the Courts below, and as, moreover, the appellant before us in her written statement in the first Court disclaimed all interest in the property sold.

The appeal therefore fails and must be dismissed with costs.

S. C. G. *Appeal dismissed.*

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26 C. 739.

APPELLATE CIVIL.

Before Mr. Justice Ghose and Mr. Justice Banerjee.

ASSANULLAH BAHADUR (*Plaintiff*) *v.* MOHINI MOHAN DAS AND OTHERS (*Defendants*).* [26th April, 1899.]

Landlord and tenant—Accretion to parent estate, Assessment of rent in respect of—Regulation XI of 1825, *s* 4, *cl.* (1)*—Act XI of* 1855, *s* 1*—Regulation VII of* 1832*—Act IX of* 1847*—Act XXXI of* 1858*—Bengal Tenancy Act* (*VIII of* 1885), *s.* 52.

In a suit brought by the *talukdar* of a certain *mouzah* against the *dur-talukdar* for a declaration that he was entitled to get rent at a certain rate annually, also for arrears of rent at that rate, and in the alternative for compensation for use and occupation of the disputed land which was an accretion to the said *mouzah*, and in respect of which a settlement was made with him by Government treating it as a separate estate, the defence (*inter-alia*) was that the suit was not maintainable unless a rental was assessed in the first instance, and that no arrears of rent could be claimed as there was no relationship of landlord and tenant between the parties.

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* Appeal from Appellate Decree No. 2373 of 1897, against the decree of Amrita Lal Pal, Subordinate Judge of Dacca, dated the 17th of September 1897, affirming the decree of Babu Bepin Behary De, Munsif of Kaligunge, dated the 4th of January, 1897.

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[740] *Held*, the landlord could not treat it as a separate tenure altogether; that the increment was to be regarded as part of the parent estate, and treating it as part and parcel of the parent estate he was entitled to get assessment of rent on the disputed land; but he was not entitled in the suit to back rent or compensation for use and occupation.

[Rel., 29 C. 247 (251); D., 19 C.L.J. 614.]

THE plaintiff as lessee under Government, of a certain *dearah mehal* 10,842 of the Dacca Collectorate, from April 1891 to March 1901, sought to recover arrears of rent from 1299 B. S., to 1302 B. S., at a certain rate specified in the plaint, by adjudication of his right to obtain the same, or at any other rate which, on enquiry, might be assessed by the Court for the use and occupation of the said *mehal*, during the period in suit. The allegation in the plaint was that he was the proprietor of *chur* Rampore bearing *Towji* No. 5035 of the Tipperah Collectorate as well as lessee under Government of the aforesaid *dearah mehal* which was contiguous to it; that the defendants were the *dur-talukdars* under him of *asli chur* Rampore; that he attempted to collect rent from *raiyats* who held land in the said *dearah mehal*, but they refused to pay rent to him on the ground that they had paid their rent to the defendants for such land; that the defendants were in wrongful possession of the said *dearah mehal*, by collecting rent from the *raiyats*; that the defendants who were only *dur-talukdars* of *asli chur* Rampore had no right to remain in possession of the *dearah mehal* by collecting rent from its *raiyats* without payment of a separate *jama* in respect of it for their use and occupation; that on measurement of the *dearah mehal* by his own men the sum of Rs. 44-5 as. 11pie, was assessed to be its annual *jamabandi*, and that he was entitled to recover the sum of Rs. 39-14as. after having deducted Rs. 4-10as. as collection expenses, from the defendants as provided for in their *dur-talukdari pottah*; that the defendants, notwithstanding repeated demands, did not pay the said *jama* together with cesses and interest, and therefore the present action was brought.

The defence mainly was that the suit was not maintainable unless a rental was assessed in the first instance, and that the plaintiff was not entitled to claim arrears of rent as there was no relationship of landlord and tenant between the parties. The Munsif dismissed the suit, holding that inasmuch as there was no [741] relationship of landlord and tenant between the parties the action for recovery of arrears of rent would not lie.

On appeal the learned Subordinate Judge confirmed the decision of the first Court.

Against this decision the plaintiff appealed to the High Court.

Babu *Srinath Das*, and Babu *Bussunt Kumar Bose*, for the appellant.

Babu *Sarada Churn Mitter* and Babu *Jnanendro Mohan Das*, for the respondents.

The judgment of the High Court (GHOSE and BANERJEE, JJ.) was as follows :—

JUDGMENT.

The plaintiff is the *talukdar* of *mouzah chur* Rampore, the defendant is the *dur-talukdar* of that property. Certain lands accreted to *chur* Rampore, and the Government, having taken proceedings, as we understand it, under Act XXXI of 1858 and Act IX of 1847, settled the accretion, treating it as a separate estate, with the *talukdar*, the plaintiff, in the present case. Subsequently, this suit was brought claiming certain reliefs

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as against the defendant, the *dur-talukdar*, in respect of the said increment.

There are two or three contradictory statements in the plaint as to the position of the defendant, but ultimately it treats him as one entitled to hold the increment as tenant, and asks that it be declared that the plaintiff is entitled to obtain annually Rs. 39-14-11 as rent from the defendant in respect of such lands, and that a decree for rent in respect of the years from 1299 to 1302 at the said rate be awarded. And as an alternative relief it asks for compensation for the use and occupation of the lands in question by the defendant.

Both the Courts below have dismissed the suit, being of opinion, as we understand their judgments, that neither under the Bengal Tenancy Act, nor under the provisions of Reg. XI of 1825, is the plaintiff entitled to any of the reliefs claimed by him in his plaint.

Referring to Reg. XI of 1825, s. 4, cl. 1, we find it enacted that when land is gained by gradual accretion, [742] whether from the recess of the river or of the sea, it shall be considered an increment to the tenure of the person to whose land or estate it is thus annexed, whether such land or estate be held immediately from Government by a zemindar or other superior landholder, or is a subordinate tenure held by any description of under-tenant whatsoever. Provided that the increment of land thus obtained shall not entitle the person in possession of the estate or tenure to which the land may be annexed to a right of property or "permanent interest therein beyond that possessed by him in the estate or tenure to which the land may be annexed," and so on. That is to say, the land thus formed by the gradual recess of a river or of the sea shall be considered an increment to the parent estate or tenure, or, in other words, it shall be regarded as a part of that estate or tenure, the land having been gained by gradual accession.

Referring in the next place, to Act XXXI of 1858, under which the Government proceeded in settling the accretion with the landlord, we find that, though under s. 1 of that Act, it is competent to the Government to settle the increment as a separate estate, yet under s. 2 it is provided that: "Nothing contained in the preceding section shall affect the rights of under-tenants in alluvial land under the provisions of cl. 1, s. 4 of Reg. XI of 1825. It shall be the duty of all officers making settlement of such land, whether the land be settled separately or incorporated with the original estate, to ascertain and record all such rights according to the rules prescribed in Reg. VII of 1822, and determine whether any and what additional rent shall be payable in respect of the alluvial land by the person or persons entitled to any under-tenure in the original sum," and so on; that is to say whatever may be the mode adopted by Government in settling the increment, it would not affect the rights of any under-tenant in the same property—rights which he may possess under the provisions of the Regulation just cited.

Now what are the rights conferred by cl. 1, s. 4 of Reg. XI of 1825, upon an under-tenant to whose property land may accrete by gradual accession? As we understand the [743] matter, the tenure-holder is entitled to possess the increment in the same right and upon the same footing as that upon which he holds the parent estate, see the cases of *Gobind Monee Debia* v. *Dino Bundhoo Shaha* (1) and *Golam Ali* v. *Kali Krishna Thakur* (2). What may be the limit of the demand which the

(1) 15 W. R. 87. (2) 7 C. 479=8 C. L. R. 517.

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landlord is entitled to make as against the tenure-holder, is not clearly prescribed by the section.

In this connection we may refer to s. 52 of the Bengal Tenancy Act, but before doing so it would be just as well to notice the last portion of cl. 1, s. 4 of Reg. XI of 1825, as it existed before it was repealed by the Bengal Tenancy Act. That portion ran as follows: " Nor if annexed to a subordinate tenure held under a superior landholder shall the under-tenant, whether a *khudkasht raiyat* holding a *mourasi istemrari* tenure at a fixed rate of rent per bigha or any other description of under-tenant liable by his engagement or by established usage to an increase of rent for the land annexed to his tenure by alluvion, be considered exempt from the payment of any increase of rent to which he may be justly liable." The substance of this portion seems to have been embodied with modifications in s. 52 of the Tenancy Act. That section runs thus: "Every tenant shall be liable to pay additional rent for all land proved by measurement to be in excess of the area for which the rent has been previously paid by him, unless it is proved that the excess is due to the addition to the tenure or holding of land which, having previously belonged to the tenure or holding, was lost by diluvion or otherwise, without any reduction of the rent being made." Sub-clause (*b*) speaks of abatement of rent which we need not consider. Then in cl. 2 it is provided that in " determining the area for which rent has been previously paid, the Court shall, if so required by any party to the suit, have regard to the origin and conditions of the tenancy, for instance, whether the rent was a consolidated rent," and so on, and then cl. 3 provides: " In determining the amount added to the rent the Court shall have regard to the rates payable by tenants **[744]** of the same class for lands of a imislar description and similar advantages in the vicinity, and in the case of a tenure-holder to the profits to which he is entitled in respect of the rent of his tenure, and shall not, in any case, fix any rent which under the circumstances is unfair and inequitable," and so forth.

Now reading this section with Reg. XI of 1825 and Act XXXI of 1858, to which we have already referred, it seems to us that, if the increment is to be regarded, as we think it ought to be regarded, as part of the parent tenure, the landlord cannot treat the increment as a separate tenure altogether, but that treating it as a part and parcel of the parent tenure he can claim such relief as under the law he is entitled to obtain as against the tenure-holder.

Having made these observations which we think arise upon a consideration of the law upon the subject, let us see what are the reliefs to which the plaintiff in the present case is entitled. It seems to us in the first place that the plaintiff is not entitled to any back rent, and *that* for two reasons: *first*, there has been no contract between the parties as regards the separate payment of any rent in respect of the additional lands; and, *secondly*, because under the law the plaintiff cannot recover the rent of such additional lands separately from the original part of the tenure. It has, however, been contended by the learned vakil for the appellant, and at one time we were impressed by this contention, that, though the plaintiff may not be allowed to recover back rent in the present suit, he may yet be allowed to obtain compensation for the use and occupation of the land by the defendant. But it seems to us that if we were to give effect to this contention, we should have to hold that the landlord is entitled to treat the additional lands as a separate property, for which he is entitled to receive from the defendant compensation for the use and occupation.

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We think that the landlord is not entitled to any such relief in the present case. Indeed, there can be no claim for compensation for use and occupation, seeing that the law makes the defendant a tenant of the accreted land from the time of accretion, and the claim, if any, must be one for rent. But then the plaintiff asks [745] for the assessment of rent upon the land in question. We are of opinion that there is no reason why he should not be entitled to this relief. The lands have formed as an accretion to the defendant's tenure; rent must be assessed upon such lands, and the plaintiff cannot recover any rent from the defendants until it be in the first instance determined what is the additional rent he ought to pay for it, though, no doubt, if he had taken proceedings under s. 52 of the Bengal Tenancy Act, for the purpose of recovering rent in respect of the entire tenure, including the lands which have formed by way of accretion to the defendant's tenure, relief might have been given to him after such investigation as the provisions of that section require. But the fact that he has not taken that course does not, we think, disentitle him to a declaration how much additional rent should be paid for the land in question. In determining what is the additional rent which ought to be assessed upon the land the Court will have to be guided by the provisions of s. 52 of the Bengal Tenancy Act, indicating the principle upon which such additional rent may be claimed for any excess area in the occupation of a tenure-holder or a *raiyat*. We think it right and proper to remand the case to the Court of first instance with the view of determining what is the additional rent which the plaintiff, the landlord, is entitled to obtain from the defendant, the tenure-holder, on account of the lands which have accreted to his tenure. It will be open to both parties to adduce such further evidence as they may be advised to adduce. As regards the costs we are of opinion, having regard to the conflicting statements made in the plaint, as to the position of the defendant, and to the somewhat conflicting reliefs which the plaintiff asked for, that the ends of justice require that the respondent should have all the costs of this litigation up to the present stage. The costs which may be incurred in future will abide the result of the trial we now direct.

We desire to add that, though this order of remand is expressly with the view of trying the question of assessment of rent upon the additional area in the occupation of the defendant, yet it would not debar the Courts below from trying any other questions which legitimately arise between the parties in the case.

S. C. G. *Appeal allowed*; *case remanded.*

26 C. 746.

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[746] CRIMINAL REVISION.

Before Mr. Justice Ghose and Mr. Justice Wilkins.

W. B. COLVILLE AND OTHERS (*Petitioners*) *v.* KRISTO KISHORE BOSE (*Opposite-party*).* [9th May, 1899.]

Revision—High Court's power of revision—Presidency Magistrate, Proceedings of—Order for further inquiry—Criminal Procedure Code (Act V of 1898), *ss.* 423, 435 *and* 439—*Letters Patent, High Court,* 1865, *cl.* 28.

The High Court has under ss. 435 and 439, read with s. 423 of the Criminal Procedure Code, the power to revise the proceedings of a Presidency Magistrate and order a further inquiry to be made. It has the same power under cl. 28 of the Letters Patent of 1865.

[**Diss.**, 27 C. 126 (129); **F.**, 36 C. 994 = 11 C.L.J. 50 (52) = 10 Cr. L.J. 395 = 13 C.W.N. 1221 = 3 Ind. Cas. 861; **R.**, 27 B. 84 (86); **Cons.**, 14 Cr. L.J. 529 = 21 Ind. Cas. 129 = 14 M.L.T. 200 = (1913) M.W.N. 728; **D.**, 34 A. 487 (489) = 10 A.L.J. 45 = 13 Cr. L.J. 479 = 15 Ind. Cas. 319.]

THE complainants filed a complaint against the accused before the Presidency Magistrate of Calcutta for having committed offences under ss. 417 and 418 of the Penal Code. The Magistrate, after hearing the evidence on behalf of the prosecution, was of opinion that no *prima facie* case had been made out against the accused and ordered his discharge under s. 253 of the Criminal Procedure Code. The complainants moved the High Court and a rule was granted for the purpose of considering whether the High Court had not power to order a further inquiry into the matter, and also for determining whether the order of discharge made by the Presidency Magistrate should not be set aside.

Mr. *Garth*, Mr. *Zorab*, and Babu *Taruk Chunder Chakrabati*, for the petitioners.

The judgment of the High Court (GHOSE and WILKINS, JJ.) was as follows :—

JUDGMENT.

This rule was issued upon the Presidency Magistrate of Calcutta to show cause "why his order discharging the accused should not be set aside in order that it may be considered whether this Court has not, under s. 15 of the Charter Act, power to [747] order a further inquiry or otherwise deal with the matter as it may appear proper." As we understand this rule, it was granted for a double purpose, *first*, for the purpose of determining whether the order of discharge made by the Presidency Magistrate should not be set aside, and *secondly*, that it may be considered at the same time whether this Court has not, under s. 15 of the Charter Act, power to order a further inquiry into the matter. So far as the first mentioned purpose is concerned, it seems to us, upon examining the judgment of the Presidency Magistrate, and after hearing Mr. Garth in support of the rule, nobody appearing on the other side to show cause, that the Presidency Magistrate has not dealt with the matter before him in the way in which he should have dealt with it. He seems to have thrown out, in the course of his judgment, that he has no jurisdiction to take cognizance of the complaint, because the offence, if any, was committed at Shalimar within the jurisdiction of the District Magistrate of Howrah. But it

* Criminal Revision No. 240 of 1899, made against the order passed by Syed Ameer Hossein, Esq., Presidency Magistrate of Calcutta, dated the 3rd of March 1899.

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appears to us that the monies having been received from the complainants' firm at Calcutta, and the false accounts, as stated by the complainants, having been rendered in Calcutta, the Presidency Magistrate had jurisdiction to take cognizance of the complaint in question. The Magistrate has in this connection referred to the evidence of one Mr. Morse as showing that the accounts used to be sent to Kidderpore and the money drawn from that place. But, as we understand it, the transactions out of which this particular complaint has arisen are transactions which took place subsequent to the time of Mr. Morse and, therefore, are not affected by the evidence that was given by that gentleman.

Then, as regards the grounds upon which the Magistrate holds that no *prima facie* case has been made out, we are of opinion that that officer has misguided himself. He seems to have been under the impression as if the main (if not the whole) question before him was whether the accused was justified in paying the coolies at higher rates than the rates at which the complainant says they ought to have been paid. But, according to the case for the prosecution, as laid before us, there were no payments made by the accused at all to many of the coolies; and it is further alleged that the accused, having made certain false [748] entries in the shape of payments made to the coolies, and having submitted his accounts at the head office in Calcutta, drew further sums of money from that office and, in that way, cheated the complainants' firm of a considerable sum of money. It seems to us that this part of the case has not been, as it ought to have been, gone into by the Presidency Magistrate; and that this ought to be now done. It follows, therefore, that the order of discharge is erroneous, and should be set aside.

As regards the other purpose for which the rule was granted, it seems to us that, under ss. 435 and 439 read with s. 423 of the Code of Criminal Procedure, this Court has the power to revise the proceedings of the Presidency Magistrate, he being subject to the appellate jurisdiction of this Court. But beyond this, on referring to cl. 28 of the Letters Patent bearing date the 28th December 1865, it appears that this Court has the power to revise the proceedings of the Criminal Courts subject to its appellate jurisdiction. The Courts of the Presidency Magistrates are subject to our appellate jurisdiction; and it follows, therefore, that this Court has the authority to revise the proceedings now before us under the said clause of the Letters Patent, not s. 15 of the Charter Act, mentioned in the rule, which was obviously a mistake for cl. 28 of the Letters Patent. With these remarks the rule is made absolute, the order of the Presidency Magistrate being set aside, and a further inquiry being directed into the complaint instituted. We further direct that the trial of this case should be held by the Chief Presidency Magistrate. Let the records be sent down to his Court.

S. C. B. *Order for further inquiry.*

26 C. 748=3 C.W.N. 741.

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CRIMINAL REVISION.

Before Mr. Justice Prinsep and Mr. Justice Hill.

SATISH CHANDRA RAI AND ANOTHER (*Petitioners*) v. JODU NANDAN SINGH (*Opposite party*).* [1st June, 1899.]

Warrant of arrest—Criminal Procedure Code (Act V of 1898), s. 80—Notification of substance of warrant—Penal Code (XLV of 1860), s. 225-B.

[749] An arrest by a police officer without notifying the substance of the warrant to the person against whom the warrant is issued as required by s. 80 of the Criminal Procedure Code is not a lawful arrest, and a resistance to such an arrest is not an offence under s. 235 B of the Penal Code.

[R., 16 P.R. 1904 (Cr) ; D., 15 Cr. L.J. 439=24 Ind. Cas. 175=25 Ind. Cas. 328=1914 M.W.N. 498.]

A WARRANT of arrest was issued for the purpose of obtaining the attendance of a person who was a party to certain proceedings under s. 110 of the Criminal Procedure Code. At the time of making the arrest the police officer did not notify the substance of the warrant, as required by s. 80 of the Criminal Procedure Code, but merely showed the warrant, which he held in his hand along with other warrants, to the person to be arrested. The petitioners resisted the execution of the warrant, and were convicted of an offence under s. 225 B of the Penal Code by the Deputy Magistrate of Faridpur. The District Judge on appeal upheld the conviction. The petitioners moved the High Court, and obtained a rule contending that the conviction under s. 225 B could not stand, inasmuch as the substance of the warrant under which the arrest was made was not notified to the person arrested as required by s. 80 of the Criminal Procedure Code.

Mr. *P. L. Roy*, Mr. *C. R. Das*, and Babu *Manmatha Nath Mookerjee*, appeared on behalf of the petitioners.

The judgment of the High Court (PRINSEP and HILL, JJ.) was as follows :—

JUDGMENT.

The petitioners were convicted by the appellate Court under s. 225 B of the Indian Penal Code.

On this rule, we have to consider whether the conviction is a valid conviction because the arrest was not lawfully made within the terms of s. 80 of the Code of Criminal Procedure, inasmuch as when the police officer, who was resisted, made the arrest, he did not notify the substance of the warrant which he held to the person to be arrested. As an authority for this, we have been referred to the case of *Abdul Gafur* v. *Queen-Empress* (1), in which it was held that an arrest so made is not a lawful arrest, resistance to which is an offence under the Penal Code. The arrest here made was not for an offence for which a police [750] officer was competent to make the arrest without a warrant. It was for the purpose of obtaining the attendance of a person who was a party to certain proceedings instituted under s. 110 of the Code of Criminal Procedure ; that is, who had been required to show cause why he should not give security for good behaviour. It has, however, been said that the person to be

* Criminal Revision No. 272 of 1899, made against the order passed by B. C. Mitter, Esq., Officiating Sessions Judge of Faridpur, dated the 9th February, 1899.

(1) 23 C. 896.

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arrested, and the petitioners were aware that the police constable had a warrant of arrest, and that, although he did not notify its substance, he showed it on the occasion of the arrest. We are not satisfied that this in itself would be sufficient to make an arrest valid without any notification of the substance of the warrant, or an opportunity given to the person to be arrested by showing him the warrant so that he might read it. In this case the warrant was held in the hand of the police officer along with six other warrants, and thus shown to him, and it was impossible for any one to know what the substance of the warrant may have been, or indeed for him to satisfy himself that the police constable really held a warrant for the arrest he was making. The conviction and sentence must, therefore, be set aside and the rule made absolute.

S. C. B.

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26 C. 750 = 4 C.W.N. 446.

APPELLATE CIVIL.

Before Mr. Justice Macpherson and Mr. Justice Ameer Ali.

CHHATRAPAT SINGH (*Judgment-debtor*) *v.* GOPI CHAND BOTHRA AND OTHERS (*Decree-holders*).* [20th March, 1899.]

Bengal Tenancy Act (*VIII of* 1885), s. 148, *cl.* (*h*)—*Assignee of decree—Trustees applying for execution for benefit of assignor's heirs.*

The word "assignee" as used in s. 148, cl. (*h*), of the Bengal Tenancy Act, does not include trustees who execute decrees under an assignment which is not for their own benefit but for the benefit of the heir of the assignor.

[**Appr**., 35 C. 737 (739, 740) = 7 C.L.J. 652 (655); **R.**, 33 C. 566 (**F.B.**) = 3 C.L.J. 470 = 10 C.W.N. 547; 16 C.L.J. 360 = 17 Ind. Cas. 343 (345); 18 C.L.J. 89 (92); 9 Ind. Cas. 625 (626); **D.**, 31 C. 550 (553) (555) = 8 C.W.N. 531; 15 C.W.N. 994 = 10 Ind. Cas. 415 (416).]

RAI DHUNPUT SINGH obtained two decrees against the appellant for arrears of rent on the 10th of July 1896, in respect of two **[751]** *putni mehals* situated in Pergunnah Haveli. On the 27th of June 1893 he had sold his right and interest in the said Pergunnah to one Bhugwanbuti Chowdrani. The above rent decrees were on account of rents due from the appellant for a period prior to the date of the sale.

On the 19th of July 1896 Rai Dhunput Singh executed a deed of trust in favour of the respondents, by which he conveyed to them various properties, both moveable and immoveable, upon certain trusts; the above two decrees against the appellant were included in the said deed. The following is a copy of the deed without the schedule of properties :—

"I, Rai Dhunput Singh Bahadur, son of the late Babu Protap Singh, by caste Oswal, by occupation zemindar, &c., inhabitant of Azimgunge, division Asanpura, Sub-Registry Baluchur, district Moorsheda-bad, execute this trust deed, *i.e.*, (*nyaspatra*) in respect of immoveable and moveable properties as follows :—

In the month of February of the year 1893, owing to the unjust proceedings of one Kastur Chand, Rai Bahadoor, I being declared an insolvent by an order of the Hon'ble High Court at Calcutta in its Original Insolvent Jurisdiction, dated the 16th February 1893, was involved in considerable debts. By sale and mortgage, I have lately paid off a large

* Appeal from Order No. 351 of 1897, against the order of Babu Chakradhar Prosad, Subordinate Judge of Purneah, dated the 2nd of September 1897.

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amount of debt, but still I have debts to a large amount. It is necessary for me to make a settlement for the purpose of liquidating the said debts in due (time). Owing to physical and mental uneasiness, I am personally unable to do business any more in a satisfactory way, and it is the wish of most of my creditors that I should make over my properties to the hands of trustees, for the purpose of liquidating my debts. For all these reasons, I make over all my immoveable and moveable properties, that is to say, all kinds of property of which I am now the owner, by appointing as trustees Gopi Chand Bothra, son of the late Fakir Chand Bothra, by caste Oswal, and Kirat Chand Srimal, son of the late Mogni Ram Srimal, inhabitants of Azimgunge, occupation service, and Surja Coomar Adhikari, son of the late Bhagwan Chunder Adhikari, by caste Brahmin, occupation service, now residing at Baluchur. The trustees, on being entitled to and coming into possession of all my properties as proprietors (*maliks*) and causing their names to be registered, &c., in the Collectorate, &c., according to law, shall pay my debts from the profits of the properties or by mortgage and sale of all or some of them; and as to those sums which are due to me, they on becoming representatives in my place, shall realize amicably or by aid of Court, and shall hand over the same also to the extent practicable for the liquidations of my debts, and shall in the first place pay the expenses that may be incurred on account of doing all these acts, as well as on account **[752]** of litigation. They shall discharge debts by even selling those properties which I have mortgaged. As to those properties which may be left as surplus, or which it may be unnecessary to sell, they are to give back the same to me or to my heir Sriman Maharaj Bahadoor. I give below a list of the properties, of which I am now the owner, but if owing to mistake any property be omitted from the list, it shall also be included in this trust deed. Prior to the liquidation of my debts, neither I nor my heir shall be able to interfere with the acts of the trustees, and unless they commit an act of waste, neither I nor any of my representatives shall be able to revoke the said trust; the trust shall operate in an irrevocable way. For preparing a list of my debts, the trustees shall ascertain (the same) by inspection of my *khata* papers, and shall not acknowledge any debts not covered by *rokas*, *hatchittas* or *hundis*, bearing the signature of me or of my *munib gomashtas* or decrees. As to any arrangements which the trustees may make, with respect to the preservation and supervision of the properties, neither I nor anybody else shall make objections to the same, and they may according to their wish, dismiss the old *amlas* and appoint new *amlas*. As to the sale of the properties, they may sell properties to any one whom they like at the value which they may think to be proper, and any *kobala* signed by them and which is registered shall have the same force as one bearing my signature or the signature of my representatives. If it be necessary to borrow money by mortgaging properties, the trustees shall do the same, but the interest on such mortgage shall not exceed Rs. 9 (nine) per cent. per annum. As to the realization of the moneys remaining due, the trustees have become the representatives in my place and they shall act by using their respective names as trustees. This trust deed shall remain in force until my debts are satisfied, that is to say, not only during my lifetime, (but) also after my death, and my heirs and representatives shall be bound by the terms of this trust-deed. If all or any of the trustees be willing to give up the trust, they must appoint another trustee and he shall act according to the trust. But if any of the trustees should resign without appointing another

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trustee, or if he should die before the appointment of another trustee, then any person whom I, during my lifetime or after my death, my widow Rani Mina Kumari or my youngest son Maharaj Bahadoor, if he had (?) of age, may appoint as trustee, shall be the trustee. This trust-deed shall be treated as a deed of conveyance of property. As to those landed properties, *jotes* and *jummas* which are made over to the hands of the trustees under this trust deed, they shall be the persons fully entitled to realize the arrears and outstandings, &c., and all kinds of dues relating to them. To this effect I execute this trust deed in a sound state of mind.

Dated the 5th Srabun 1303, corresponding with the 19th July 1896.

Dhunput Singh died in the month of September 1896, and on the 3rd of December following the trustees, respondents, applied [753] for execution of the said two decrees. The appellant, judgment-debtor, raised several objections, contending amongst other things, that, under s. 148, cl. (*h*) of the Bengal Tenancy Act, the application for execution of the decree by the trustees was not maintainable inasmuch as the landlord's interest in the land had not become vested in them.

The Subordinate Judge overruled the objections and ordered the execution of the decrees.

The judgment-debtor appealed to the High Court.

Dr. *Rash Behari Ghose* and *Babu Joy Gopal Ghose*, for the appellant.

Babu *Saroda Churn Mitter* and Babu *Pramatha Nath Sen*, for the respondents.

The following judgments were delivered by the High Court (MACPHERSON and AMEER ALI, JJ.) :—

JUDGMENTS.

AMEER ALI, J.—This appeal arises out of an application for execution of two decrees obtained by one Rai Dhunput Singh Bahadoor against the present appellant in respect of certain *putni* rents. The application is dated the 3rd of December 1896.

It appears that on the 27th of June 1893 Rai Dhunput Singh, who was the owner of Pergunnah Haveli within which the *putni mehals* are situated, sold his right and interest to one Mussammat Bhagwanbuti Chowdrani. On the 10th of July 1896, he obtained the decrees in question for the rents due from the appellant for a period prior to the sale; and on the 19th July 1896 he executed a trust deed in favour of one Gopi Chand Bothra and others by which he conveyed to them various properties, both moveable and immoveable, upon certain trusts. The two decrees against the appellant were included in the said trust deed.

Dhunput Singh died in September 1896; and on the 3rd of December following, as already stated, the trustees applied for execution.

On the 3rd March 1897 a petition of objection was put in on behalf of the judgment-debtor in which he contended, *first*, that the trustees' power came to an end on the death of Dhunput Singh, and that, therefore, they had no authority to apply for [754] execution; *secondly*, that the decree-holder's adult sons, Gunpat Singh and Nurput Singh, together with his minor son, Maharaj Bahadoor Singh, were his legal representatives; *thirdly*, that, inasmuch as the judgment-debtor's right in the properties had already been sold, and purchased by one Bibi Jarao Kumari Saheba, the respondents were not entitled to proceed against the tenure; and *fourthly*, that under s. 148, cl. (*h*) of the Bengal Tenancy Act, the application for execution of the decree on behalf of the trustees was not maintainable.

Upon these objections the Subordinate Judge laid down the following points as arising for determination :—

"*1st.*—Is the application for execution of the decree on behalf of the trustees maintainable?"

"*2nd.*—If maintainable, whether the decree under execution can be treated as a first charge on the properties sought to be sold, and whether they should be considered rent decrees?"

"*3rd.*—Whether Maharaj Bahadoor alone is legal heir and representative of the deceased Babu Rai Dhunput Singh, the original decree-holder?"

"*4th.*—Whether a subsequent application by Maharaj Bahadoor for being added as an applicant, remedies the defect which the judgment-debtor seeks to press?"

It is to be noticed that on the 7th of August 1897 Maharaj Bahadoor, the infant son of Dhunput, joined in the application for execution.

The Subordinate Judge holds that the power of the trustees did not expire with the death of Dhunput, and that the trustees are entitled to execute the decrees; he holds further that inasmuch as the rents for which the decrees were obtained accrued when the relationship of landlord and tenant existed between Dhunput and the judgment-debtor, the lien still continues and that the trustees are entitled to enforce the same. He also holds that any technical defect in the application arising from the non-joinder of the personal representatives of Dhunput was cured by the fact of Maharaj joining in the application. And the learned Judge accordingly overruled the judgment-debtor's [755] objections, directed execution of the decrees at the instance of the trustees and Maharaj Bahadoor, and declared that the *putni* tenures were liable to be sold in execution of those decrees.

The judgment-debtor has appealed to this Court. His case has been argued with considerable ingenuity, and the same objections which were taken in the Court below have been pressed before us.

I think, however, that those objections are not tenable.

First, with regard to the authority of the trustees the contention is that they were merely agents of Dhunput Singh, and that consequently upon the death of Dhunput the agency came to an end, and the trustees became practically *functi officio*, all authority vesting in them by virtue of the trust deed falling to the ground. In my opinion this argument proceeds upon a somewhat fallacious reasoning. The passages cited from Lewin on Trusts must be read with the documents on which the cases referred to in the text-book proceeded. Each case must, it seems to me, be dealt with upon its own special facts; and we have, accordingly, to see what the document in the present case directs and provides. In other words, we must see whether, as is contended by the appellant's pleader, it only gives to the trustees an authority to do certain acts constituting them merely as his agents for certain purposes, or whether, as the learned Subordinate Judge finds, it conveys a legal estate to the trustees and virtually amounts to an actual transfer in their favour, subject to certain trusts. For this purpose it is necessary to refer to the terms of the trust deed. It begins by reciting that the executant Dhunput was largely involved in debt, and that it was necessary for him to make a settlement for the purpose of liquidating the same and accordingly, as he himself was "unable to do business any more in a satisfactory way," and it was the wish of most of his creditors that he should make over all his properties, moveable and immoveable, "that is to say, all kinds of properties of which he was then the owner," to certain trustees for the purpose of liquidating his debts, he, accordingly,

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made over all his immoveable and moveable properties to the persons therein named. The deed then goes on to provide that the trustees were to hold possession [756] of all his properties as proprietors, to get their names registered in the collectorate, and pay the debts from the profits of the properties or by mortgage and sale of all or some of them. After the debts were discharged they were to give back the surplus or whatever remained to Dhunput or his heir, Maharaj Bahadoor. The deed then declares that neither he nor his representatives shall be able to revoke the said trust, and that it shall operate in an irrevocable way. And it then goes on to state as follows :—

"This trust deed shall remain in force until my debts are satisfied, that is to say, not only during my lifetime (but) also after my death and my heirs and representatives shall be bound by the terms of this trust deed. If all or any of the trustees be willing to give up the trust they must appoint another trustee and he shall act according to the trust. But if any of the trustees should resign without appointing another trustee, or if he should die before the appointment of another trustee, then any person whom I, during my lifetime or after my death, my widow Rani Mina Kumari or my youngest son Maharaj Bahadoor, if he had (?) of age, may appoint as trustee, shall be the trustee." And it winds up by declaring: "This trust deed shall be treated as a deed of conveyance of property. As to those landed properties *jotes* and *jummas*, which are made over to the hand of the trustees under this trust deed, they shall be persons fully entitled to realize the arrears and outstandings, &c., and all kinds of dues relating to them. To this effect I execute this trust deed in a sound state of mind."

Upon the terms of the deed there can be no doubt that it purports to convey to the trustees, absolutely, the properties covered by it subject to certain trusts. In my opinion there is no ground whatsoever for saying that it was merely an authority to the so-called trustees to do certain acts, which authority ceased with the death of the principal. The properties were conveyed to the trustees for the purpose of discharging his debts, and then returning any residue left either to Dhunput or his heir. It was to be irrevocable on the part of his heirs and representatives, was to take effect as a conveyance, and was to continue in force, not only in his lifetime, but after his death, until the purpose for which [757] it was executed had been fully discharged. In my opinion there is no ground for contending that the trustees under such a conveyance had no power to execute the decrees. I hold, therefore, that the first objection is wholly untenable.

It is also clear from the recitals contained in the document printed at p. 44 of the Paper Book, which bears date the 30th June 1893, and from the entire evidence of the record, that the two adult sons of Dhunput separated from him in 1887, and ceased to have any interest whatsoever in the properties covered by the deed of trust, and that Maharaj Bahadoor, Dhunput's minor son, alone is the person entitled to the benefit of the trust. No question of limitation is raised in this case. Maharaj has by a petition joined in the application for execution ; and I think the learned Judge in the Court below was right in holding that Maharaj, in conjunction with, or separately from, the trustees, was entitled to execute the decrees obtained by his father.

It was contended that under cl. (*h*) of s. 148 of the Bengal Tenancy Act the trustees were not entitled to execute the decrees. That clause runs as follows :—

"(*h*) Notwithstanding anything contained in s. 232 of the Code of

Civil Procedure, an application for the execution of a decree for arrears obtained by a landlord shall not be made by an assignee of the decree unless the landlord's interest in the land has become and is vested in him."

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26 C. 750= 4 C.W.N. 446.

In my opinion there is no force in this contention. From one point of view the trustee is an assignee, inasmuch as the property is conveyed to him as has been done in this case. But to my mind the Legislature never intended to include in the word "assignee" used in cl. (*h*) persons in whom a legal estate was vested by an act of the owner, but who had no independent interest in the property. I think that the provision in question applies only to outside purchasers for consideration.

There remains then only one question to consider, namely, whether, in view of the fact that the *putni mehal* had been sold in execution of a money decree and purchased by one Bibi Jarao Kumari, the applicants are entitled to proceed against the tenures for the satisfaction of their rent decrees. As the learned **[758]** Judge points out certain rents had become due from the appellant whilst he held the tenure. After Dhunput transferred the property to Mussammat Bhagwanbuti Chowdrani he obtained decree for these rents. The sale of these tenures in execution of money decrees could not release the tenures from the lien which had already attached to them. Further it seems to me that as the appellant contends he has lost the property he is not entitled to raise the question that the tenures are not liable to sale in execution of these decrees.

The applicants are clearly entitled to have execution of the decrees; and I should accordingly dismiss the appeal with costs.

MACPHERSON, J.—I agree that the appeal must fail. We are asked to hold that the Court could not act upon the applications for execution, because the trustees had no authority to make them, and the want of authority was not cured by the subsequent joinder of Maharaj Bahadoor. Also that the Court was wrong in declaring that the *putni mehals* could be sold under the provisions of the Tenancy Act. *First*, because the applications were in direct contravention of the provisions of cl. (*h*), s. 148 of that Act, the original applicants being assignees of the decrees in whom the landlord's interest had not become vested; *secondly*, because the decrees were not decrees for rent within the meaning of the Act as Dhunput was not at the time when he obtained them the landlord of the appellant the judgment-debtor.

By the deed of the 19th of July 1896, Dhunput made over the decrees in question, and all his property to the applicants for execution, in trust avowedly for the payment of his debts, and the surplus was to be returned to him, or his heir Maharaj Bahadoor, when the debts were satisfied, but not before. The effect of this deed as a trust for the payment of debts was considered in the case of *Fink* v. *Maharaj Bahadoor* (1). That was a suit brought by the receiver of an estate to recover the money due on three *hundis* drawn by Dhunput. The claim on one of the *hundis* was barred by limitation—unless the creditor could, as he attempted to do, take advantage of the trust deed. It was not **[759]** proved that the deed had been communicated to the creditors or assented to by them, and the Court held that the creditor was not a beneficiary under the deed and could not take advantage of it. We are now asked to go a step further, and to hold, at the instance of a debtor to the estate, that the deed was wholly inoperative, or that it at all events became so on the death of

(1) 2 C.W.N. 469.

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Dhunput, and this solely for the purpose of determining whether the Court could execute the decrees on the application of the trustees.

There is no doubt as to the execution of the deed which purports to convey the properties, and to be very much more than a deed of agency, it has never been questioned by Maharaj Bahadoor, who putting the creditors on one side, appears to be the only person who could question it, and there is no proof that it has not been acted on. The proof is, indeed, the other way. It seems to me unnecessary in this proceeding to consider what the legal effect of the deed may be as regards the properties affected by it. There was, I think, a perfectly good application for execution under s. 232 of the Civil Procedure Code, and the Court might have acted upon it if it thought fit to do so. The judgment-debtor, it is true, objected, and said there had been no valid assignment, but the transferor, or rather his representative, then joined in the application, and by so doing and in the absence of any question of limitation, put an end to the necessity of any further discussion as to the validity of the transfer. It is said that as Dhunput left two other sons Maharaj Bahadoor is not his only representative. It appears that in 1887 there was a family settlement by which the two elder sons took a portion of the property, and agreed not to claim any part of what was left in Dhunput's possession or was afterwards acquired. It is argued that this operated only as an agreement which must be enforced in the regular way. The sons are not before us, and do not appear to have claimed any part of the property covered by the trust deed. They assert no interest in these decrees, and their rights, if any, are not prejudiced by allowing the execution. So far as appears they have no rights, and I see no reason why the decrees should not be executed on the applications before us.

Can they then be executed as rent decrees? Section 148, cl. (*h*) of the Tenancy Act, enacts that "notwithstanding **[760]** anything contained in s. 232 of the Code of Civil Procedure an application for the execution of a decree for arrears obtained by a landlord shall not be made by an assignee of the decree, unless the landlord's interest in the land has become and is vested in him." The landlord's interest in the land is not vested in the trustees, and it is argued that their applications for execution were inadmissible by an express provision of law, and that the subsequent joinder of Maharaj Bahadoor could not make them good applications under the Tenancy Act. Dhunput, it may be observed, had parted with his interest in the land before the decrees were obtained, but it cannot, on that ground, be successfully contended that he could not have executed the decrees under the provisions of the Tenancy Act, by the sale of the tenures in respect of which they were obtained. The relationship of landlord and tenant existed during the period for which the rent was claimed, the rent was due to him as landlord, was decreed to him as such, and it was a charge on the tenures. The only question, therefore, is whether, having regard to the provisions of s. 148, cl. (*h*) of the Tenancy Act, the applications should have been rejected. I agree that the word "assignee" as used in that section does not include persons in the position of the applicants, who are executing the decrees under an assignment, which is not for their benefit, but for the benefit of the heir of their assignor. If the deed does not, as the appellant contends, create a trust for creditors, Maharaj Bahadoor is now the only beneficiary under it, and the applicants are trustees for him. He could certainly have applied for execution without infringing the provision of s. 148, and to hold that the trustees could not do so would be, I think, to give the section a

wider scope than it was intended to have. He, moreover, has now joined in the application.

It is not alleged that the tenure has been sold for any arrears which have since become due, and the sale of the judgment-debtors' rights and interests, if there has really been any such sale, would not prevent the sale of the tenures in satisfaction of these decrees. For the above reasons I consider that the appeal fails and must be dismissed with costs.

S. C. B. *Appeal dismissed.*

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26 C. 761.

[761] APPELLATE CIVIL.

Before Mr. Justice Rampini and Mr. Justice Handley.

DIGAMBAR MAHTO (*Plaintiff*) *v.* JHARI MAHTO AND OTHERS (*Defendants*).* [2nd June, 1899.]

Landlord and tenant—Korfa raiyats *in Manbhum—Ejectment—Sufficiency of notice to quit—Act X of* 1859.

There is no authority for the proposition that notice to quit to a *korfa raiyat* in Manbhum must be a six months' notice. Such a *raiyat* is only entitled to a "reasonable notice." What is a reasonable notice is a question of fact, which must be decided in each case according to the particular circumstances and local customs as to reaping crops and letting land.

Kishori Mohun Roy Chowdhry v. *Nund Kumar Ghosal* (1), distinguished.

Jagut Chunder Roy v. *Rup Chand Chango* (2), *Radha Gobind Koer* v. *Rakhal Das Mukherji* (3), *Bidhumukki Debea Chowdhrain* v. *Kefyutullah* (4), and *Kali Kishen Tagore* v. *Golam Ali* (5), referred to and followed.

[**R.**, 16 C.L.J. 30 (32) = 11 Ind. Cas. 368 ; 8 C.W.N. 774 (**F.B.**) ; **D.**, 17 C.W.N. 1073 = 20 Ind. Cas. 363.]

THIS was a suit for a declaration of the plaintiff's title to, and for recovery of *khas* possession of, certain lands in Manbhum. The plaintiff alleged that the defendants were holding the land under him as *korfa raiyats* at a yearly rent, and that he had given to the defendants more than a month's notice to quit. The defendants alleged that they were not *korfa raiyats*, but held the land in ancestral *junglebari noyabadi* right, and further contended that the plaintiff's claim was barred by limitation, and that the notice was not sufficient and therefore invalid.

The Munsif found that the suit was not barred, and that the notice was valid in law, but that the defendants being *junglebari raiyats* could not be ejected.

On appeal, by the plaintiff, the Subordinate Judge dismissed the appeal, holding that, even assuming the defendants to be [762] *korfa raiyats* the defendants were entitled to six months' notice according to the decision in *Kishori Mohun Roy Chowdhry* v. *Nund Kumar Ghosal* (1).

From this decision the plaintiff appealed to the High Court.

Babu *Sarada Charan Mitter* (and Babu *Digambar Chatterjee*), for the appellant.—The Subordinate Judge ought to have decided whether the notice given was resonable or not, and not upon a hard and fast rule, which

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* Appeal from Appellate Decree No. 60 of 1898, against the decree of Babu Sarada Prasad Chatterjee, Subordinate Judge of Manbhum, dated the 9th of December 1897, reversing the decree of Babu Sasi Bhusan Chatterjee, Munsif of Purulia, dated the 18th May 1897.

(1) 24 C. 720. (2) 9 C. 48. (3) 12 C. 82. (4) 12 C. 93. (5) 13 C. 3.

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he found in *Kishori Mohun Roy Chowdhry* v. *Nund Kumar Ghosal* (1). The case relied upon by the lower appellate Court came from the District of Dacca, and in it there was a tenancy-at-will, and the subject of the tenancy was not agricultural, whilst the present case came from Manbhum, in which the provisions of Act X of 1859 prevail. The cases of *Jagut Chunder Roy* v. *Rup Chand Chango* (2), *Radha Gobind Koer* v. *Rakhal Das Mukherji* (3), *Bidhumukhi Dabea Chowdhrain* v. *Kefytullah* (4), and *Kali Kishen Tagore* v. *Golam Ali* (5), show that the question to be decided is whether the notice is reasonable.

Babu *Nolini Ranjan Chatterji*, for the respondent.—In *Kishori Mohun Roy Chowdhry* v. *Nund Kumar Ghosal* (1) the learned Judges decided that for a tenancy reserving an annual rent six months' notice should be given, and in the present case also there is a tenancy with an annual rent reserved. Hence the lower appellate Court was quite right in relying on that case.

The judgment of the High Court (RAMPINI and HANDLEY, JJ.) was as follows :—

JUDGMENT.

This is an application against the decision of the Subordinate Judge of Manbhum, dated the 9th December 1897. The suit was one for the ejectment of *korfa raiyats*, who held at a yearly rent of Rs. 5-6 annas 10 gundas, and the Subordinate Judge has dismissed the plaintiff's suit on the ground that the notice to [763] quit served upon the *korfa raiyats* was insufficient, being one of about two months.

The learned Subordinate Judge held that in this case the defendants were entitled to six months' notice expiring at the end of the year of the tenancy before they could be ejected from their holding, and in support of this view he relies on the case of *Kishori Mohun Roy Chowdhry* v. *Nund Kumar Ghosal* (1).

The learned pleader for the appellant has, however, pointed out to us that the case referred to is no authority for the decision at which the Subordinate Judge has arrived. The present case comes from Manbhum, where the provisions of Act X of 1859 prevail ; but the case of *Kishori Mohun Roy Chowdhry* v. *Nund Kumar Ghosal* referred to above, is one coming from the district of Dacca, in which the defendant was a tenant-at will, and in which the subject of the tenancy was certainly not agricultural land, otherwise the provisions of the Bengal Tenancy Act would have been applicable.

The cause of action in that suit arose from the fact that the defendants had built a *pucca posta* and *ghat* upon the land, and the learned Judges who decided that case said that it did not come under the Tenancy Act, but under the purview of the case of *Rajendronath Mookhopadhya* v. *Bassider Rhuman Khondkhar* (6), and they therefore held that "there being no authority to the contrary in this country, we see no reason, nor has any reason been suggested, why the rule of English law should not be applicable to such a tenancy as the present in this country, and we think that six months, terminating at the end of the year, is the notice to which the tenant under such a tenancy as that in this case is entitled."

We, however, do not think that this is any authority for a six months' notice being required in a case coming from Manbhum, in which the defendants are *korfa raiyats*.

(1) 24 C. 720. (2) 9 C. 48. (3) 12 C. 82.
(4) 12 C. 93. (5) 13 C. 3. (6) 2 C. 146.

The question of notice to quit in cases coming under Bengal Act VIII of 1869, which Act is similar to Act X of 1859, has [764] been considered in several cases. The first of these cases is *Jagut Chunder Roy* v. *Rup Chand Chango* (1), in which the learned Judges laid down this rule: "We think that the result of the cases is this, that such a *raiyat* is entitled to a reasonable notice. What is a reasonable notice is a question of fact which must be decided in each case according to the particular circumstances and the local customs as to reaping crops and letting land. In the present case a three months' notice was given, and there was no contention that at the time when that notice expired, any crop was upon the ground, the necessity of removing which would have made the notice, under the circumstances, unreasonable."

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This case has been followed in the cases of *Radha Gobind Koer* v. *Rakhal Das Mukerji* (2), *Bidhumukhi Dabea Chowdhrain* v. *Kefytullah* (3), and *Kali Kishen Tagore* v. *Golam Ali* (4).

We think that these cases lay down the rule which is applicable to the present case, and we, therefore, set aside the decision of the Subordinate Judge and remand the case to him for a decision according to the law applicable to this case. He must consider what in the circumstances is a resonable notice to quit, and decide the case accordingly.

If the notice is unreasonable, he should dismiss the suit; otherwise, he should dispose of the other issues which arise in the case.

Costs will abide the result.

M. R. M. *Case remanded.*

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26 C. 764.

MATRIMONIAL JURISDICTION.

Before Mr. Justice Stanley.

STEVENSON *v.* STEVENSON. [8th and 19th June, 1899.]

Practice—Divorce Act (IV of 1869), *s.* 36—*Alimony* pendente lite, *Application for—Denial of means by respondent—Reference to Registrar—Respondent ordered to attend Court for cross-examination as to his means.*

On an application alleging means made by a petitioner, the wife, for alimony *pendente lite* the respondent denied means. The Court refused to [765] refer the matter to the Registrar to inquire and report, but ordered the respondent to attend Court for cross-examination as to his means.

THIS was a wife's petition for divorce. Before the hearing the petitioner applied for alimony *pendente lite* on an affidavit setting out that the respondent had means. The respondent by his affidavit in reply swore he was without means, dependent on his relatives, and out of employment.

Mr. *Bell*, for the petitioner.

Mr. *Knight*, for the respondent.

Mr. *Bell* asked for the usual order of reference to the Registrar to determine the amount of alimony.

Mr. *Knight*, *contra.*—I submit this is not a question of amount. The respondent swears he has nothing, and is out of employment. The respondent could easily be examined in Court without referring the matter to the Registrar. I would ask the Court not to refer the matter,

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(1) 9 C. 48. (2) 12 C. 82. (3) 12 C. 93. (4) 13 C. 3.

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but dispose of it on the motion. This is the English practice, see *Gaynor* v. *Gaynor* (1), a much stronger case than this, as the respondent there had an appointment, but was on leave. *Fletcher* v. *Fletcher* (2). There also the respondent was holding an appointment, though at the time he was on leave. To refer the matter under the existing circumstances would be simply putting the parties to needless costs.

Mr. *Bell.*—The practice of the Court has been to refer in all cases.

STANLEY, J.—I certainly shall not order an idle reference. Let the respondent attend Court for cross-examination as to his means next Monday week.

On the day fixed the respondent attended as ordered and was put in the witness-box by Mr. Knight.

Mr. *Bell.*—I do not desire to cross-examine the respondent.

Mr. *Knight.*—Then the application must be dismissed. I do not ask for costs.

ORDER.

STANLEY, J.—Counsel on behalf of the petitioner states that he does not desire to cross-examine the respondent. The respondent **[766]** has filed an affidavit in which he states that he is without any means whatever. The application must consequently be dismissed. I reserve the question of costs. The petitioner to have liberty, if such liberty be required, to renew the application at any future time.

Attorneys for the petitioner: Messrs. *S. J. Leslie & Sons.*

Attorneys for the respondent: Messrs. *Sanderson & Co.*

D. S.

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26 C. 766.

ORIGINAL CIVIL.

Before Mr. Justice Stanley.

DWARKA DASS AGURWALLAH *v.* GIRISH CHUNDER ROY.
[7th July, 1899.]

Practice—Deposit by defendant of money in Court in satisfaction of claim—Right of plaintiff to draw out such money and prosecute suit for balance claimed—Discretion of Court—Code of Civil Procedure (Act XIV of 1882), ss. 377, 379.

Suit for recovery of Rs. 5,500 on three promissory notes. Defendant pleaded minority at the date of the transactions, denied all liability, also denied receiving Rs. 5,500, but admitted receipt of Rs. 1,500, which sum together with interest he tendered to the plaintiff in full satisfaction of his claim. On refusal by the plaintiff to accept that sum it was paid into Court. The plaintiff then applied to the Court for payment to him of the said amount. The defendant contended that the amount should be kept in Court pending the hearing, as all liability was denied, and offered to pay interest if plaintiff succeeded in his suit.

Held, that the plaintiff was entitled to take the money out of Court.

THIS suit was instituted by the plaintiff against the defendant for the recovery of the sum of Rs. 5,500 and interest due on three promissory notes, dated the 29th June 1895, the defendant being an infant his written statement was filed through his guardian; the execution of the three promissory notes was admitted, but the defendant denied all liability and

(1) (1862) 31 L J.P. & M. 144. (2) (1862) 2 Sw. & Tr. 434.

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(*inter alia*) alleged that the sum of Rs. 5,500 had never been advanced as alleged. He admitted having received Rs. 1,500, and alleged that the plaintiff was aware of his being a minor at the date of the transactions. He further pleaded that the plaintiff had instituted [767] a suit against him on one of the notes in the Small Cause Court at Calcutta, and had withdrawn it without leave to institute any further suit, and in consequence thereof the claim so far as that note was concerned was barred. Upon the defendant coming of age the guardian was discharged, and the defendant filed an additional written statement, wherein he adopted the defence set up by his guardian, and further stated that he had on the 22nd March 1899 tendered the sum of Rs. 1,836, being the sum of Rs. 1,500, which he admitted he had received, and interest thereon up to the said 22nd March 1899, to the plaintiff, stating that though he was advised he was in no way liable to the plaintiff, and denied any liability, he had in fact received that sum and was ready and willing to return it with interest thereon, and that he accordingly tendered that sum on condition that the plaintiff should enter up satisfaction for the full amount of his claim in the suit, and had informed the plaintiff that if he refused to accept the said sum it would be paid into Court on the same condition. He also stated that owing to the plaintiff refusing, he had accordingly brought the money into Court, and while still denying all liability he was willing that the plaintiff should be paid the same and allowed to take it out of Court, provided the amount was accepted by him in full satisfaction of all his claims in this suit. Simultaneously with filing his additional written statement the defendant paid the amount into Court, and the order giving him leave to do so was dated the 11th April 1899, and drawn up in the usual form, and while referring to the additional written statement ordered that the defendant be at liberty to pay to the Comptroller-General to the credit of this suit the sum of Rs. 1,836 admitted by him in his additional written statement to be due to the plaintiff. The money was paid into Court by the defendant on the 28th April 1899. The plaintiff on the 7th July 1899 applied in Chambers for payment to him of the said sum of Rs. 1,836, with liberty to him to prosecute the suit for the remainder of his claim.

Mr. *R. Mitter*, for the plaintiff.

Mr. *Hyde*, for the defendant.

Mr. *Mitter*.—The plaintiff is entitled to draw the sum out of Court and prosecute his suit with regard to the rest of his claim [768] (see ss. 377 and 379 of the Code of Civil Procedure). The sections of the Code with reference to the payment of monies into and out of Court were based upon and followed the practice at the time those sections were framed, though not now, obtaining in England.

Mr. *Hyde, contra*.—Where, as in this case, the money is paid into Court with a denial of liability and with an offer that if the plaintiff accepts it in full satisfaction of his claim, he can do so; the practice in England now is if the money be not accepted in full satisfaction to retain it in Court, Order XXII, Rule 6, Annual Practice, 1899. I submit that in s. 377 of the Code the words " unless the Court otherwise directs " gives the Court discretion to keep the money in Court, pending the hearing of the suit, and the Court in exercising that discretion would exercise a wise one, if it proceeded on the basis of the practice now existing in England. No doubt in the order obtained by the defendant on the 11th April 1899 it is stated that the sum of Rs. 1,836 is admitted by the defendant in his additional written statement to be due to the plaintiff in this suit. That

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is the usual form in which such orders are drawn up. It is incorrect, as that order referred to and must be read with the defendant's additional written statement, where, while he admits having received Rs. 1,500 when a minor, he denies all liability to the plaintiff of any kind. The defendant is ready to pay interest on the money at the rate of 6 per cent. if the plaintiff succeeds in his suit. The defendant does not in any way desire to profit by what has taken place; as soon as he could do so he at once offered to refund the Rs. 1,500 and interest up to date at 6 per cent. to the plaintiff.

ORDER.

STANLEY, J.—The question is not one as to the greater convenience of the English practice or the practice in this country. According to the English practice the money remains in Court till the decision of the suit. That was possibly a wise alteration of the previous practice. The practice is not so here. By the provisions of the Code a defendant is allowed to pay money into Court, and after such payment he is not liable to pay any interest in respect of the amount so paid. The plaintiff is penalised if he does not take the money out. The Code provides that no interest is to be paid to the plaintiff after he receives [769] notice of the payment into Court, and directs that the money shall be paid to the plaintiff "unless the Court otherwise directs." I think the Court has a discretion to refuse to allow the money to be paid out, but that discretion is to be exercised reasonably. In a case where the money sued for is due on a promissory note it would be unreasonable in the absence of special circumstances not to allow the plaintiff to take the money out. I am aware of Mr. Hyde's offer to pay interest, but I do not think that this offer would justify me in refusing to grant the application. I think Mr. Mitter has established his right to take the money out of Court, and I shall make the order with costs.

Attorneys for the plaintiff: Messrs. *Kally Nath Mitter & Sarvadhikari.*

Attorneys for the defendant: Messrs. *Watkins and Co.*

D. S.

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26 C. 769.

ORIGINAL CIVIL.

Before Mr. Justice Stanley.

GHASSEE JEMADAR *v.* NASSIRUDDIN MISTRY. [3rd July, 1899.]

Practice—Agreement as to Costs between attorney and client—Change of attorney—Right of attorney to his taxed costs.

Where *F* an attorney agreed to conduct a suit for his client and to accept Rs. 150 for his personal services, and not in respect of out-of-pocket costs and Counsel's fees, and in the event of his client being successful to recover his full costs from the opposite party and to refund the Rs. 150, it was *held* upon the client desiring to change to another attorney that he could do so upon payment to *F* of his taxed costs.

IN this case the defendant employed Mr. E. J. Fink, an attorney of the High Court, to defend a suit. The terms upon which the attorney agreed to act were embodied in the following letter dated 30th March 1898:—

"Ghassee Jemadar v. Yourself.

DEAR SIR,

As you are so desirous that I should act for you herein on terms, I will defend this suit and act for you on your paying me Rs. 150 cash for

my fees and labour; stamps and Counsel's fees, and all out-of-pocket expense to be paid by you separately from time to time as and when required. Should you win the suit you will get a refund of the Rs. 150 from me on my realizing my entire costs from the plaintiff.

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26 C. 769.

Yours faithfully,
(Sd.) E. J. FINK."

[770] In pursuance of the said agreement the defendant paid to Mr. Fink from time to time Rs. 205, namely, Rs. 150 his costs as settled, and Rs. 55 on account of out-of-pocket expenses. The defendant, owing, as he alleged, to a misunderstanding having arisen between himself and Mr. Fink as to payment of certain costs, instructed another attorney Babu N. G. Newgie to obtain a change of attorney, and on the 23rd May 1899 the usual order for change of attorneys was obtained, the defendant being directed to pay Mr. Fink the costs due to him upon taxation as between attorney and client. Mr. Fink's costs were taxed, and he was allowed Rs. 353-14 for in-pocket costs and Rs. 71 for out-of-pocket costs. The defendant, however, alleged that under the said agreement Rs. 16 only, being the balance of the out-of-pocket costs, were due by him to Mr. Fink, and on the 3rd July 1899, the defendant, upon notice to Mr. Fink, applied to the Court for an order for the completion of the change of attorney on payment by him to Mr. Fink of Rs. 16. Mr. Fink alleged that he had always been ready and willing to act for the defendant, and that the only misunderstanding he had had with the defendant was entirely unconnected with any matter of costs in this suit, and that he was entitled to his costs as taxed.

Mr. *Bonnaud*, for the defendant.

Mr. *Sinha*, for Mr. E. J. Fink.

Mr. *Bonnaud*.—The attorney entered into a special contract with the defendant as to his fees. He cannot now ask that his costs be taxed in the usual way. As to the attorney losing his chance of recovering his fees from the other side, that can be no ground for compelling the client to retain him. There is nothing in the agreement which compels the defendant to continue his services, nor has he agreed to pay him any more than the Rs. 150, in the event of his dispensing with his services. In England, where the attorney has entered into a special contract, the Court has always allowed the client to change his attorney on good cause shewn. Here there was a misunderstanding between the client and his attorney, and the client desires to go to another attorney. He has already paid the sum which he agreed to pay, [771] and the order for change should now be made on payment of Rs. 16, the balance of the out-of-pocket costs.

Mr. *Sinha contra*.—There is no doubt that a client is at liberty to change from one attorney to another during suit, and then the ordinary rule is that he can obtain that order for change only on payment of his attorney's costs. Here the client contends that he is not bound by the ordinary rule because of a special agreement, but that special agreement amounts to this, that the attorney was to carry on the suit from beginning to end getting Rs. 150 only from the client and having a chance of recovering costs from the other side if his client succeeded. The client himself desires to put an end to that contract, as he does not want the attorney to conduct the case any further, though the case is now on the list and ripe for hearing; that being so, he cannot claim any advantage under that special agreement; it is one entire indivisible contract. The special

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agreement therefore being broken by the client himself, he must under the ordinary rules pay costs irrespective of the special agreement before he can obtain the change.

ORDER.

STANLEY, J.—In this case there was an agreement in writing between the defendant and his attorney, whereby the attorney agreed to accept Rs. 150 for his personal services in addition to costs out-of-pocket and Counsel's fees, but in the event of the client being successful the attorney was to refund the Rs. 150, and in that event to recover full costs from the plaintiff. Some misunderstanding appears to have arisen between the defendant and his attorney, and the defendant in consequence desires to change his attorney, and thereby preclude him from carrying on the case to a termination with the chance of success and profit therefrom to the attorney. It is said by Mr. Bonnaud that the attorney agreed to conduct the case for Rs. 150, and has been paid that sum, and he is not entitled to have his costs taxed in the usual way. I am of opinion that on the terms of the agreement the attorney is entitled, upon his ceasing at the instance of the defendant to act as attorney for him, to have his costs taxed in the usual way. The special agreement has been rescinded by the client by his insisting upon a change of attorneys; he cannot therefore base any [772] claim upon a contract to which he himself has not adhered. Mr. Bonnaud's client must pay the costs of this application, and I certify for Counsel. Application for change of attorney without payment of costs is refused.

Attorney for the defendant: Babu *N. J. Newgie.*

Mr. *E. J. Fink* acted as Attorney on his own behalf.

D. S.

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Before Mr. Justice Stanley.

FINK *v.* MAHARAJ BAHADOOR SING AND OTHERS.* [5th July, 1899.]

Execution of decree—Distribution of proceeds of execution—Assets realized by sale or otherwise in execution—Monies realized by Receiver appointed by decree-holder—Equitable execution—Code of Civil Procedure (Act XIV of 1882), s. 295.

Rents of property under attachment which have been realized by a Receiver appointed at the instance of one decree-holder are "assets realized by sale or otherwise in execution of a decree" within the meaning of s. 295 of the Code of Civil Procedure.

The appointment of a Receiver by the Court at the instance of a judgment-creditor is a "process of execution."

[F., 9 C.L.J. 210=4 Ind. Cas. 52 (53); R., 28 B. 264 (274); 10 O.C. 268 (270) (B).]

BY a decree in this suit, dated the 30th April 1898, it was (*inter alia*) ordered and decreed that the infant defendant, Maharaj Bahadoor Sing, should out of the estate of his deceased father Rai Dhunput Singh pay to the plaintiff, (the Receiver of the estate of one Sewbux Sureka deceased), the sum of Rs. 3,394-4, with interest at the rate of 6 per cent. per annum, and should also pay to the plaintiff the costs of the suit with interest at the same rate. The costs amounted to Rs. 1,072-13. The defendant

* Original Civil Suit No. 352 of 1897.

having failed to pay the decretal amount and costs the plaintiff, on the 8th August 1898, obtained an order for execution of the decree by attachment of, amongst others, certain premises in Calcutta. By an order, dated the 26th August 1898, Mr. Belchambers was appointed Receiver under s. 503 of the Code of Civil Procedure to collect the rents of the said premises and pay the same after deducting thereout his commission and [773] charges to the Comptroller General of Accounts to be placed to the credit of this suit, subject to the further order of this Court. The Receiver on the 19th April 1899 paid in the sum of Rs. 3,493-7-6 to the credit of the suit. No prohibitory order or attachment had been filed in the office of the Accountant General affecting this fund, and it appeared that neither this nor any other property of the defendant was affected by any attachment before judgment.

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The plaintiff applied on summons to the defendant and to a number of creditors of Rai Dhunput Singh, who had previously obtained execution of decrees, and some of whom had attached the same properties, the rents whereof had been collected by the said Receiver, praying that the amount paid into Court should be paid to him in part satisfaction of his decree, or in the alternative for a reference to the Registrar to ascertain which of the decree-holders were entitled to the money in Court under the provisions of s. 295 of the Code of Civil Procedure.

The application was heard in Chambers.

Babu *Kally Nath Mitter*, for the plaintiff.

Babu *Bhupendra Nath Bose*, for the defendant.

Mr. *N. C. Bose*, for some of the attaching creditors.

Babu *Kally Nath Mitter*.—Money realized by the Receiver is not "assets realized by sale or otherwise" within the meaning of s. 295 of the Code, and, therefore, the plaintiff alone is entitled to the benefit of the money. Section 295 does not in any way apply to money realized by the Receiver in this case; the modes of execution "otherwise than by sale" prescribed in the Code can only be under ss. 291, 305 and 322. *Gopal Dai* v. *Chunni Lal* (1), *Purshotamdass Tribhovandass* v. *Surajbharthi Haribharthi* (2) and *Sew Bux Bogla* v. *Shib Chunder Sen* (3) were referred to.

Mr. *N. C. Bose*, *contra*.—The appointment of a Receiver after decree under s. 503 of the Code is a mode of realizing [774] money in the hands of third parties. It does not make any difference in the nature of the money realized, nor does it take it out of the operation of s. 295: *Sorabji Edulji Warden* v. *Govind Ramji* (4).

Babu *Bhupendro Nath Bose* supported the contention put forward by the plaintiff: *Prosonnomoyi Dassi* v. *Sreenauth Roy* (5), and *Siriah* v. *Muckanachary* (6). The appointment of the Receiver was in the way of "equitable execution." It is an execution not under the provisions of the Code, and therefore does not come under the word "otherwise" in s. 295.

ORDER.

STANLEY, J.—In this matter a summons was taken out by the plaintiff for an order for payment to him by the Accountant General of the balance which shall remain of the sum of Rs. 3,458-7-5 representing monies paid into Court by the Receiver appointed at the instance of the plaintiff over certain immoveable property of the defendant after payment

(1) 8 A. 67. (2) 6 B. 588. (3) 13 C. 225.
(4) 16 B. 91 (97 to 99). (5) 21 C. 809. (6) 10 M. 194.

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of costs, or in the alternative that it be referred to the Registrar to report who are the persons if any entitled to participate in the fund besides the plaintiff.

The plaintiff obtained a decree against the defendant on the 30th of April 1898 for the sum of Rs. 3,394-4-0 and costs, and on the 8th of August 1898 he obtained an order of attachment of, amongst other, certain property of the defendant in Khungraputty Street and in Cross Street in Calcutta.

By an order of the 26th of August 1898 made in this action Mr. Belchambers was appointed Receiver to collect from the tenants the rents of the property above referred to, and was directed, after payment thereout of charges and commission, to pay the balance of the amount so to be realized to the Comptroller General of Accounts and the Secretary and Treasurer of the Bank of Bengal, with the privity of Accountant General to be by them placed to the credit of this suit, subject to the further order of this Court. The Receiver collected the rents, and on the 19th of April last he paid into Court the sum of Rs. 3,493-7-6.

[775] No prohibitory order or attachment has been filed in the office of the Accountant General affecting this fund, and from the Sheriff's certificate, dated the 25th of May 1899, it appears that neither this nor any other property of the defendant is affected by any attachment before judgment.

A number of decree-holders other than the plaintiff in this action having obtained attachments against the immoveable properties of the defendant between the 24th of January 1895 and 23rd of May 1899, contend that under s. 295 of the Code of Civil Procedure they are entitled to have the fund in Court rateably divided between them and the plaintiff.

It is clear that no creditor, who obtained an attachment order subsequent to the realization of the rents now represented by the moneys in Court, is entitled to participate, as it is only decree-holders who have applied to the Court for execution of their decrees prior to the realization who are comprehended in the section.

The question then is whether or not rents of property under attachment which have been realized by a Receiver appointed by one decree-holder are assets realized "by sale or otherwise" in execution of a decree within the meaning of s. 295 of the Code. This is a question of some difficulty and of considerable importance. On the part of the plaintiff it is contended that the words "or otherwise" refer to a realization under ss. 291, 305 or 322, the provisions of these sections being all modes of realizing assets from the property of the judgment-debtor "otherwise" than by sale, and do not include a realization of assets by the appointment of a Receivor under s. 503. On the part of the other decree-holders it is argued that the words by "sale or otherwise" are comprehensive, and should be construed as meaning by sale or by other process of execution provided for by the Civil Proceduro Code, and that the assets realized by the appointment of a Receiver are assets realized by a process of execution provided for by the Code.

The object of the Legislature in introducing s. 295 into the Code was manifestly to place all judgment-creditors on the same footing in the administration by the Court of their [776] debtor's estate, provided that they had taken the precaution of invoking the aid of the Court by applying for execution of their decrees in any of the modes prescribed by the Code. Here the mode of execution in which the assistance of the Court was required by the creditors was by attachment of the debtor's property,

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but the plaintiff also sought execution of his decree by the appointment of a Receiver.

None of the cases to which I have been referred govern the present case. In the case of *Purshotamdass Tribhovandass* v. *Surajbharti Haribharthi*(1) it was held that moneys paid by a judgment-debtor under arrest in satisfaction of the decree were not assets realized "by sale or otherwise" under s. 295 of the Code: that this section must be read as if the words "from the property of the judgment-debtor" were inserted after the word "realized." In this case, it will be observed, the debt was not realized by any of the modes of execution prescribed by the Code.

That decision was approved of in the case of *Gopal Dai* v. *Chunni Lal* (2). In that suit the plaintiff and the defendant held decrees against one Bishambarnath and took out execution of them, and the judgment-debtor's property was attached, but no sale took place. The judgment-debtor paid into Court the sum of Rs. 1,200 on account of the plaintiff's decree, and it was held that the plaintiff was entitled to the sum so paid into Court, and that it could not be regarded as "assets realised by sale or otherwise in execution of a decree" so as to be rateably divisible between the decree-holders under s. 295 of the Code, inasmuch as it could not be said that there was a realization from the property of the judgment-debtor. The payments in both these cases were made by the judgment-debtor voluntarily, though no doubt under the pressure of the decrees.

In the case of *Sew Bux Bogla* v. *Shib Chunder Sen* (3) the plaintiff had obtained a decree against the defendants for **[777]** a sum of Rs. 1,397-11-0. In execution of this decree certain property of the judgment-debtor was attached on the 7th of January 1886. On the 31st of August 1885 one Bhugwan Doss obtained a decree against the same defendants for the sum of Rs. 1,241-14-3, and on the 8th of January 1886 applied for attachment of the defendant's property. On that date a warrant was issued, but the property was never actually attached. Some time between the 8th and 15th of January 1886 the defendants filed their petition of insolvency, and the usual vesting order was made. The Official Assignee then paid into Court the amount of the decree obtained by Sew Bux, and the property was released from attachment. In an application of Bhugwan Doss to the Court under s. 295 of the Code for a share of the money so paid into Court, it was held by Trevelyan, J., that the applicant was not entitled to participate in it, inasmuch as s. 295 only provided for the case where by the process of the Court in execution of a decree property has become available for distribution amongst the judgment-creditors. The learned Judge expressed his opinion that the words "by sale or otherwise" meant by sale or by other process of execution provided for in the Civil Procedure Code. This decision was followed by Sale, J., in the case of *Prosonnomoyi Dasi* v. *Sreenauth Roy* (4).

I concur in this view. I see no good reason for limiting the meaning of the words so as to exclude from their operation any process of execution which is available to a judgment-creditor under the provisions of the Code. The Legislature in my opinion intended by the language of the section to secure for all judgment-creditors who had invoked the aid of the Court in the manner pointed out by the section a rateable participation in all assets realized by any process of execution.

(1) 6 B. 588. (2) 8 A. 67. (3) 13 C. 225. (4) 21 C. 809.

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It remains then to consider whether the appointment by the Court of a Receiver is a process of execution. Section 503 of the Code provides that "whenever it appears to the Court to be necessary for the realization, preservation or better custody or management of any property, moveable or immoveable, the subject of a suit or *under attachment*, the Court may appoint a Receiver." [778] The appointment of a Receiver by the Court at the instance of a judgment-creditor is equitable execution—see the judgment of Cotton, L.J., in *Anglo-Italian Bank* v. *Davies* (1), it is a process of execution which is enforced by the Court at the instance of a judgment-creditor. Unlike the cases above referred to, where the moneys were paid into Court voluntarily by the judgment-debtor and by the Official Assignee, respectively, the moneys recovered in this suit have been realized out of the estate of the judgment-debtor *in invitum* and by the aid of the Court. This being so, I fail to see any reason for limiting the application of the principle of rateable distribution adopted in s. 295 in the way in which the plaintiff submits that it should be limited. My decision no doubt will deprive the plaintiff to a large extent of the immediate fruits of his superior diligence, but it is, I believe, consonant with the spirit and intention of the framers of the Code.

I shall therefore refer the matter to the Registrar under the alternative relief asked by the summons. The costs of all parties other than the defendants of this application to be paid out of the balance of the fund in Court before distribution after satisfying the costs of realization, including the plaintiff's costs of this application.

Attorneys for the plaintiff: Messrs. *Kally Nath Mitter & Sarvadikari.*

Attorney for the defendant: Babu *Bhupendra Nath Bose.*

Attorney for the attaching creditors: Mr. *N. C. Bose.*

D. S.

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Before Mr. Justice Sale.

DENO NATH BATABYAL *v.* NUFFER CHUNDER NUNDY AND OTHERS.* [13th June, 1899.]

Presidency Small Cause Courts Act (*XV of* 1882), s. 26, *sub-ss.* 2, 3, 4, *ss.* 28, 61, 62—*Attachment—Claim by mortgagor in execution proceedings in Small Cause Court—Civil Procedure Code* (*Act XIV of* 1882), ss. 278, 279, 280, 281, 282, *and* 293—*Presidency Small Cause Court Rules of Practice*, 49, 50, 51—*Tiled huts*—"*For the purposes of execution*," *meaning of*—Res judicata.

[779] An order made upon a claim to attached property filed in the Small Cause Court of Calcutta in a proceeding under s. 278 of the Civil Procedure Code is "an order made in a suit" within the meaning of s. 37 of the Presidency Small Cause Courts Act (Act XV of 1882), and is final, subject only to the right to apply for a new trial.

The words of s. 28 (Act XV of 1882) "*for the purposes of execution*" must mean for all purposes of execution, inclusive of the purpose of determining objections made to attachments. Tiled huts for all purposes of execution are therefore moveable property under that section.

The Small Cause Court has full power and authority to determine the question of title under a mortgage over attached property, and that question is, therefore, *res judicata*. *Ismail Solomon Bhamji* v. *Mahomed Khan* (2), followed.

[Rev., 4 C.W.N. 470; R., 34 C. 823 (826).]

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* Original Civil Suit No. 54 of 1898.

(1) (1878) L.R. 9 Ch. D. 275 (290). (2) 18 C. 296.

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THIS was a suit on a mortgage of certain tiled huts executed by the defendant Nuffer Chunder Nundy in favour of the plaintiff.

The defendants Adhur Chunder Sett and Hridoy Nath Sett obtained a decree for Rs. 2,000 against the defendant Nuffer Chunder Nundy in the Calcutta Small Cause Court, and in execution of that decree attached the said tiled huts which had been mortgaged to the plaintiff. The plaintiff thereupon filed a claim in the Small Cause Court, but the claim was disallowed, the Court being of opinion that the mortgage was not a genuine transaction. The Small Cause Court also allowed compensation to the defendants, the attaching creditors. The plaintiff having failed to substantiate his claim in the Small Cause Court, brought this action in the High Court on his mortgage, making the attaching creditors as well as the mortgagor defendants, praying as against the former that a Receiver might be appointed to take charge of the property, and also that the former might be restrained by and under the injunction of this Court from proceeding to a sale or otherwise disposing of the property.

Mr. *R. Mitra*, and Mr. *S. R. Das*, for the plaintiff.

Mr. *B. Chakravarti*, and Mr. *N. Chatterjee*, for the defendants Adhur Chunder Sett and Hridoy Nath Sett.

The defendant Nuffer Chunder Nundy did not appear.

[780] Mr. *Chakravarti.*—The suit is not maintainable—see *Ismail Solomon Bhamji* v. *Mahomed Khan* (1). Although s. 23 of the Small Cause Court Act (Act XV of 1882) has been repealed by s. 12 of Act I of 1895, s. 9 of Act I of 1895 continues in force the whole of the practice and law of procedure in force on the 31st of December 1894, unless and until cancelled and varied by rules made by the High Court. The plaintiff had the choice of his forum. He could either have come to the High Court or the Small Cause Court. He elected to have his claim investigated and adjudicated upon by the Small Cause Court; he would not be allowed to agitate the High Court because his claim was disallowed. The order of the Small Cause Court is final and conclusive under s. 37 of Act XV of 1882. Here the properties under attachment are the tiled huts which, by legislation, have been made moveable property, at any rate for the purpose of execution. See Tagore Lectures (1895), p. 36.

Mr. *Mitra.*—Under the General Clauses Act, s. 3, sub-s. 25, tiled huts are immoveable property—see also *Nattu Miah* v. *Nand Rani* (2). The rules made by the Small Cause Court are *ultra vires*.

JUDGMENT.

The following judgment was delivered by

SALE, J.—The plaintiff in this case seeks to enforce a mortgage against the defendant Nuffer Chunder Nundy executed by him in favour of the plaintiff on the 24th of November 1896 to secure a sum of Rs. 1,000 with interest, which sum the plaintiff alleges he advanced to the mortgagor as a loan. The mortgaged property consisted of three tiled huts situate in Calcutta, which the mortgagor either acquired by purchase or caused to be erected on land rented by him.

The plaintiff further alleges that the defendants Adhur Chunder Sett and Hridoy Nath Sett, in the month of September 1897, caused the said properties to be attached in execution of a money decree obtained by them against the mortgagor, and that he (the plaintiff) as mortgagee of the properties filed a claim in [781] the Court of Small Causes, which was, on the 30th of November 1897, disallowed.

(1) 18 C. 296. (2) 8 B. L. R. 508.

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The plaintiff accordingly submits that the Sett defendants, the attaching creditors, are necessary parties to this suit, and he says they have been called on to redeem the said mortgaged properties, and the relief prayed against them is, that a Receiver may be appointed to take charge of the properties, and that they (the attaching creditors) may be restrained by and under the injunction of this Court from proceeding to a sale or other disposition of the said properties.

The defendant Nuffer Chunder Nundy has not appeared in the suit, but the defendants Adhur Chunder Sett and Hridoy Nath Sett have appeared to contest the plaintiff's claim, and in their written statement make the following allegations :—

That the mortgage in suit is a fraudulent transaction resorted to by the mortgagor in collusion with the plaintiff with the object of defeating the just claim of the attaching creditors.

That the decree, in execution of which the mortgaged properties have been attached, was made on the 21st of July 1897 in a suit instituted in the Small Cause Court on the 24th of November 1896, a day previous to the date of the alleged mortgage, in which the claim was in respect of a sum of Rs. 2,000 due from the defendant Nuffer Chunder Nundy on a *hathchitta*.

That the sum due to the attaching creditors under the said decree is Rs. 2,000, together with the sum of Rs. 254-12 awarded as costs.

That the claim filed by the plaintiff in the Court of Small Causes came on for hearing on the 2nd November 1897, when the Court found on the evidence that the alleged mortgage was not a genuine transaction; that it was a device concocted by the defendant Nuffer Chunder Nundy, in conjunction with the plaintiff, to defeat the decree which the attaching creditors obtained against their judgment-debtor, and that the Court, accordingly, dismissed the plaintiff's claim and allowed the sum of Rs. 100 as compensation to the judgment-creditors.

That the plaintiff had filed an application for a new trial which [782] was then pending. That in pursuance of a consent order made by this Court on the 10th February 1898, the mortgaged properties had been sold, and the sale proceeds had been paid into Court to the credit of this suit.

At the hearing it was contended on behalf of the attaching creditors by way of a preliminary objection to the suit that the order of the Small Cause Court disallowing the plaintiff's claim is a bar to the relief which is sought against them, and that the finding also of the Court as to the genuineness of the mortgage is conclusive between the parties, and that, as a result, the suit is not maintainable and ought to be dismissed as against them.

No evidence was adduced on either side upon the preliminary point, the argument proceeding upon the basis that the finding of the Small Cause Court in the claim suit was correctly stated in the defendant's written statement. It was stated, however, and not disputed, that the plaintiff's application for a new trial of the claim suit was withdrawn, and that the amount of the sale proceeds of the mortgaged properties now in Court is insufficient to satisfy in full the claim of the attaching creditors.

The procedure of the Small Cause Court is now regulated by Act XV of 1882 as amended by Act X of 1888 and I of 1895.

By s. 37 of the Amended Act it is provided that, subject to the right to apply for a new trial, every decree and order of the Small Cause Court in a suit shall be final and conclusive.

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The first question then is, whether the order of the Small Cause Court disallowing the plaintiff's claim—based on his mortgage, to have the attachment of the judgment-creditors removed, can be said to be an order made in a suit.

The procedure as to claims made in respect of attached property by persons other than the judgment-debtor is regulated by s. 26 of Act XV of 1882, paras. 2, 3 and 4, ss. 61 and 62 of the same Act, ss. 278, 279, 280, 281 and 282 of the Civil Procedure Code, and by rules 49, 50 and 51 of the Small Cause Court Rules of Practice.

No doubt s. 23 of Act XV of 1882, which extended certain portions of the Civil Procedure Code, including the claim [783] sections, to the Small Cause Court has been repealed by s. 12 of the Amending Act I of 1895, but, on the other hand, s. 9 of the same Amending Act continues in force the whole of the present practice and law of Procedure of the Small Cause Court, until this procedure has been superseded by a new procedure to be introduced by rules framed by the High Court.

The rules of practice of the Small Cause Court have been framed under the powers reserved to the Court by s. 9 of Act XV of 1882, as it stood before the Amending Act I of 1895 came into operation. By that section the Court was empowered, with the previous sanction of the High Court, to make rules to provide in such manner as it thought fit for all matters not specially provided for by the Act.

Section 61 of the Act provides: "If any claim is made to or in respect of any property seized under this chapter, or in respect of the proceeds or value thereof by any person not being the debtor, the Registrar of the Small Cause Court, upon the application of the bailiff who seized the property, may issue a summons calling before the Court the claimant and the person who obtained the warrant."

The section, after providing for the stay of any suit which may have been brought in the High Court in respect of the claim, proceeds: "And a Judge of the Small Cause Court shall adjudicate upon such claim and make such order between the parties in respect thereof and of the costs of the proceedings as he shall think fit; and such order shall be enforced as if it were an order made in a suit brought in such Court. The procedure in the Small Cause Court in cases under this section shall conform, as far as may be, to the procedure in an ordinary suit in such Court."

Section 62 gives the Court power to award compensation to the claimant, and provides that the order of the Judge awarding or refusing such compensation shall bar any suit for the recovery of compensation for any damage caused by the distress. Similarly by s. 26, para. 2, it is provided "when any claim preferred or objection made under s. 278 of the Civil Procedure Code is disallowed, the Small Cause Court may in its [784] discretion order the person preferring or making such claim or objection to pay to the decree-holder or to the judgment-debtor or to both by way of satisfaction as aforesaid such sum or sums as it thinks fit." And further: "Any order made under this section may, in default of payment of the amount payable thereunder, be enforced by the person in whose favour it is made against the person against whom it is made, as if it were a decree of the Court."

Rule 49 of the rules of practice provides that the claimant who is summoned before the Court under the provisions of s. 61 of the Act must file a plaint, and shall be the plaintiff, while the person who obtained the warrant shall be the defendant, and the matter shall then be treated as a suit. In every respect, therefore, both under the Act and under

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the rules and also under s. 278 and the following sections of the Civil Procedure Code, a claim proceeding is to be treated and dealt with as a suit, and I have no doubt, therefore, that an order made in such a proceeding by the Small Cause Court is an order made in a suit within the meaning of s. 37 of the Act. Section 283 of the Civil Procedure Code, which expressly reserves to the party against whom an order is made in a claim proceeding to establish his right by suit, does not affect the present question, because that section has been excluded from application to a claim proceeding in the Small Cause Court by a notification issued by the Court under the powers reserved to it by s. 23 of the Act, which notification under s. 3 of Act X of 1888 is still in force.

I agree with the view expressed by Wilson, J., in the case of *Ismail Solomon Bhamji* v. *Mahomed Khan*(1), that the omission of s. 283 from the sections of the Procedure Code applied to the Small Cause Court was intended to preserve the finality of orders made in claim suits by the Small Cause Court.

If then the order of the Small Cause Court disallowing the plaintiff's claim to interfere with the attachment of the defendants is final and conclusive between the parties, it would seem to follow **[785]** that his claim in this suit to restrain the defendants from proceeding with their attachment is barred. But then it is said the order of the Small Cause Court disallowing the plaintiff's claim is bad, because it was based upon a finding which was *ultra vires*, as it affected the plaintiff's title on his mortgage. Tiled huts, it is contended, are immoveable property, and the Small Cause Court had, therefore, no power to determine the question of the validity of the mortgage, as it involved a question of title to immoveable property. The answer is that the plaintiff himself put the validity of his mortgage in issue in the proceeding by basing his claim to the attached property on his mortgage. How then can he be heard to say that the order complained of is bad, because the Court in making it determined the very question he invited it to determine? Moreover, assuming that tiled huts are for certain purposes immoveable property, it is clear, and this I did not understand to be disputed, that by virtue of s. 28 of the Small Cause Court Act XV of 1882 popularly known as the tiled hut section—the mortgaged property for the purposes of execution must be deemed to be moveable property.

The words of the section "for the purposes of execution" must mean for all purposes of execution inclusive of the purpose of determining objections made to attachments. It would be hardly reasonable to suggest that what the Legislature intended was that for the purposes of issuing process tiled huts were to be deemed moveable property, whereas for the purposes of determining objections to such process they were to be deemed immoveable property.

I think, therefore, the Small Cause Court had under the circumstances and for the purposes of the plaintiff's claim full power and authority to determine the question of the plaintiff's title under his mortgage to the attached property, and that this question is now *res judicata* as between the parties.

It is to be observed that the Small Cause Court, under s. 282 of the Civil Procedure Code, if satisfied with the validity of the plaintiff's mortgage, had power to continue the attachment subject to such mortgage.

(1) 18 C. 296 (301).

Wilson, J., in the case already cited, remarks as follows: "Under the rules of the Small Cause Court [786] claims are not tried summarily, they are dealt with just as suits are with the same remedy in case of mistake by application for a new trial, and the Court has full power to award damages to either party. A person who thinks himself aggrieved by the seizure of goods in execution of a Small Cause Court decree has his choice of remedies. He may bring an ordinary suit in the proper Court, or he may make a claim in the Small Cause Court. In either case his rights are fully tried out, and it would, I think, be inconvenient and contrary to sound principle to allow him to try first one remedy and then the other."

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With these observations I entirely agree. This suit must be dismissed against the defendants Adhur Chunder Sett and Hridoy Chunder Sett, and the plaintiff must pay their costs on scale No 2. Liberty to these defendants to apply for payment of the money in Court.

Suit dismissed with costs.

Attorney for the plaintiff: Messrs. *Thakur & Bysack.*
Attorney for the defendant: Babu *K. M. Gangooly.*
C. E. G.

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26 C. 786 = 3 C.W.N. 491.

CRIMINAL REVISION.

Before Mr. Justice Ghose and Mr. Justice Wilkins.

JAGAT CHANDRA MOZUMDAR (*Petitioner*) v. QUEEN-EMPRESS (*Opposite Party*).* [12th May, 1899.]

Magistrate, Jurisdiction of—Criminal Procedure Code (Act V of 1898), *s.* 190, *sub-s.* (1), *cls.* (*a*) *and* (*c*), *and s.* 191*—Taking cognizance of offence by Magistrates upon receiving a complaint of facts—Right of the accused to claim a transfer—Penal Code (Act XLV of* 1860), *s.* 193*—Sanction unnecessary when offence alleged to have been committed in the course of an investigation by the Police—Interference by the High Court in a pending case.*

The complainant made a complaint to the Magistrate by a petition in which he named three persons and charged them with offences under certain sections of the Penal Code. The Magistrate thereafter examined the complainant [787] and some witnesses on his behalf and issued summonses against the three persons mentioned in the petition of complaint as well as against the petitioner in this case for an offence other than those mentioned in the said petition.

Held, the Magistrate took cognizance of the offence as against the petitioner under cl. (*a*) and not cl. (*c*) of sub-s. (1) of s. 190, and consequently he was not debarred by s. 191 of the Criminal Procedure Code from trying the case.

No sanction under s. 195 of the Criminal Procedure Code is necessary for taking cognizance of an offence under s. 193 of the Penal Code when the alleged false evidence is said to have been fabricated, not in relation to any proceeding pending in any Court, but in the course of an investigation by the Police into the matter of an information received by them.

It is inadvisable to interfere in a pending case unless there is some manifest and patent injustice apparent on the face of the proceedings and calling for prompt redress.

[F., 13 C.L.J. 43 (46); 8 Ind. Cas. 1161 (1162) = 33 P.R. 1910 (Cr) = 57 P.L.R. 1911; 32 P.R 1904 (Cr) = 68 P L.R. 1904; **Disappr.**, 24 Ind. Cas. 954 = 18 C.W.N. 921 = 15 Cr.L.J. 546; **R.**, 37 C. 250 (254) = 10 C.L.J 564 = 11 Cr.L.J. 37 = 14 C W.N. 330 = 4 Ind. Cas. 710; 38 C. 68 (74) = 11 Cr.L.J. 525 = 7 Ind. Cas. 747; 11 Cr.

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* Criminal Revision No. 133 of 1899, made against the order passed by G. Balthasar, Esq., Sub-Divisional Magistrate of Goalpara, dated the 5th October 1898.

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L.J. 489=7 Ind. Cas. 461=U.B.R. (1910) 1st Quarter, 2 (Cr); 14 Cr.L.J. 290 (291)=19 Ind. Cas. 916=9 N.L.R. 65; U.B.R. (1897-1901) 56 (57) Cr; U.B.R. (1904) 1st Quarter, Crim. Pro. Code, p. 4.]

ON the 13th of September 1898 Kunja Ganika lodged a complaint against three persons in the Court of the Sub-divisional Magistrate of Goalpara charging them with having committed offences under ss. 352, 354 and 109 of the Penal Code. The Magistrate subsequently examined the complainant on oath and some witnesses on her behalf and ordered summonses to be issued against the three persons mentioned in the petition of complaint as well as against the petitioner in this case under ss. 193 and 109 of the Penal Code. On subsequent dates he heard evidence and drew up a charge under ss. 193 and 109 against the petitioner. Then on the 30th November the petitioner moved the Deputy Commissioner of Goalpara to stay all proceedings as against himself, but he declined to interfere. The petitioner then moved the High Court and obtained a rule in the following terms :—

"Let the record be sent for and a rule issue to the District Magistrate of Goalpara to show cause why the case should not be transferred to another Magistrate by reason of s. 191 of the Code of Criminal Procedure, and next because the Sub-divisional Magistrate has, in the proceedings, shown a bias against the accused, or why such other orders should not be made as to this Court may appear proper. The objection in regard to the invalidity of the proceedings in consequence of the want of sanction under s. 195 will be better determined when the facts are made clear by the record of the [788] proceedings, and the Court will then be in a position to consider also whether, as contended by learned counsel, there is any case at all made out for the prosecution of the petitioner. In the meantime further proceedings will be stayed."

Mr. *Jackson*, and Babu *Hara Prasad Chatterjee* appeared for the petitioner.

JUDGMENT.

The High Court (GHOSE and WILKINS, JJ.) in their judgment, after reading the terms of the rule as above, continued as follows :—

The facts appear to be as follows :—

One Kunja Ganika filed a petition of complaint before the Magistrate, Mr. Balthazar, on the 14th September 1898. She was examined by the Magistrate, and deposed that the petitioner, who was then a Sub-Inspector of Police, came to her house with a head constable and with other persons and enquired from her about a *sari*, in respect of which apparently a charge of theft had been lodged by some other person. Her complaint was that the head constable himself introduced this *sari* into her house, and then pretended to have found it there; and that she was then assaulted by the head constable and taken away to the *thana*, whence she was ultimately allowed by the petitioner to depart without bail. Of the persons named in her vernacular petition of complaint as accused, the present petitioner is not one; and the offences charged against others were stated to be offences under ss. 352 and 354 of the Indian Penal Code.

The Magistrate forwarded the complaint to his Deputy Commissioner for sanction to the prosecution thus instituted; in doing so he appears to have acted under some executive order in respect of complaints made against police officers. Sanction having been obtained, the Magistrate then summoned and examined the complainant's witnesses before issuing process against the accused. Then, on the 28th September, he passed an order to

summon the head constable under s. 193 of the Indian Penal Code, and the sub-inspector (petitioner) under ss. 193 and 109 of the Indian Penal Code. He then, on the 5th October and subsequent dates, heard evidence and drew up charges, *viz.*, charges under s. 193 of the Indian Penal Code, and s. **[789]** 29 (Act V of 1861) against the head constable and a charge under s. 109 read with s. 193 of the Indian Penal Code against the petitioner and two others who were not police officers.

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In the meantime, on the 5th October 1898, the Magistrate had asked his superior officer for a specific sanction to proceed against the sub-inspector, and he was on the 2nd November directed to proceed with the trial.

Then on the 30th November, the petitioner moved the Deputy Commissioner to stay all proceedings as against himself, and on the 10th February 1899 the Deputy Commissioner declined to interfere. The petitioner then moved the High Court and obtained a rule in the terms already set forth.

We have heard Mr. Jackson for the petitioner and have considered the cause shown by the Deputy Commissioner in his letter of explanation.

We think that the petitioner is not entitled to have this case transferred either on the ground of bias or by reason of s. 191 of the Criminal Procedure Code. As to bias of any kind disqualifying the Magistrate from trying out the case, or rendering it inexpedient that he should try it out, we can find no indications upon the record, and indeed this part of the case was not pressed upon us by the learned Counsel for the petitioner. As regards s. 191 of the Criminal Procedure Code it is contended by Mr. Jackson that as the complaint of Kunja Ganika disclosed no offence under s. 193 of the Indian Penal Code the Magistrate must have taken cognizance of that offence under cl. (*c*) of s. 190 of the Criminal Procedure Code. But this is hardly so. The Magistrate in effect received a complaint of facts, which in his opinion constituted an offence under s. 193 of the Indian Penal Code, and consequently took cognizance of that offence under cl. (*a*) of s. 190 of the Criminal Procedure Code. The fact that the complainant did not specifically, and in terms, accuse any one of an offence under s. 193 of the Indian Penal Code does not affect the real position of affairs ; if the facts, as stated by her in her deposition of complaint, constituted an offence which really would fall under s. 193 of the Indian Penal Code, then her complaint was one **[790]** under cl. (*a*) of s. 190 of the Criminal Procedure Code ; and consequently the Magistrate was not debarred by s. 191 of the Code of Criminal Procedure from trying the case.

Then it was contended on the petitioner's behalf that the Magistrate could not legally take cognizance of the offence under s. 193 of the Indian Penal Code in the absence of any sanction under cl. (*b*) of s. 195, Criminal Procedure Code, inasmuch as this alleged fabrication of false evidence was " in relation to " some proceeding in some Court, and the case of *Chandra Mohon Banerjee* v. *Balfour* (1) was referred to in support of this contention. But that case was altogether upon a different footing, for the petitioner therein was accused of having instigated one Mrs. Balfour to give false evidence in a divorce case, which was actually pending in the High Court at the time. In the case now before us, there was no proceeding pending in any Court in relation to which the alleged false evidence was said to have been fabricated. There was then simply an

(1) 26 C. 359.

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investigation, which was being held by the Police into the matter of the information in connection with the theft of the *sari*. We are therefore of opinion that no sanction under s. 195 of the Criminal Procedure Code was necessary in this case. That none was legally required under any local executive order, in order to give the Magistrate jurisdiction, is conceded.

We finally proceed to consider the last question stated in the rule, *viz.*, as to whether there is any case at all made out for the prosecution of the petitioner ; but before doing so, we desire to say that, in our opinion, it is only in very exceptional instances that this Court should as a Court of Revision interfere with the action of a subordinate Court in respect of any pending case, and especially when such a case has reached the stage where a charge has been drawn and only the defence of the accused remains to be heard. We do not desire to lay down, nor can we lay down, any hard and fast rule upon the subject, for the interference of this Court should be regulated by the particular circumstances of each case. But speaking generally it seems to us to be inadvisable to [791] interfere in a pending case, unless there is some manifest and patent injustice apparent upon the face of the proceedings and calling for prompt redress. As we understand this portion of the rule, it contemplates the existence of such an injustice in the present case ; for if neither the complaint, nor the evidence for the prosecution, makes out any case whatever against this petitioner, it is manifest that he should not have been charged and so called upon to enter upon his defence, and it follows that he should not be left, for a moment longer than is necessary, in the position of a person accused of an offence and forced to defend himself against a charge which there is no legal evidence to establish. Now, we have considered the whole of the evidence for the prosecution in the case before us, and we fail to see that it discloses any act of the accused which can be interpreted so as to bring him within the four corners of the charge. There is nothing whatever to show that he himself did anything, or connived at any other person doing anything, towards fabricating any false evidence against the complainant either with or without the intention that such evidence should be used in any stage of a judicial proceeding. Whatever the head constable or the other accused may have done, there is nothing to shew that the petitioner acted in any way except in the *bona fide* discharge of his duty, or that he was cognizant of any one fabricating any false evidence for the purpose in question. This being so, it is clearly most unfair to him that he should now be called upon to rebut a charge which, upon the evidence, is baseless in so far as it affects him. And to remedy this injustice, it is right that we should interfere.

We accordingly quash the proceedings, so far as the petitioner is concerned, and direct that he be at once discharged.

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[792] APPELLATE CIVIL.

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APPELLATE CIVIL.

26 C. 792=3 C.W.N. 695.

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, Mr. Justice Prinsep, and Mr. Justice Banerjee.

PROSUNNO COOMAR ROY (*Plaintiff*) v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL (*Defendant*).*
[2nd May, 1899.]

Settlement—Settlement of noabad *taluks in Chittagong—Power of Government to make settlement—Waste lands—Resumption—*Kabuliat, *Effect of—Acceptance of* kabuliat *by the landlord—Ratification—How far the acts of Government officers bind the Government—Regulation III of* 1822, *s.* 5, *cl.* 1—*Regulation VII of* 1822, *s.* 7, *cl.* 1—*Evidence—Presumption of due performance of official acts—Acquiescence—Acceptance of rent after term of settlement.*

The plaintiff sued the Secretary of State for India in Council for the declaration that a certain *noabad mehal* of his in the District of Chittagong was a permanent *taluk*, not resumable by the Government. He based his claim on two grounds: (1) that the *mehal* existed from before the time of the Decennial Settlement, and the settlement of 1800 confirmed the permanent right of the *talukdar* in the same; (2) and that at any rate, a *kabuliat* executed in 1836 by his predecessors in title with the approval of the Collector had the same effect. In defence, it was alleged (1) that the *mehal* was not in existence at the time of the Decennial Settlement, and the settlement of 1800 was a temporary one; and (2) that the *kabuliat* was never accepted by the Government, but that on the contrary the Government passed distinct orders that the settlements of 1836 were for thirty years only, which order was duly published by an *istahar* to that effect. It was found on the evidence that the *taluk* was not shown to have been in existence before 1800 and the settlement proceedings of that year and the variation of rent from time to time did not support the plaintiff's contention: *Held*, that the *kabuliat* of 1836 was merely an offer on the part of the *talukdar* for the time being and was not binding on the Government, its terms not having been accepted either by the Government or by any duly authorised officer thereof; that both by law and by the special instructions issued for the guidance of settlement officers, no settlement could be binding on the Government unless confirmed by the Governor-General in Council.

There being no proof given by either party as to whether the *istahar* abovementioned was or was not duly published, *held*, that the publication [793] of the *istahar* must be presumed having regard to the presumption in favour of the due performance of official acts.

Held also that, even assuming that the officers of the Government induced by their act and conduct a belief in the *talukdar* that the *kabuliat* had been accepted by the Government, or that a permanent settlement had been sanctioned by the Government, that did not amount to a ratification of the *kabuliat*, inasmuch as such conduct of the officers was in violation of their duty as such officers and in direct contravention of the express orders of the Government.

Held, also, that the acceptance by the Government of rent at the old rate from the *talukdar* for a long time after expiration of thirty years did not amount to an acquiescence in the terms of the *kabuliat*.

Unsettled and unoccupied waste land, not being the property of any private owner, must belong to the State.

[F., 9 C.L.J. 265=13 C.W.N. 235=4 Ind. Cas. 49 (50); R., 8 C.L.J. 470 (473); 11 C.W.N. 928 (930) (932) (935).]

THE plaintiff, Prosunno Coomar Roy, brought the present action against the Secretary of State for India in Council for the establishment of the plaintiff's title to a certain *noabad mehal* known as *taluk* Shermast Khan, No. 203, situated in *mouza* Rajarkal, Thana Ramu, in the District of Chittagong, for a declaration that 86 *drones* 2 *kanis* 9 *gandas* and 2

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* Letters Patent Appeal No. 1 of 1898 in Appeal from Original Decree No. 264 of 1896.

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karas of *hasila* (arable) land, and 491 *drones* 15 *kanis* 2 *gandas* and 1 *kara* of *khila* (waste) land, aggregating to 578 *drones* 1 *kani* 11 *gandas* and 3 *karas* of land, as measured and found by the recent survey, was included in the said *taluk* Shermast Khan; and for a further declaration, upon the construction of a *kabuliat*, dated the 9th November 1836, that the Government had no right to take any land out of the said *mehal*, or make it *khas*, or interfere in any way with the rate of rent at which the plaintiff has been paying, in accordance with the terms of the same *kabuliat*. The plaintiff alleged that the said *mehal* had been in existence from before the Decennial Settlement, and averred in effect that the permanent character of the *taluk* was confirmed by the *kabuliat* which the Government took from Sheik Obedulla and others, his predecessors in title, on the 9th November 1836.

In defence, it was urged, amongst other things, that the plaintiff's *taluk* was not in existence at the time of the Permanent Settlement, but that it was included in the Cox's Bazar *khas mehal*, No. 34,613, which had never been permanently settled; [794] that the settlement made with Sheik Obedulla and others was for a term of thirty years only; and that the *kabuliat* upon which the plaintiff based his claim was not accepted by the Government, who never approved it, but that, on the contrary, the order of the Government was conveyed in letter No. 620, dated the 17th April 1838, approving grants of thirty years leases and declining to grant perpetual leases, which order was duly published and notified. The defendant also denied that the waste land claimed by the plaintiff was ever in his possession and that at any time it formed part of his *taluk*.

It appears that in 1796, the Government, having discovered that a *sanad*, under which the descendants of one Joy Narain Ghosal claimed all the waste lands of the Chittagong district as belonging to their *mehal noabad* Joynugger, was a forged document, directed the whole of the said *mehal* and lands to be resumed and brought under assessment. This measure was carried into effect in the year 1800, under the Collector, Mr. Kerr. The instruction issued by the Government to regulate the resumption and assessment proceedings were as follow :—

I (*a*). Perpetual *pottahs* were to be granted for the cultivated and uncultivated lands, which had already been brought upon the *jumma* in favour of the defendant *talukdars*, by whom they were then held, on condition that the boundaries of the lands be fixed by actual measurement.

(*b*). Such lands as had been reduced to cultivation since the last measurement (of 1788-89) were to be brought upon the *jumma* of Government.

(*c*). The assessment of the whole (*a* and *b*) was to be adjusted according to the rates observed in forming the assessments on the lands of other independent proprietors in the Chittagong District, by which means the *talukdars* would pay to Government exactly *pro rata* what they then paid to the descendants of Gokul Chunder Ghosal.

II (*d*). Other waste lands, not brought upon the *jumma*, were to be granted, with fixed and ascertained boundaries, to individuals, in small and compact portions, according as applications might be made for them.

(*e*). Revenue was to be assessed upon the waste land lots [specified in (*d*)], according to the established rates of assessment, for such area as might, at the end of three years, be reduced to cultivation.

(*f*). The revenue in respect of these waste land lots was to be further proportionally increased, on the above principle, for such area as might be

afterwards brought into cultivation, whenever and as often as it might be **[795]** thought advisable to set on foot an inquiry for the purpose of ascertaining that point. 1899 MAY 2.

It appears that previous to this, *mouza* Rajarkal, Thana Ramu, was measured in 1126 Maghi (1764-65), and 1150 Maghi (1788-89). In the measurement papers of 1764-65, there was no mention of *taluk* Shermast Khan. In the measurement papers of 1788-89, the following entries occurred :— APPELLATE CIVIL. 26 C. 792= 3 C.W.N. 695.

Lahkiraj pending decision Khairat. Zimma Shermast Khan, son of Zabardast Khan.	Total quantity of land. 126*d.* 4*k.* 18*g.* 1*k.*	*khila*—34*d.* 7*k.* 6*g.* 1*k.* *hasila*—91*d.* 13*k.* 12*g.*
Zimma Shermast Khan.	Total quantity of land. 55*d.*	*Khila*—55*d.*

There was no assessment with regard to either of these lands held by Shermast Khan. But in the measurement papers of the year 1800, a *noabad mehal,* called *taluk* Shermast Khan, was described as containing 11 *drones* 7 *kanis* 18 *gandas* 1 *kara* of *khila* land and 41 *drones* 6 *kanis* 9 *gandas* 3 *karas* of *hasila* land, altogether 52 *drones* 14 *kanis* 8 *gandas*, assessed at the annual revenue of Rs. 659-6 2 ; then there are mentioned some "*Lakhiraj* pending decision" and other lands. Afterwards, as stated by Mr. J. I. Harvey, Collector, " in the survey of 1176 Maghi (1814-15) 29 *drones* 6 *gandas* 1 *kara* of *hasila* land of the village were measured under the *taluk* Shermast Khan, on which a *jumma* of Rs. 460-5-1 (*sicca*) was fixed; the remaining lands of the survey of 1162 Maghi (1800-1) were improperly included under the head of *lakhiraj* land in the name of Sermast Khan. This caused a decrease in Government revenue from the *jummabandi* of 1162 Maghi by Rs. 199-1-0 (*sicca*)," the arrears of which amount were subsequently realised by Mr. Harvey (Ex. I).

In 1815, the Ghosals obtained a decree of the Sadar Dewany Adalut adjudging that they should recover as much as might be ascertained to have been in the year 1764 the undoubted property of their family. In order to facilitate the execution of this decree, by the identification and separation of the lands awarded to the Ghosals, the Government in 1833 resolved to conclude the Chittagong settlement on a scientific and exhaustive basis. This settlement was conducted by the Collector, Mr. Harvey, under the superintendence of Mr. Dampier, then Commissioner. Thana **[796]** Ramu was surveyed in 1834-35, and the settlement was submitted to the Government for sanction on the 5th November 1837, with a memorandum by Mr. Walter, temporary member of the Sadar Board of Revenue (Ex. D.). In this memorandum, Mr. Walter solicited the sanction and confirmation of the Government for the result of the survey and assessment regarding the Government portion of the *noabad* estate, in each of the 51 *mouzas* included in the thana for a period of 30 years, and that the *taluks* should be considered dependent *taluks*. It was stated, however, evidently with approval, that "Mr. Dampier and Mr. Harvey strongly recommend the grant of *pottahs* to all the *noabad talukdars*, and further that notice should be issued declaring that the present measurement should always be respected and the new cultivation alone be subjected to assessment." [para. 45]. The Government order on this memorandum was communicated to the Board of Revenue in a letter, dated the 19th April 1838 (Ex. C.) The Government assented to the proposition that the *taluks* should be considered dependent *taluks* as well as to the proposition to grant *pottahs* to the *talukdars* for a period of thirty years. But with regard to the recommendation that the *pottahs* should convey an assurance that the

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cultivated lands included in the several *taluks* and holdings should not be liable to any enhancement of assessment at any future time, it was observed as follows:—

9. *Pottahs* conveying an assurance to the above effect would in fact be equivalent to perpetual leases for that portion of the land included in them which is now in cultivation. Such *pottahs* the Deputy Governor thinks objectionable; there being no reason whatever why Government as proprietor of the estate should not have the increased rents which the land may be expected to be capable of yielding thirty years hence, either from being rendered more productive than they are at present by improved husbandry, or in consequence of a general rise in the value of agricultural produce.

10. The Deputy Governor is of opinion that the boundaries of each of the several *taluks* and holdings according to the measurement described in para. 116 of the memorandum should be fixed; and that a lease (*pottah*) should be granted for the whole of the land, both cultivated and uncultivated, included with those boundaries; which lease should convey no other assurance than that no increase to the *jumma* assessed by the present settlement will be demanded either for the cultivated or uncutivated lands within the boundaries specified, during the period of the lease.

[797] These orders were communicated on the 16th June 1838, by Mr. Harvey, then Commissioner, to Mr. Raikes, the Collector of Chittagong, with the following instructions (Ex. E):—

4. You will please to publish the accompanying *istahar* for public information at your *kutchery* and in the Thana of Ramu, intimating that the detailed measurement and settlement of the Thana of Ramu, effected under the provisions of Reg. VII of 1822, has received the sanction of Government, and that no increase on the *jumma* assessed by the present settlement will be demanded either for the cultivated or uncultivated lands borne on the *jummabandi* of each *taluk* for a period of thirty years from the date of *jummabandi*.

5. You will hereafter receive *pottahs* prepared in accordance with the orders of Government for distribution to the *talukdars*, *itmamdars* and *raiyats* who have engaged for their holdings.

No evidence having been given by either party to the present suit as to whether the *istahar* abovementioned was or was not duly promulgated, the following extracts from Vol. IV of the Selections from the Records of the Board of Revenue, L. P., compiled by Mr. Cotton, will be found to have some bearing on the question as to how far the responsible officers of Government took steps to impress on the *noabad talukdars* the temporary character of their *taluks* and to induce them to execute revised engagements.

Letter from Mr. Scott, Collector, to Sir Henry Ricketts, Commissioner, No. 45, 18*th April* 1842, *regarding settlement of mouza Beala Manick Chur.*

"I have before communicated on the inexpediency and hardship of sending for these *talukdars* after a lapse of years merely to execute revised engagements, to say nothing of the contingency of objections."

Instructions given by Sir Henry Ricketts to Mr. Scott, Letter No. 2443, 20*th April* 1842.

"The settlements sanctioned by Government have been for thirty years, and at the back of all the engagements of the *talukdars* in these settlements it should be recorded that the settlement was sanctioned for

thirty years, and not in perpetuity, as inserted in the *talukdar's* engagement. If this be not done, considerable embarrassment may be experienced on the expiration of the term thirty years hence; of course all settlements were made conditionally on their being approved by Government, and the limited approvement accorded by Government should be distinctly noted. * * * * . It appears to me that the contingency of objections is in favour of revised engagements being taken, instead of against it. Should he have objections to offer, surely he should be heard. Moreover, it would be wrong to allow a *talukdar* to [798] remain quietly in possession, and spend his money under the impression that his lease was in perpetuity while we have a document in our desk authorising us at the expiration of thirty years to reassess him. * * I request that you will send for the *talukdar* and take an engagement from him for thirty years."

From Mr. Scott to Sir Henry Ricketts. No. 93, 31*st August* 1842.

"Another point of great importance in the disposal of settlements that have been concluded by former Deputy Collectors arises from the view the Commissioner has taken of the *kabuliat* which has been hitherto used. Considering their documents as conveying a right to the assessment now fixed in perpetuity and not during the pleasure of Government, it appeared to him expedient to have revised engagements taken, and the parties concerned to be informed of their limited interests. * * * I offer no objection to the revised form, but submit that there is no necesssity for any retrospective adoption of it. As to the people being under the impression that the assessment is in perpetutity, I have never heard it advanced by any one, and it is opposed to all their past experience."

From Sir Henry Ricketts to the Government, No. 1424, 20*th December* 1842.

"As to the revised *kabuliat* I have directed to be taken from all *talukdars*. The form in use appeared to me distinctly to convey a right to possession of the cultivated land at the *jumma* now fixed for ever. No mention of any limited period was made, and as it is not likely any of us shall be here thirty years hence to explain that the settlement was for thirty years only, I considered it prudent and likely to prevent misunderstandings and doubts hereafter to direct that the form should be altered before settlements were submitted for approval."

It is also necessary to mention that on the 2nd March 1829, circular instructions were issued by the Government for the guidance of the local Revenue Commissioners, which contained, amongst others, the following directions (Ex. H) :—

1. No settlement of land revenue shall be concluded by the Sadar Board, or be held binding upon Government, unless the same shall have been formerly confirmed by the Governor General in Council.

2. Settlements shall be made in the manner prescribed by the Regulations by the Collectors or Deputy Collectors subject to the Commissioners, the Sadar Board and the Government.

In the settlement proceedings of Mr. Harvey, dated the 21st November 1836, and in the settlement record of the same officer, dated the 29th January 1837, forming part of the survey and settlement of Thana Ramu mentioned above, *taluk* Shermast [799] Khan was recorded as containing, as then measured, 79 *drones* 6 *kanis* 7 *gandas* 1 *kara* of *hasila* land, and 137 *drones* 14 *kanis* 18 *gandas* 1 *kara* of *khila* land, aggregating 217 *drones* 5 *kanis* 5 *gandas* 2 *karas* of land, belonging to the zemindari of the Government, and assessed at the annual revenue of Rs. 659-6-2 (*sicca*—

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old *jumma*) + Rs. 607-14-0 (Company's) = Rs. 1,311-3-5 (Company's), Rs. 607-14-0 being the assessment for the *excess hasila* land of 37 *drones* 15 *kanis* 17 *gandas* 2 *karas*, as compared with the survey of 1800.

The *kabuliat* relied upon by the plaintiff was executed in the office of Mr. Harvey by Sheik Obedulla and others on the 9th November 1836, and bears at the top the following endorsement: "Executed in this office by the within named.—J. I. Harvey, Chittagong Collectorate, 14th November 1836." It contains the following clauses: —

"In the measurement of 1197 Maghi era, 79 *drones*, 6 *kanis* 7 *gandas* 1 *kara* of *hasila* land and 137 *drones* 14 *kanis* 5 *gandas* 1 *kara* of *khila* land, in all 217 *drones* 5 *kanis* 5 *gandas* (*sic*) 2 *karas* of *hasila* and *khila*, land in *mouza* Rajarkal, Thana Ramu, in the *noabad mehal*, the zemindari of the (East India) Company's Government, known as *taluk* Shermast Khan, were measured as the *milkiat* of Sheik Obed, Sheik Badi-uz-zaman Asalat Khan and Dewan Bibi, *maliks*. Out of this area, 41 *drones* 6 *kanis* 9 *gandas* 3 *karas* of land are mentioned in the *jummabundi* and measurement papers of 1162 Maghi era. We do therefore of our own free will and accord execute this *kabuliat* and declare as follows:—

"We will hold as *maliks* with power to make sale or conveyance 41 *drones* 9 *kanis* 9 *gandas* 3 *karas* of *hasila* land on account of the former *jummabundi* on a *jumma* of *sicca* Rs. 659-6-2 at *sicca* Rs. 15-14 16 *gandas* per *drone* and also 37 *drones* 15 *kanis* 7 *gandas* 2 *karas* of *hasila* land on (a *jumma* of) Company's Rs. 607-14-0 at Rs. 16 per *drone*, the whole amount of revenue being Rs. 1,267-4-2 in *sicca* and Company's coin which we will pay in proper time according to the terms of the *jummabundi* and the *kistibundi*, and we will appropriate the proceeds of the said property, and our descendants, generation after generation, will continue to do the same. For any quantity of cultivation-land, which may be found in our possession at the time of the next measurement, we will pay *jumma* at the above rate along with that aforesaid *taluk*."

In the settlement proceedings of Mr. Harvey, dated the 21st November 1836, above referred to, it was also stated that there were 26 *drones* 8 *kanis* 9 *gandas* 2 *karas* of *bat*, or culturable [800] fallow land in the *taluk noabad* in dispute, on account of which, Rs. 209 6-5 were remitted for three years only from 1198 Maghi to 1200 Maghi. It appeared, however, that the plaintiff and his predecessors had up to the date of the present suit all along paid the annual rent of Rs. 1,106-8 6, never the full amount of Rs. 1,311-3-5, the difference being attributed by the plaintiff to the said remission.

In 1888 and 1890, the Government of Bengal ordered a survey to be made and a record of rights to be prepared in respect of lands situate in old Thana Ramu, under s. 101 of the Bengal Tenancy Act. A record of rights of *mouza* Rajarkal was accordingly completed and finally published in 1894; and the Revenue Officer, having held that the term of the plaintiff's *mehal* had expired, offered to resettle with the plaintiff 86 *drones* 10 *kanis* 6 *gandas* 1 *kara* of *hasila* land and 45 *drones* 2 *kanis* 10 *gandas* of *khila* land at an annual rent of Rs. 1,474, failing which, the lands were to be settled with other people. Hence the present suit.

The District Judge dismissed the suit, and the plaintiff appealed to the High Court. The appeal came on for hearing before a Division Bench consisting of Rampini and Henderson, JJ. The Judges having differed in opinion, the decree appealed against was affirmed and the appeal dismissed under s. 575 of the Code of Civil Procedure.

The plaintiff then preferred an appeal under s. 15 of the Letters Patent.

Mr. *Hill*, Babu *Aukhoy Coomar Banerjee*, and Babu *Jatramohan Sen*, for the appellant.

The Advocate-General (Sir *Charles Paul*), Mr. *Woodroffe*, Babu *Ram Charan Mitter*, and Babu *Lal Mohan Dass*, for the respondent.

JUDGMENT.

The judgment of the Court (MACLEAN C. J., PRINSEP and BANERJEE, JJ.) was delivered by

MACLEAN, C. J. (PRINSEP and BANERJEE, JJ., concurring)—This appeal arises out of a suit brought against the Secretary of State for India in Council by the plaintiff, appellant, to establish his title to certain lands, and to obtain certain declarations, the **[801]** most important of which are that the said lands are included in plaintiff's *taluk* Shermast Khan, and that the Government has no right to resume any lands of the said *taluk*, or to assess any rent on the same, otherwise than under the terms of a certain *kabuliat* of the 9th of November 1836.

The material allegations upon which the plaintiff bases his right to the reliefs claimed are, that *taluk* Shermast Khan is the purchased ancestral property of the plaintiff; that the taluk has been in existence from before the Decennial Settlement; and in 1162 Maghi, that is 1800, a *jummabundi* was made by which 41 odd *drones* of land of the said *taluk* were assessed at Rs. 15-14-16 *gandas* per *drone* and a *jumma* of 659-6·2 pies was fixed; that in 1197 Maghi, that is 1835, the *taluk* was measured again and found to contain 79 odd *drones* of *hasila* or culturable lands, and 137 odd *drones* of waste land, and Government on the 9th of November 1836 took from the *talukdar* a *kabuliat* fixing the *jumma* at Rs. 1,267-4-2 pies (in *sicca* or Company's coin), which was made up of the old *jumma* of Rs. 659-6-2, *sicca* and an additional *jumma* of Rs. 607-14-0 in Company's coin at the rate of Rs. 16 on the excess of 37 odd *drones* in the culturable area; that the *kabuliat* contains a stipulation that any additional land that might be found, on future measurement, to have been brought under cultivation was to be assessed at the rate of Rs. 16 a *drone*; that out of the *jumma* fixed by the *kabuliat*, a certain deduction on account of *bat khila* or waste land being made, the sum of Rs. 1,101-8-6 pies continued to be the *jumma* payable and was actually paid; that at the recent survey, the *mehal* was improperly recorded as the *khas* property of Government, and the plaintiff was, by a notice, dated the 26th July 1892, and by a proceeding, dated the 6th August 1892, required to take a fresh settlement, on the ground of the former settlement having expired; and that these alleged illegal proceedings have endangered the plaintiff's permanent right to *taluk* Shermast Khan.

The defence, so far as it is necessary to be considered for the purposes of this appeal, was, in substance, a denial of the permanent *talukdari* right claimed by the plaintiff.

The first Court found for the defendant and dismissed the suit.

[802] The plaintiff preferred an appeal to this Court against the decree of the first Court; that appeal was heard by a Division Bench, and as one member of that Bench, Mr. Justice Rampini, was of opinion that the decree appealed against should be affirmed, while the other, Mr. Justice Henderson, was of a contrary opinion, the decree was consequently affirmed under s. 575 of the Code of Civil Procedure. Against the judgment of Mr. Justice

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Rampini, affirming the judgment of the first Court, the present appeal has been preferred by the plaintiff under s. 15 of the Letters Patent.

The points urged in this appeal on behalf of the plaintiff are shortly these: *first*, that the settlement of 1800 was in confirmation of certain existing *talukdari* rights, and had the effect of conferring on the plaintiff's predecessor in title a permanent right in the *taluk* Shermast Khan and in the lands in dispute, as appertaining to that *taluk*; *second*, that the *kabuliat* of the 9th of November 1836 had the same effect; and *third* that even if the *kabuliat* alone could not have such effect, it was subsequently ratified by the Government through its officers, and even if not ratified, that the Government have acquiesced in the terms of the *kabuliat*, and that it is not now open to the Government to resile from those terms. We ought to state that it is no part of the plaintiff's case that the lands in suit, which are claimed as *taluk* Shermast Khan and as settled at the permanent settlement, formed part of the estate of Joynugger.

Upon the first point it has been urged for the appellant that, by the policy of the British Government (as indicated in the earlier Regulations, such as the preambles to Reg. II and IX of 1793) which was in accordance with the policy of the Mahomedan Government, the property in the suit was declared to be vested in the landholder, and the claim of the Government declared to be limited to a share of the profit in the shape of revenue; that in pursuance of that policy the Government approved the recommendations made by the Board of Revenue for the settlement of the waste lands of Chittagong, which had not been included in any zemindari or *turuf*, and which were called *noabad* or newly reclaimed lands; that the lands comprising *taluk* [803] Shermast Khan were accordingly settled with the holder thereof; and that regard being had to these circumstances and to the terms of the Board's recommendation, the settlement of the *taluk* should be taken to be a perpetual settlement in recognition of pre-existing rights in the *talukdar*.

On the other hand, it has been contended for the Government that though, in regard to land that is settled with or occupied by any one, the right of the Government may be limited to the revenue, yet unsettled and unoccupied waste land belongs to the Government; that there is nothing to show that *taluk* Shermast Khan existed before the Decennial Settlement, and that the settlement of *taluk* Shermast Khan in 1800 was not under the directions of the Board a perpetual settlement, but came under that head of the directions which recommended temporary settlement.

We are dealing with a state of circumstances and a condition of affairs which are involved in some obscurity, owing to a century having expired since the date of the transactions in question, and there is practically no direct evidence on the matter, either oral or documentary. It must, however, be borne in mind at the outset, that, if the plaintiff sets up as against the Government a permanent or perpetual settlement, it is incumbent upon him to make out that case; and upon the question of evidence we may perhaps observe that no question has been raised by either party as to the admissibility of the various despatches and correspondence and other documents which have been referred to by both sides and in some sense relied upon by both sides during the course of the argument. Both parties have treated them as admissible and the case has been argued upon that footing.

After carefully considering the arguments on both sides, we are of opinion that unsettled and unoccupied waste land, not being the property of any private owner, must be held to belong to the State. This view is

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not opposed to the policy of the British Government in India, and is in accordance with such policy as appears from the express language of the preamble of Reg. III of 1828. But it is unnecessary to pursue this discussion, as the holder of *taluk* Shermast Khan in the *kabuliat* executed by [804] him on the 9th of November 1836, upon which the plaintiff's case is so strongly based, admits that the *taluk* is situated " in the *noabad mehal*, which is the zemindari of the East India Company's Government."

It has, in our judgment, been established that *taluk* Shermast Khan is not shown to have been in existence from before the Decennial Settlement. The earliest settlement of *taluk* Shermast Khan, that is mentioned or referred to, is that of 1800 by Mr. Kerr, Collector of Chittagong. We have not before us the papers of 1800, nor was any application made by the plaintiff for the production of these papers, until after he had closed his case, and it may well be that he was not very anxious to have them produced lest they might prejudice his case. It must be remembered that the plaintiff claims a permanent *talukdari* right, not merely in the 41 odd *drones* settled as *taluk* Shermast Khan, at a rent of Rs. 659 odd in 1800, but in an area of 578 odd *drones*. Be that, however, as it may, we should have felt inclined to give effect to the argument that, from the proved existence of *taluk* Shermast Khan in 1800, a reasonable presumption arose in favour of its existence before that date, were it not for the fact that, as appears from the settlement proceedings of Mr. Harvey, Collector of Chittagong, dated the 21st of November 1836, which is the earliest document showing the existence of the *taluk* in 1262 Maghi or 1800 A. D. the *taluk* had no existence in 1150 Maghi or 1788 A. D., there being no mention of it, though there is mention of certain other lands specified as *lakhiraj* in the name of Shermast Khan in the survey of 1788, which was the next preceding survey, and of which the particulars are given in the proceedings. And it may be noticed that in the survey proceedings of 1162 Maghi (A. D. 1800), a distinction is drawn between *noabad* lands such as those now in suit, and *lakhiraj* lands. The interval between 1788 and 1800 was not long, and it is not suggested that there was any survey or settlement between these two dates. It cannot, therefore, be reasonably inferred that *taluk* Shermast Khan was formed before 1800.

Nor can the directions of the Board of Revenue under which Mr. Kerr acted, on settling *taluks* in 1800, warrant our holding [805] that the settlement of *taluk* Shermast Khan was a settlement in perpetuity. Those directions which have been copiously referred to on both sides from the abstract given of them in the report of the case of *Vakeel of Government* v. *Rajesree Debea* (1) will be found at pp. 349 and 350 of the Paper Book.

These directions, as we gather from the memorandum of Mr. Walters, dated the 5th of November 1837 (Ex. D.) para. 8 and from Mr. Cotton's note, para. 6 (p. 222 of the Paper Book) which were referred to on both sides, were issued in 1796 or 1797; so that the latest measurement before they were issued was the measurement of 1788, and the only lands that could come under the first description referred to in the above extract, would be lands measured in 1788, all lands not covered by the measurement of that year being included in the second description. Now

(1) 2 Sel. Rep. S. D. A. New Ed., 199=6 I.D. (O.S.) 510.

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the lands of *taluk* Shermast Khan were not included in that measurement, for the measurement papers are silent as to them, and so they did not fall under the first description, and the direction for the grant of a perpetual *pottah* could not apply to them. It was argued for the appellant that the land of *taluk* Shermast Khan should be taken as coming under the first description as having been permanently settled, and, as being land which "had been reduced to cultivation since the last measurement," that is, the measurement of 1788, and that it could not come under the second description because it was settled, not in small portions but as in one large area, and the rent was made payable not after three years but at once, which could not have been the case if the land had been of the second description. The first branch of this argument is, in our opinion, unsound. The only lands that could come under the first description, as being lands which had been reduced to cultivation since the last measurement, are those which had already been included in the measurement of some *taluk*, but which had not been assessed owing to their not having been brought under cultivation, and the land settled as *taluk* Shermast Khan in 1800 was not of this class. As to the second branch of the argument, if the fact of the land being a large area of 41 *drones*, and being assessed with the rent of Rs. 659 odd payable at once, militates **[806]** somewhat against the view of its being temporarily settled as land of the second description, the fact of its being re-measured and re-assessed in 1176 Maghi, that is in 1814, as a smaller area of 29 *drones* for a smaller rent of Rs. 460 odd (as appears from the settlement proceeding of 1836, Ex. I, p. 15), and the fact again of the rent being changed from Rs. 1,311-3-5 to Rs. 1,101-8-6 (see Ex. I, para. 16 and the plaint, para. 4) and of the rate being changed from Rs. 15-14-16 sicca to Rs. 16 Company's coin (see *kabuliat* Ex. III and Ex. I, para. 13), are wholly inconsistent with the theory of a perpetual settlement of the *taluk* in 1800.

The first contention of the appellant must, therefore, fail; in other words the plaintiff has failed to establish a perpetual settlement in 1800.

The second contention of the appellant, namely, that the *kabuliat* of the 9th of November 1836 conferred on the holder of *taluk* Shermast Khan a permanent *talukdari* right in respect of certain lands, would be well founded, if the *kabuliat* amounted to a binding contract between the *talukdar* and the Government. The *kabuliat* doubtless provides that the *talukdar* will hold the land of the *taluk*, generation after generation, on payment of the stipulated rent, and of such additional rent, at the fixed rate, as may be payable on account of any additional land that may be subsequently found by measurement to have been brought under cultivation. But how does this *kabuliat* amount to a contract binding on the Government? It was no doubt executed by the holder of *taluk* Shermast Khan for the time being, and it was executed in the office of the Collector, Mr. Harvey, as the note at the top of the document shows; but there was no execution or acceptance by the Government of the terms of this *kabuliat* or by any duly authorized officer of the Government. It was an offer on the part of the owner for the time being of the *taluk* in question, and nothing more. No doubt Mr. Harvey recommended the grant of permanent *pottahs* to all *noabad talukdars* (see Mr. Walter's Memorandum, Ex. D, p. 45), but it is amply clear that this view not only did not find favour with the Government, but was distinctly repudiated by it. It is equally clear Mr. Harvey had no authority to bind the Government in the matter. The settlement by Mr. Harvey was made **[807]** under Reg. VII of 1822, which had been

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extended to the whole of the Bengal Presidency by Reg. IX of 1825; and both by general law (see Reg. III of 1822, s. 5, cl. 1 and Reg. VII of 1822, s. 7, cl. (1)) and by the special instructions issued for the guidance of Settlement Officers (see Ex. H, para. 1) no settlement could be binding on the Government unless confirmed by the Governor-General in Council. The proceedings of Mr. Harvey were in the ordinary course submitted to Government, along with a Memorandum by Mr. Walters (see Ex. I and Ex. D) but the Government by its letter, dated the 19th April 1838, Ex. C, refused to sanction any perpetual settlement, and assented to the granting of *pottahs* for 30 years only. The *kabuliat* cannot be regarded as conferring any permanent rights on the *talukdar*, it does not represent any contract between the *talukdar* and the Government.

Then it is contended, and this contention was accepted as well founded by Mr. Justice Henderson, that though the *kabuliat* standing alone, might not be sufficient to confer any permanent rights on the *talukdar*, yet, by reason of ratification or acquiescence on the part of the Government, as evidenced by the acts and conduct of its officers, the *talukdar* must be held to have acquired the permanent rights referred to in the *kabuliat*. Ratification is one thing, acquiescence is another, and though they have been much intermingled in the argument, it will be preferable to deal with them separately.

What then are the acts and conduct of the officers of the Government, which are relied upon as constituting ratification of the *kabuliat* on behalf of the Government? In dealing with this question, it must be borne in mind that "the acts of a Government officer," as was pointed out by the Privy Council in *The Collector of Masulipatam* v. *Cavaly Vencata Narrainapah* (1), "bind the Government only when he is acting in the discharge of a certain duty within the limits of his authority, or if he exceed that authority, when the Government, in fact or in law directly or by implication, ratifies the excess."

We are invited to infer this ratification from the following circumstances: (1) The omission of the officers of the Government [808] to issue the *istahar* or proclamation which the Collector of Chittagong was, by the Commissioner's letter of the 16th June 1838 (Ex. E) (2) directed to publish, intimating that the settlement of Thana Ramu (which included *taluk* Shermast Khan) had been confirmed only for thirty years, and their omission to give any intimation to the holder of *taluk* Shermast Khan that his *kabuliat* was not accepted by the Government; (2) their strong expressions of opinion in favour of the permanent rights of *noabad talukdars*, as expressed in their official correspondence.

With regard to the alleged omission to issue the *istahar* or proclamation, which the Commissioner directed the Collector to publish, it is contended for the appellant, that, as the publication of the *istahar* is not proved, its publication ought not to be presumed, seeing there was great disinclination on the part of the Collectorate officers, including the Collector himself, to intimate to the *talukdars* the refusal of Government to sanction a perpetual settlement as is shown by Mr. Scott's letter of April 1842 to the Commissioner (see *ante*, p. 797). It is further urged that, if the publication of the *istahar* was thus purposely omitted by the officers of Government, the holder of *taluk* Shermast Khan was led to believe, and to act upon the belief, that the permanent settlement embodied in the *kabuliat* of the 9th November 1836 was sanctioned, and the Government

(1) 8 M. I. A. 500 (554).

(2) 26 C. 797.

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ought to be held precluded from questioning the existence of the permanent right referred to in the *kabuliat*.

We are of opinion that this argument cannot prevail. The direction of the Commissioner to publish the *istahar* or proclamation was conveyed in his letter of the 16th June 1838 (1) to Mr. Raikes, the Collector of Chittagong, and there is absolutely nothing to show that Mr. Raikes evinced any disinclination to publish the proclamation, or that it was not duly published. We are invited to say that the officer in charge in 1838 neglected to do his duty, in publishing the proclamation, because his successor in 1842 four years afterwards expressed to his superior officer an opinion adverse to the policy of sending for the *talukdars* to execute revised engagements. Having regard to the presumption in favour of the due performance of official acts, we [809] are of opinion that in the absence of evidence to the contrary the publication of the *istahar* in question must be and ought to be presumed. Moreover, though, perhaps, it is unnecessary to follow this up, the disinclination of Mr. Scott related to sending for the *talukdars* to execute revised engagements, and when he was in reply directed by the Commissioner, Sir Henry Ricketts, to give due intimation to the *talukdars*, as "it would be wrong to allow a *talukdar* to remain quietly in possession, and spend his money under the impression that his lease was in perpetuity," (see *ante*, pp. 797, 798), Mr. Scott replied (see *ante*, p. 798) "as to the people being under the impression that the assessment is in perpetuity, I have never heard it advanced by any one, and it is opposed to all their past experience." This indicates that, in Mr. Scott's opinion at any rate, no impression had been created in the mind of the people that permanent rights had been created. It is extremely improbable that the *talukdars* were not aware that their *kabuliats* and assessments had to be submitted for the sanction of the Government, and that being so, that they would not inquire whether such sanction had or had not been granted. There is nothing to indicate that the officers of the Government did anything to lead the holder of *taluk* Shermast Khan to believe that the *kabuliat* of the 9th November 1836 had been accepted by the Government, or that a permanent settlement had been sanctioned by the Government. Even if the officers of the Government had induced any such belief, their conduct was in violation, and not in discharge, of their duty as such officers, and being in direct contravention of the express orders of Government, could not bind the Government in any way.

There are no doubt strong expressions of opinion by certain local officers of the Government, especially Mr. Lowis and Mr. Cotton (see pp. 264 and 277 of the Paper Book) in favour of the creation of permanent rights in *noabad talukdars* generally, and criticising adversely the policy of the Government in this matter; but these views were never accepted by the Government, and can have no real effect upon the question whether or not permanent rights were created.

We now pass to the last question, that of acquiescence. We are asked to say that the Government has acquiesced in the terms [810] of the *kabuliat*, by accepting the rent thereby reserved after the expiration of the 30 years running from 1836. In the first place the rent was paid, not according to the terms of the *kabuliat*, which fixed the amount at Rs. 659-6-2 sicca and Company's Rs. 607-14-0, but at the rate of

(1) 26 C. 797.

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Rs. 1,101-8-6. This is admitted in the plaint (paragraph 4). There was then no acceptance of rent according to the terms of the *kabuliat*.

But in dealing with this question, one must bear in mind that, when the lease of a particular *taluk* determines it is not the practice of the Government to, at once, make a fresh or revised settlement of that particular *taluk*, but to deal with the district generally, and until the re-settlement of the district can be dealt with, to continue to accept the rent previously paid in respect of any particular *taluk*. It often takes, as in this case—the case of a large and wild district in Chittagong—many years before the Government can be sufficiently advised by its executive officers as to the terms of a re-settlement, and in the meantime it accepts the old rent. To say that this is tantamount to an acquiescence on the part of the Government that a previous settlement is to be regarded as creating permanent rights, does not strike us as a well founded conclusion. In our opinion no case of ratification or acquiescence has been established against the Government, such as to preclude it from saying that no permanent rights have been created under the *kabuliat* of the 9th November 1836.

The contentions urged for the appellant, therefore, all fail, and this appeal must consequently be dismissed, and the decree of the District Judge dismissing the plaintiff's suit affirmed with costs.

We cannot, however, part with this case without expressing our deep regret, without desiring to impugn his impartiality, that the District Judge of Chittagong should have thought fit, after the plaint had been filed in the Court of the Subordinate Judge, to transfer the case to himself to be tried, and then to try it. In 1884, as an executive officer of the Government, he had enquired into and reported upon these very *noabad* settlements, and in his report had expressed an opinion distinctly adverse to **[811]** the asserted rights of the plaintiffs ; and notwithstanding this, and the urgent objection of the plaintiffs, he elected at the instance of the Government to try the case, which, we understand, is a test case, and involving a very large amount of money. His judgment under such circumstances can be of but little value, and we express our surprise, equally with our regret, that such a course should have been adopted.

PRINSEP, J.—I concur.

BANERJEE J.—I am of the same opinion.

M. N. R. *Appeal dismissed.*

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Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, and Mr. Justice Banerjee.

F. W. DUKE, CHAIRMAN OF THE HOWRAH MUNICIPALITY (*Defendant*) *v.* RAMESWAR MALIA (*Plaintiff*).* [10th April, 1899.]

Jurisdiction of Civil Court—Bengal Municipal Act (Bengal Act III of 1884). *ss.* 224, 245 *and* 246*—Acts done in accordance with ss.* 245 *and* 246, *whether subject to the jurisdiction of a Civil Court—Notice under s.* 246 *whether sufficient for the purpose of the removal of huts in a* basti *as well as a* pucca *privy.*

Where a Municipality, having proceeded in accordance with ss. 245 and 246 of the Bengal Municipal Act, decide that certain works are necessary, that conclusion, in the absence of *mala fides* or fraud or considerations of that nature, cannot be questioned in a Civil Court.

The action of the Municipality, so far as a privy was concerned, was held not to be *ultra vires*, although in the notice issued in accordance with s. 246 of the Bengal Municipal Act they directed the plaintiff to remove, not only certain huts, but also a *pucca* privy, inasmuch as the Municipality had a right to require him to remove the privy under s. 224 of the Act.

[R., 6 Ind. Cas. 430 (437)=6 N.L.R. 53; 16 Ind. Cas. 449 (452)=8 N.L.R. 107; 58 P.R. 1907=196 P.L.R. 1908=136 P.W.R. 1907.]

THIS appeal arose out of an action brought by the plaintiff against the Howrah Municipality for a declaration of the plaintiff's right to a *basti* in the town of Howrah, and also for a declaration that the defendant Municipality had no right to enforce the construction of a road through the *basti* by demolishing huts [812] and a *pucca* privy situated on the land in dispute. The allegation of the plaintiff was that the Chairman of the Howrah Municipality had improperly issued a notice upon him under s. 246 of the Bengal Municipal Act (Bengal Act III of 1884) for the construction of a new road through his *basti* land; that on the receipt of the said notice he, the plaintiff, made an application to the Chairman stating that there was no necessity for the construction of the road mentioned in the notice; but that the application was rejected and a fresh notice was issued requiring the plaintiff to remove the tiled huts and the *pucca* privy, and to construct the new road through the *basti*. Hence the suit.

The defence (*inter alia*) was that the Commissioners of the Howrah Municipality having been satisfied from the report of the Officiating Sanitary Commissioner of Bengal, that the proposed sanitary improvements were necessary in the *basti*, at a meeting held on the 7th December 1893 resolved that the said *basti* was, by reason of the manner in which the huts were crowded together, attended with risk of disease to the inhabitants, and directed the locality to be inspected by two Medical Officers as required by s. 245 of the Bengal Municipal Act; and that in pursuance of the said resolution the said *basti* was inspected by the Civil Surgeon of Howrah and the Deputy Sanitary Commissioner, Western Bengal Circle, who submitted their report on the 19th April 1894, and upon receipt of the said report they (the Municipal Commissioners) directed notices to issue upon the owners of the land.

* Appeal from Appellate Decree No. 2188 of 1897, against the decree of Babu Abinash Chunder Mitter, Subordinate Judge of Hooghly, dated the 23rd of July 1897, affirming the decree of Babu Debendra Bijoy Bose, Munsif of Howrah, dated the 28th of March, 1896.

The defendants further contended that the *pucca* privy in question did not belong to the plaintiff, but to their tenants of the *basti* who were served with a notice under s. 224 of the Act to remove the said privy.

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The Munsif found that the road was not necessary, and that the Municipality had no right to enforce the construction of the road in question and decreed the plaintiff's suit.

On appeal the Subordinate Judge confirmed the decision of the first Court.

Against this decision the Chairman of the Municipality appealed to the High Court.

[813] Babu *Mohendra Nath Roy*, for the appellant.

Babu *Shiba Prosonno Bhattacharjee*, for the respondent.

The following judgments were delivered by the High Court (MACLEAN, C.J., and BANERJEE, J.).

JUDGMENTS.

MACLEAN, C.J.—This is a suit, in effect, to restrain the defendant, as Chairman of the Municipality at Howrah, from acting under the resolutions of the Board passed under the following circumstances.

The plaintiff is the owner of certain *basti* land within the jurisdiction of the Municipality, and the Municipality, in 1893, having ascertained that the sanitary condition of these *bastis* was very unsatisfactory, appointed the Officiating Sanitary Commissioner to make a report to them upon the matter, and it is clear from the 8th resolution passed at a meeting of the Commissioners held on Thursday, the 7th December 1893, that the Commissioners, in meeting assembled, were satisfied from the report of the Officiating Sanitary Commissioner, that the existing block of huts in the Bengal Babu *basti*, within the Howrah Municipality, was, by reason of the manner in which the huts were crowded together, attended with risk of disease to the inhabitants or to the neighbourhood, and being unanimously of that opinion, they resolved that the locality be inspected by two medical officers, namely, the Civil Surgeon of Howrah and a gentleman to be nominated by the Sanitary Commissioner, who should make a report under s. 245 of the Municipal Act, Bengal Act III of 1884. Accordingly two medical officers were appointed, and they made a report. Without going into the details of the report it is sufficient to say that the medical officers recommended that certain things should be done, and, amongst others, that a road should be made through this *basti*. On the 17th May 1894, that report was read at a meeting of the Municipal Commissioners, and it was duly proposed and seconded that the owners of the land on which the huts stood should be required, under the provisions of s. 246 of the Act, to carry out and execute, within four months, all the works as specified in the report. That motion was carried unanimously, and in pursuance of that motion, the plaintiff was required to execute the works in [814] question. In my opinion, in the course which the Commissioners adopted, they have complied with the provisions of ss. 245 and 246 of the Municipal Act, Bengal Act III of 1884.

As a consequence of the notice which he received to carry out the works mentioned in the report, the plaintiff instituted this suit on the 25th July 1895, and, as I understand, obtained from the Munsif an *ex parte* injunction in effect restraining the Municipality from proceeding under their resolution. It has not transpired when, actually, in point of date, the notice to do this work was served upon the plaintiff, nor is it

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explained why there was so long a delay between the date of the resolution in May 1894 and the filing of the suit in July 1895. I feel some surprise, however, that the Munsif should, under the circumstances, have made an *ex parte* order, and greater surprise, that when the defendant applied to discharge that order, instead of listening to the application, he should have ordered it to stand over until the trial of the suit. In the absence of any explanation, that does not strike me as a proper method of procedure, nor consistent with the principles upon which injunctions in such cases ought to be granted. The practical and unsatisfactory result has been that, though the report by the medical officers described the matter as one of urgency, nothing has been done for nearly four or five years, during which period this insanitary *basti* has been allowed to continue in its insanitary condition. This quiescent state of matters has, doubtless, been very satisfactory to the plaintiff, who has thus escaped complying with the direction of the Municipality for some years, but I am surprised that the Municipality should have allowed the matter to linger on in this unsatisfactory manner.

The plaintiff's case is based upon the view that there is no necessity for the construction of the works directed, least of all the construction of the new road. That appears again and again in the plaint, and the learned Judge in the lower appellate Court has gone into the question of necessity, and has arrived at the conclusion that the works directed by the Municipality to be executed were not necessary. That is the basis of his decision. In this he has erred, and he [815] ought not to have gone into the question of necessity or no necessity. The question of necessity or otherwise is left by the Legislature to the decision of the Municipality, and though, no doubt, a Civil Court can restrain a Corporation from doing anything *ultra vires*, the question of necessity is not to be so decided. Subject to what I will say in a moment as to the *pucca* privy, no question of *ultra vires* is suggested against the Municipality, nor is it suggested in the plaint that the provisions of ss. 245 and 246 have not been duly complied with, or that the works required are outside the terms of the report, which was admitted in the first Court. If the Municipality decide, having proceeded in accordance with the provisions of the above sections, that certain works are necessary, that conclusion, in the absence of *mala fides* or fraud or considerations of that nature cannot be successfully challenged and cannot be gone into in a Civil Court, otherwise every person, who is directed by a Municipal body to do certain things upon sanitary grounds, could at once institute a suit in a Civil Court, and challenge the necessity of the works directed. This is not what the Legislature contemplated, nor is it reasonable to suppose that any such course could have been contemplated. If it were otherwise, the delay in the present case supplies an apt illustration of how impracticable it would be for Municipalities to control sanitary matters within their jurisdiction. The judgment then of the Court below proceeds upon an entirely erroneous principle, and must be reversed.

But it has been argued that the action of the Municipality was *ultra vires*, because in their notice they directed the plaintiff to remove, not only the huts, but that which is spoken of as a *pucca* privy, and that they had no power under s. 246 of the Act to direct an owner to do that, because a *pucca* privy is not a hut. The Municipality did no doubt by their notice require the plaintiff to remove this privy in order that the road might be made, and they can require him to do this under s. 224 of the Act, and they did also serve the occupier under the latter section. When they served their

notice on the plaintiff, although it purports to be a notice under s. 246, the Municipality clearly had a right to require him to remove the privy under s. 224. [816] They had power then, under the Act generally, to require this privy to be removed, and I am not prepared to hold that, because they entitled their notice only under the one section, instead of the two, the whole proceeding is *ultra vires*. Besides, no such case is definitely raised by the pleadings. Again, the Municipality, if they be so advised, can now serve a notice on the plaintiff under s. 224, for nothing as yet has been done.

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Upon these grounds the view taken by both the Courts below is wrong, and the appeal must be allowed, the decrees of the lower Courts reversed, and the plaintiff's suit dismissed with costs in all the Courts.

BANERJEE, J.—I am of the same opinion. The appeal arises out of a suit brought by the plaintiff respondent for a declaration that the plaintiff is entitled to the land in dispute, and that the defendant is not entitled to make a road over that land by demolishing huts and a *pucca* privy situated thereon, and that, if he is entitled at all to do so, he is so entitled only upon payment of compensation to the plaintiff. The allegation upon which the suit is based is shortly that the defendant, the Chairman of the Howrah Municipality, improperly issued on the plaintiff a notice under s. 246 of Bengal Act III of 1884 for the construction of a new *basti* road after removal of the plaintiff's *pucca* privy and certain tiled huts, when there was no necessity for the construction of any such new road. The defence was that the Municipality, after going through the preliminary steps required to be taken by s. 245 of Bengal Act III of 1884, issued in due form the notice under s. 246 of the Act, which is referred to in the plaint; and that as regards the *pucca* privy, the defendant, under the belief that it belonged to the tenants, issued a notice on them under s. 224 of the Act, for the removal thereof.

The parties went to trial on the three following issues:—*First*: Whether the suit is maintainable in its present form. *Second*: Does the privy referred to belong to the plaintiff? And has the defendant Municipality any right to cause its removal, without the plaintiff's consent? *Third*: Has the defendant Municipality any right to make the road on the plaintiff's land [817] as alleged without the plaintiff's consent, and without giving any reasonable compensation for the same, under the circumstances of the case?

The first Court found for the plaintiff upon all these issues, and it was of opinion that the *basti* road in question was not necessary to be constructed. On appeal by the defendant, the lower appellate Court has confirmed the first Court's judgment on the grounds on which it is based, and on the further ground that the report of the medical officers, appointed by the Municipality under s. 245 of Bengal Act III of 1884, was inadmissible in evidence without strict proof thereof.

On second appeal it is contended for the Municipality: *First*, that the Courts below are wrong in holding that it was open to the Civil Court to determine, whether the road in question was necessary or not; and, *secondly*, that the lower appellate Court is wrong in holding that the report of the medical officers appointed by the Municipality was not admissible in evidence, because it was not proved, when no question was raised as to the fact of such a report having been made.

On the other hand it is contended by the learned vakil for the respondent that the Courts below were right in holding that they had jurisdiction to go into the question of the necessity of the road, and that

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the Municipality, so far as it required the plaintiff to remove the *pucca* privy, under ss. 245 and 246 of the Bengal Municipal Act, has acted beyond the limits of its statutory power, the only power given by those sections being a power of directing the removal of huts.

The first question raised by the learned vakil for the defendant appellant is a very important question. There can be no doubt that the Civil Courts have jurisdiction to try the question whether the Municipality had been acting within the limits of its statutory power. It is conceded, and very properly conceded, by the learned vakil for the appellant that that is so. But then it does not follow that the Civil Courts have jurisdiction to try the question whether the Municipality, when it was acting within the limits of its statutory power, was right in its judgment that a certain road should be opened.

[818] The law authorizing the Municipality to act in this matter is contained in ss. 245 and 246 of Bengal Act III of 1884. Section 245 provides that " whenever the Commissioners at a meeting are satisfied—" I am quoting only so much of the section as is applicable to this case —" by report of competent persons, that any existing block of huts within the Municipality is, by reason of the manner in which the huts are constructed or crowded together, attended with risk of disease to the inhabitants, or the neighbourhood, they may cause the locality to be inspected by two medical officers, who shall make a report in writing on the sanitary condition of the said block of huts, and shall specify, if necessary, in the said report, the huts which should be removed and the roads which should be constructed, with a view to the removal of the said risk of disease ; " and then s. 246 provides that on receipt of the said report the Commissioners may serve the owner of the land with a notice requiring him to effect the improvements considered to be necessary, and if such notice is not complied with, the Commissioners may themselves execute the works.

In the plaint the plaintiff does not say that the necessary preliminaries have not been complied with. What the plaintiff urges in his plaint is, that there was no necessity for the construction of the new road. And he further urges that the Municipal Commissioners had no power to direct the removal of the *pucca* privy. The Courts below have in their judgment said that the report of the Sanitary Commissioner, and that of the two medical officers, upon which the Municipality took action in the present case, were not sufficient to justify any action being taken.

I do not think that this view is correct. Reading the portions of the report of the Sanitary Commissioner, which are given in the judgment of the first Court, I find that the requirements of s. 245 are fully satisfied. What the Courts below have said in effect is, that although the Commissioners say that they were satisfied upon the report that there existed a block of huts within the Municipality which, by reason of the manner in which the huts were constructed or crowded together, was attended with risk of disease to the inhabitants, they ought not to have been so satisfied if they had exercised their judgment properly. But the [819] law makes them the judges upon the point. So long as they had the materials before them it was for them, and them alone, to say whether, upon those materials they were satisfied that there was risk of the kind the section contemplates. So again, upon the report of the two medical officers appointed by them being submitted, if there was such a report, it was for the Commissioners, and for them alone, to say whether there was any

necessity for constructing the road such as they directed the plaintiff in the present case to construct. 1899 APRIL 10.

The view I take is not only consonant with reason and common sense, but is also supported by authority. I may refer to the observations of Lord Cranworth in *Stockton and Darlington Railway Co.* v. *Brown* (1) and the judgment of Sir George Jessel in *Wilkinson* v. *Hull Railway and Dock Co.* (2). APPELLATE CIVIL.

I now come to the consideration of the second question raised in this appeal, namely, whether the lower appellate Court was right in holding that the report of the medical officers appointed by the Municipality was inadmissible in evidence. The report was put in, it was admitted, by the first Court, and no objection is taken in the plaint to the fact of any such report having been made. That being so, I do not think it was open to the lower appellate Court to throw out the report on the simple ground that it had not been strictly proved. 26 C. 811= 3 C.W.N. 508.

The learned vakil for the appellant further contended that the certified copy of the report, which was put in in this case, was admissible under s. 74, sub-s. (1), cl. (ii) of the Evidence Act. The question, whether it was so admissible or not, is not altogether free from difficulty, but in the view I take it becomes unnecessary to determine that question.

It remains only to consider the question with reference to the *pucca* privy. Upon this point I have nothing to add to what has been said by the learned Chief Justice except this, that if a notice under s. 224 of Bengal Act III of 1884, under which the Commissioners had full power to direct the removal of the privy, [820] had required any preliminaries other than those that are necessary to be complied with before the issue of a notice under s. 246, then the absence of compliance with such preliminaries might have stood in the way of our accepting the present notice under s. 246 as sufficient; but as that is not the case, I do not think that we ought to consider the present notice as insufficient or invalid.

S. C. G. *Appeal allowed.*

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26 C. 820=3 C.W.N. 770.

APPELLATE CIVIL.

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, and Mr. Justice Banerjee.

MOHANUND MONDUL (*Plaintiff*) v. NAFUR MONDUL AND OTHERS (*Defendants*).* [8th May, 1899.]

Hindu Law—De facto *manager*—*Sale by a* de facto *manager of minor's property for legal necessity and for his benefit, whether valid.*

A *de facto* manager of an infant's estate has, in case of necessity or for the benefit of the minor, power to sell his property.

[R., 17 Ind. Cas. 609 (613)=23 M.L.J. 638 (644)=12 M.L.T. 547; 4 N.L.R. 20; 36 A. 158=12 A.L.J. 139=22 Ind. Cas. 633; 27 M.L.J. 285.]

THIS appeal arose out of an action brought by the plaintiff for recovery of possession of certain immoveable property, on establishment

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* Appeal from Appellate Decree No. 1762 of 1897, against the decree of L. Palit, Esq., Officiating District Judge of Moorshidabad, dated the 4th of August 1897, affirming the decree of Babu Nogendra Nath Dhur, Munsif of Jungipur, dated the 24th of March 1897.

(1) (1860) 9 H.L.C. 246. (2) (1882) L.R. 20 Ch.D. 323 (329).

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of title thereto. The plaintiff's allegation was that the disputed land was his ancestral *jote*; that his father was in possession of the said *jote* as owner till his death; that on his father's death the plaintiff became the owner by right of inheritance while he was a minor; that the defendants acquired no title by their alleged purchase of the said *jote* from his paternal grandmother, who had no right to sell it, inasmuch as he was a minor at the time of the sale; and that the defendants without any title to the disputed land kept him out of possession for six or seven years previous to the suit. Hence this suit was brought by the plaintiff on his attaining majority.

The defence (*inter alia*) was that the suit was barred by limitation, inasmuch as it was not brought within three years from the date of the plaintiff's attaining majority; that the land in suit was sold to the defendants for the benefit of the plaintiff to [821] pay off certain debts by his grandmother and natural guardian during his infancy, therefore the sale was a valid one.

The Court of first instance, having held that the transfer to the defendants was made by the lawful guardian of the plaintiff for his benefit, dismissed the suit.

On appeal the District Judge affirmed the decision of the lower Court.

Against this judgment the plaintiff appealed to the High Court.

Dr. *Ashutosh Mookerjee*, for the appellant.

Babu *Nalini Ranjan Chatterjee*, for the respondents.

The following judgments were delivered by the High Court (MACLEAN, C.J., and BANERJEE, J.):—

JUDGMENTS.

MACLEAN, C.J.—The point we have to decide upon this appeal is a short one, and not in my opinion a very difficult one.

The suit is one to set aside the sale of a certain property effected under the following circumstances: The sale was effected by the grandmother of the plaintiff, who was then a minor, and it is the minor now of age, who is seeking to set the transaction aside. The grandmother has not been found by the lower appellate Court to have been the duly appointed guardian of the infant, though the Munsiff found that she was, and, for the purpose of this decision, therefore, I will take it that she was only the *de facto* manager of the minor's property, and that, as *de facto* manager of that property, she sold the property in dispute, in order to pay off a debt secured by mortgage over other parts of the minor's property, upon which mortgage a very high rate of interest was running.

The lower Court, upon the authority of the Privy Council case of *Hunooman Pershad Panday* v. *Munraj Koonweree* (1), has decided that the sale was a good one, and that the *de facto* manager, even though not *de jure* manager, had power to sell the property.

It is urged, on behalf of the appellant, that that decision applies only to the case of a mortgage by a *de facto* manager, and not to an out and out sale of the property. I need not dwell upon the obvious distinction between the two, nor point out that from one point [822] of view, a mortgage, inasmuch as an opportunity of redeeming is reserved, may be the more beneficial to the minor; though, on the other hand, if the money can only be raised at a high rate of interest, it may be more beneficial to sell a

(1) 6 M. I. A. 412.

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portion of the estate to pay off existing mortgages than to go on mortgaging at such high rate of interest.

I do not think that the distinction sought to be drawn is well founded. Though no doubt the case cited was one of mortgage, and not of sale, the principle of that decision is, that a *de facto* manager has, under the Hindu law, the power to bind the estate, if he is acting honestly, and the transaction is an honest transaction and one for the purpose of saving or benefiting the estate. I can see no principle upon which it can be successfully urged that he can only do this by way of mortgage, when the circumstances of the estate may be such as to make it obvious that it might be more beneficial to that estate to do it by way of sale. If he have the power to bind the estate, it is difficult to see why he should not have the power of deciding, assuming the most absolute *bona fides* in the transaction, how best, in the interest of the estate, the matter can be dealt with as between a sale and a mortgage. I am assuming of course that the circumstances would support the transaction, had it emanated from a *de facto* and *de jure* manager. I notice that in Mr. Mayne's Book on Hindu Law, s. 196, he says: "When the act is done by a person who is not his guardian, but who is the manager of the estate in which he has an interest, he will equally be bound, if under the circumstances the step taken was necessary, proper, or prudent." And he cites as his authority for that proposition, the case in the Privy Council, to which I have just referred. Mr. Mayne is a careful and experienced author, but he draws no such distinction, as we are now invited to make if there were this distinction, seeing that as often as not a manager sells instead of mortgaging, it is curious that there should be no decision upon the point, for the case must have occurred again and again. This absence of judicial authority suggests that the point has not been regarded as open to serious argument. On the contrary, the cases of *Dorab Ally Khan* v. *Abdool Azees* (1), [823] and *Gunga Pershad* v. *Phool Singh* (2) tend directly in the opposite direction. I am consequently against the appellant upon the point I have been discussing.

On the second point, whether there was *legal necessity* for the sale, the Judge in the Court below has found that there was such necessity; and, although he has not stated the facts from which he draws that inference, and perhaps it would have been more satisfactory if he had done that seeing that he was affirming the judgment of the Munsif, it is not unreasonable to conclude that he took the same view of the facts upon this question as the Munsif had done.

The appeal fails on both points, and must be dismissed with costs.

Banerjee, J.—I am of the same opinion. The suit was brought by plaintiff-appellant, to recover possession of certain immoveable property on the allegation that the defendants were holding possession of the same by setting up an unauthorised alienation from the plaintiff's grandmother during his minority.

The defence was that the sale by the plaintiff's grandmother during his minority was one which was authorised by law, and that the defendants purchased the property in good faith for value and were entitled to retain possession.

The Courts below have found that the plaintiff's grandmother, by whom the conveyance in favour of the defendants was executed, was the *de facto* manager of the plaintiff's estate during his minority, and that the

(1) 4 C. 229.

(2) 10 W.R. 106 = 10 B.L.R. 368, note.

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alienation by her was made under necessity and for the benefit of the minor's estate; and they have accordingly dismissed the suit.

In second appeal it is contended for the plaintiff-appellant, that the Courts below are wrong in holding that the principle laid down in the case of *Hunooman Pershad Panday* v. *Munraj Koonweree* (1), upon which they have relied, was applicable to this case, as that was a case of mortgage, whereas the present one was a case of sale; and it is further contended that the finding upon the question of necessity is not sufficient to warrant the decree that has been made by the Courts below.

Now it is quite true that in the case of *Hunooman Pershad* [824] *Panday* the alienation in question was a mortgage and not a sale; and it is true also that in one respect there is a distinction between a mortgage and a sale, the distinction being that whereas in the case of a mortgage the property may be redeemed and recovered, in the case of a sale the minor loses all chance of recovering the property even upon repayment of the consideration money. But though that is so, is there any reason for holding that the principle that applies to the case of a mortgage by a *de facto* manager of an infant's estate should not apply to the case of a sale by such manager, even though pressure on the estate or benefit to it was established? I am of opinion that the question must be answered in the negative. The reason why a *de facto* manager of an infant's estate has been held competent to alienate his property by way of mortgage would, in many cases, hold equally good where the alienation is by way of sale. Indeed, in some cases the reason for the rule in favour of upholding an alienation by a *de facto* manager of an infant's estate would be satisfied better if the alienation was by way of sale than if it was by way of mortgage, for in some instances, such as in this case, as has been found by the first Court, the sale of a part of the minor's estate may prove more beneficial to him than a mortgage. And it would not therefore be quite reasonable to hold that the power, which the *de facto* manager in such cases possesses, should be limited to one of creating a mortgage only. Nor is there anything in the Hindu law (upon which some stress was laid in the course of the argument) for drawing any such distinction, for one of the well-known passages authorising alienation by a *de facto* manager of the property of the minor (I mean paragraphs 28 and 29 of the Mitakshara, chap. I, s. 1) speaks of sale as well as mortgage. It is true that that passage has reference to cases of joint property where the *de facto* manager of the minor's estate possesses some proprietary interest in himself, but that does not in my opinion affect the question, because, so far as the minor's interest is concerned, the right of the co-owner to dispose of it rests only on his power as manager.

Then there is the case of *Ram Chunder Chukerbutty* v. *Brojonath Mozumdar* (2) in which a sale of a minor's immoveable [825] property by the *de facto* manager of his estate was upheld by a Full Bench of this Court. It is true that the precise question that is now raised was not raised in that case, but the affirmance of the principle that the *de facto* manager of a minor's estate has power to sell his immoveable property is necessarily involved in the decision arrived at in that case. In support of the view I take that no distinction in principle can be drawn between the power of a manager of an infant's estate to mortgage and his power to sell, I may also refer to a well-known work on the subject, "The Law relating to Minors" by Mr. Trevelyan, in which it is said at p. 164 of the second

(1) 6 M.I.A. 412. (2) 4 C. 929.

edition, "No distinction can be drawn between the power to charge and the power to sell, and the need which would justify the exercise of the one would justify that of the other." 1899 MAY 8.

Lastly, a distinction was sought to be drawn between the case of the exercise of the power of mortgage or sale by the *de facto* manager of a minor's estate who was also his natural guardian and the case of a *de facto* manager who was not his natural guardian according to the Hindu law. Without entering into any discussion as to whether there exists such a distinction, it will be enough in the present case to say that the *de facto* manager was the paternal grandmother of the minor, his father and mother both being at the time dead. If that was so, it is not questioned, and it cannot be very well questioned, that the *de facto* manager answers to the description of natural guardian in this case. APPELLATE CIVIL. 26 C. 820 = 3 C.W.N. 770.

On these grounds I am of opinon that upon reason as well as authority the view taken by the Courts below, that the *de facto* manager of the infant's estate has in case of necessity or for the infant's benefit power to sell his property, is correct.

With regard to the second point, the finding arrived at by the lower appellate Court is sufficient in my opinion to warrant the decree that has been made. The judgment of the lower appellate Court affirms that of the first Court, and therefore, though it is not very explicit, we may take it that it in substance adopts the view taken by the Munsif with regard to the question of legal necessity.

S. C. G. *Appeal dismissed.*

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26 C. 826.

[826] APPELLATE CIVIL.

Before Sir Francis William Maclean, K.C.I.E., Chief Justice, and Mr. Justice Banerjee.

RADHA MADHUB SAMONTA (*Plaintiff*) v. SASTI RAM SEN AND OTHERS (*Defendants*).* [22nd February, 1899.]

Voluntary payment—Contract Act (IX of 1872), s. 69—Payment by a purchaser of a putni taluk *during the pendency of an appeal for setting aside the* putni *sale—Person interested in the payment of the* putni *rent—(Putni Regulation VIII of* 1819), *s.* 14.

A payment of rent made by the purchaser of a *putni taluk*, after the decision of the first Court in a suit brought by the defaulting *putnidars* for the setting aside of the *putni* sale, by which it was held that the sale was invalid, and during the pendency of an appeal preferred not by the plaintiff, the auction purchaser, but by the zemindar at whose instance the said sale had been brought about, is not a voluntary payment, inasmuch as he (the plaintiff) is a person interested in the payment of the money, within the meaning of s. 69 of the Contract Act.

Bindubashini Dassi v. *Harendra Lal Roy* (1), followed.

The remedy which the plaintiff in this case had, after the reversal of the sale, to be re-imbursed by the defendant under s. 69 of the Contract Act, was held not to be curtailed by the provisions of s. 14 of Regulation VIII of 1819.

[Cons., 19 C.L.J. 72 = 18 C.W.N. 778 = 21 Ind. Cas. 207; R., 11 Ind. Cas. 155 (159); D., 7 O.C. 146 (149); 11 O.C. 279 (284)]

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* Appeal from Appellate Decree No. 879 of 1897, against the decree of J. Bradbury, Esq., District Judge of Hooghly, dated the 17th of February 1897, affirming the decree of Babu Abinash Chunder Mitter, Subordinate Judge of that District, dated the 6th of May 1896.

(1) 25 C. 305.

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THE plaintiff in this case purchased a *putni taluk* at a sale held under Reg. VIII of 1819 in Joist 1299 B. S. (June 1892), and he was in possession of it till Joist 1300 B. S. (June 1893), when the defendants Nos. 1 to 5 instituted a suit against the zemindar and the present plaintiff to set aside the sale, which suit was decreed on the 14th May 1894, and the order setting aside the sale was confirmed by the High Court. During the pendency of that suit the defendants Nos. 1 to 5 (who were the plaintiffs in that suit) made an application under s. 501 of the Civil Procedure Code and took possession of the *putni taluk* on the 25th January 1894 through the Court by ejecting the plaintiffs, and they as well as defendants Nos. 6 to13, who were [827] their co-sharers, were in possession till the time of the institution of the present action. After the setting aside of the sale by the first Court, the zemindar alone preferred an appeal to the High Court, and during the pendency of the said appeal, procedings under Reg. VIII of 1819 were taken by him in respect of rent for the year 1301 B. S. (1894) against the plaintiff and the defaulting *putnidars*. The plaintiff, to save his *putni* right satisfied the demand, and the present action was brought by him to recover the money so paid, either from the defaulting *putnidars* or from the zemindar.

The defence (*inter alia*) was that the plaintiff was not entitled to be reimbursed by the defendants, inasmuch as the payment was a voluntary one.

The Subordinate Judge dismissed the suit.

On appeal the District Judge confirmed the decision of the first Court.

Against this decision the plaintiff appealed to the High Court.

Babu *Saroda Churn Mitter*, and Babu *Haro Kumar Mitter*, for the appellant.

Babu *Ram Churn Mitter* (Senior Government Pleader), Dr. *Ashutosh Mookerjee*, Babu *Shiva Prosonno Bhattacharjee*, and Babu *Joygopal Ghose*, for the respondants.

The following judgments were delivered by the High Court (MACLEAN, C. J., and BANERJEE, J.) :—

JUDGMENTS.

MACLEAN, C. J.—The principle of the case of *Bindubashini Dassi* v. *Harendra Lal Roy* (1) which was recently before this Court, governs the present case, though in the facts there is some distinction.

The defendants are certain *putnidars;* they defaulted in their rent; the zemindar took proceedings against them; the property was ordered to be sold; it was sold, and the plaintiff, in May 1892, purchased the *putni* interest at the sale held in pursuance of the order. On the 12th May, 1894, the sale was, in a suit instituted for the purpose, set aside; the zemindar alone appealed against that decision, and the plaintiff was a respondent on the appeal. In April 1895, during the pendency of the appeal, the [828] zamindar applied to the plaintiff to pay the rent which had accrued from the 13th April 1894 to November in that year, and in the same month he instituted proceedings against the plaintiff to enforce his rights upon the footing of the non-payment of the rent. On the 16th May 1895, the plaintiff paid the money claimed amounting to Rs. 2,000 or thereabouts. On the 9th August 1895, the appeal was heard and the decision of the Court below setting aside the sale was affirmed. On the

(1) 25 C. 305.

12th December 1895, the present suit was instituted by the plaintiff against the defendants, the bulk of whom are the *putnidars*, the only other defendant being the zemindar. He claims to recover the Rs. 2,000 upon the ground that when he made the payment he was a person interested in the payment of the money which the *putnidars* were bound by law to pay, and that he is entitled to be reimbursed by them.

Both the lower Courts have decided against him; hence this appeal. The first question is, whether the case falls within s. 69 of the Contract Act. I think it does. It is difficult to say that, at the time the plaintiff made the payment, he was not interested in that payment which the *putnidars* were bound to make. If the decision of the lower Court had been reversed by this Court, the plaintiff would have been confirmed in his position as *putnidar;* and as such would have been liable to pay the rent to the zemindar. No doubt at the time he made the payment it had been held that the sale ought to be set aside, in which case his interest in the *putni* lease was gone. But at the same time an appeal was pending, and there was the possibility at least of a reversal of the decision. Under these circumstances can it be successfully urged that he was a mere volunteer, and not interested in the payment of the money, which, as matters have eventuated, the present respondents are bound by law to pay? We should be placing a narrow construction upon the section if we acceded to this view. If he had not paid it and the decision had been reversed, he would have run the risk of his *putni* interest being sold at the suit of the zemindar. The defendants have had the benefit of this payment; if it had not been made, their *putni* lease might have been again put up [829] for sale at the suit of the zemindar. The principles of justice, equity and good conscience appear to me to demand that the plaintiff should be reimbursed by the defendants, the *putnidars*.

But it is said that the concluding sentence of the first clause of s. 14 of Reg. VIII of 1819 virtually bars this suit, and that the plaintiff is not entitled to maintain it, and that he ought to have applied in the previous suit for the reimbursement in question. In point of fact he had made no payment when the suit was before the first Court, though he had when it was before this Court. If the attention of this Court had been directed to the matter, I am not prepared to say that it might not have made an order reimbursing the plaintiff against this payment, or for any other loss he might have sustained, but I am not prepared to say that, when the section speaks only of the Court being careful to indemnify the person paying against all loss, that that is sufficient to deprive to the plaintiff of a right to maintain the present suit. The language of the section is not sufficiently precise to justify us in saying that the plaintiff's right to sue for reimbursement is taken away.

In the result, the appeal will be allowed with costs as against the respondents Nos. 1 to 13 and dismissed with costs as against the respondent No. 14. There must be the usual decree for payment of the amount claimed, with the costs of the suit.

BANERJEE, J.—I agree with the learned Chief Justice in thinking that this case comes within the scope of s. 69 of the Contract Act, and is governed by the principle laid down in the cases of *Dakhina Mohan Roy* v. *Sharoda Mohan Roy* (1) and *Bindubashini Dassi* v. *Harendra Lal Roy* (2).

(1) 21 C. 142. (2) 25 C. 305.

1899 FEB. 22. — APPELLATE CIVIL. — 26 C. 826.

It was contended for the defendants, in the first place, that the plaintiff was not a person interested in the payment of the money in question within the meaning of s. 69 of the Contract Act, and that the present case is distinguishable from the cases to which I have just referred because the payment here was made after the decision of the first Court in the suit for reversal of the *putni* sale by which it was held that the sale was invalid, and during the pendency of an appeal preferred, not [830] by the plaintiff, the auction-purchaser, but by the zemindar, at whose instance the *putni* sale had been brought about; and in the second place, it was contended that the suit was barred by the provisions of the first clause of s. 14 of Reg. VIII of 1819. Then it was, in the third place, contended on behalf of the defendant No. 8, that he ought not to be held liable in any event, as the payment was made by the plaintiff at a time when the *putni* was in the possession, not of all the *putnidar* defendants, but of defendants Nos. 1 to 5 only.

I am of opinion that the first contention is not sound, and that the circumstances relied upon do not really distinguish this case from the cases to which reference has been made above, and do not take this case out of the purview of s. 69 of the Contract Act. It is quite true that the decision of the first Court in the suit for reversal of the *putni* sale was in favour of the defaulting putnidars, but that did not preclude the possibility of a contrary decision being arrived at by the Court of appeal, and the fact of the plaintiff not having been the appellant did not make him any the less a person interested in the payment, when the appeal of the zemindar would, if successful, have inured to the benefit of the plaintiff.

Section 69 of the Contract Act does not require that the person who made the payment should have done anything actively to keep up the interest which he claims. All that is required is, that the payment should be made by a person who is interested in the payment; and the plaintiff was clearly interested in the payment that he made, seeing that if it had not been made and the *putni* had been sold in consequence, it would have prevented him from reaping the advantage that he might have gained in the event of the success of the zemindar's appeal.

Nor is there much force in the second contention. All that s. 14 of Reg. VIII of 1819 says, with reference to the point now before us, is this—that "the purchaser shall be made a party in such suits, and upon a decree passing for reversal of the sale, the Court shall be careful to indemnify him against all loss at the charge of the zemindar or other person at whose suit the sale may have been made."

[831] This, no doubt, provides for the auction-purchaser, in the event of reversal of the sale, being indemnified against all loss that may have been sustained by him, and the remedy is to be at the expense of the zemindar at whose instance the sale was brought about. But it does not say that the remedy prescribed is to be the sole remedy to which the auction-purchaser is entitled, notwithstanding that, by virtue of any other provision of law, he may be entitled to a remedy against any other person than the zemindar.

If then s. 69 applies to the case, and as I said above it does apply to it, and the plaintiff is, in consequence, entitled to be reimbursed by the defaulting *putnidars*, who were bound to pay the money, the provisions of s. 14 of Reg. VIII of 1819, quoted above, cannot, in my opinion, stand in the way of the plaintiff's obtaining such relief. That the defaulting *putnidars* were liable for the rent, the demand for which was satisfied by the plaintiff's payment, is not disputed, and cannot be disputed. That

being so, I do not think that the remedy which the plaintiff has under s. 69 of the Contract Act is curtailed by the provisions of s. 14 of Reg. VIII of 1819 quoted above. 1899 FEB. 22.

As to the third contention, namely, the one urged on behalf of the defendant No. 8, I do not think that his case can be distinguished from that of the other *putnidars*, defendants, because he was as much bound by law to pay the rent which was paid by the plaintiff as the other *putnidars* who had been put in possession under s. 501 of the Code of Civil Procedure. There is no valid reason shown why he should be held not bound by law to pay the arrears of rent due on account of this *putni* when he claims to be interested in the *putni* just as much as the other *putnidars* are. The contentions urged before us on behalf of the respondents in support of the lower Court's judgment therefore all fail. APPELLATE CIVIL. 26 C. 826.

S. C. G. *Appeal allowed.*

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26 C. 832.

[832] APPELLATE CIVIL.

Before Mr. Justice Macpherson and Mr. Justice Stevens.

HEM CHANDRA CHOWDHRY (*Plaintiff*) *v.* KALI PRASANNA BHADURI AND OTHERS (*Defendants*).* [12th May, 1899.]

Enchancement of rent—Partition of estates—Bengal Tenancy Act (*VIII of* 1885), *ss.* 7 *and* 188—*Customary rate of rent—Fair and equitable rent—Joint-landlords—Onus of proof—Road-cess returns—Evidence Act* (*I of* 1872), *ss.* 21 *and* 32—*Bengal Cess Act* (*Bengal Act IX of* 1880), *s.* 95.

In a suit for enhancement of rent of a tenure under s. 7 of the Bengal Tenancy Act, it is for the plaintiff to start his case by proving that the existing rate was below the customary rate payable by persons holding similar tenure in the vicinity, or that it was not fair and equitable, before the *onus* can be shifted to the defendant, to prove that the existing rent was fair and equitable.

A tenure was held under a zemindari, which originally formed one entire estate. The estate was subsequently partitioned by the revenue authorities into four several estates. The rent of the tenure was thereupon allotted proportionately to each of the four estates thus formed, although the land forming the tenure remained undivided. In a suit for enhancement of the rent of the tenure brought by the proprietor of some of the estates, *Held*, that the effect of the partition of the parent estate was to create separate and distinct tenures out of the original single tenure under the proprietors of each of the estates; that the proprietors of the several estates were not *joint* landlords of the tenure within the meaning of s. 188 of the Bengal Tenancy Act; and that therefore a suit for enhancement of rent would lie by a proprietor of one of the estates in respect of the rent allotted to his estate.

Surut Soonduree Debia v. *Sumeeroodeen Talukdar* (1), and *Sarat Soondary Dabee* v. *Anund Mohun Surma Ghuttak* (2), followed.

Semble :—The statements made by the deceased tenants in cess returns filed by them regarding assets of the tenancy are not admissible in evidence under s. 32 of the Evidence Act.

[R., 10 C.W.N. 818 (819).]

PERGUNNAH Pukheria Jainsahi in the District of Mymensingh, originally formed one parent estate, which was partitioned by the Revenue Authorities into four several estates. One of these estates, namely, *mehal* No. 122, represents a ten annas [833] share of the original estate,

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* Appeals from Original Decrees Nos. 391 and 392 of 1896, against the decree of Babu Krishna Chunder Chatterjee, Subordinate Judge of Mymensingh, dated the 31st of July 1896.

(1) 22 W.R. 530. (2) 5 C. 273.

1899 MAY 12. — APPELLATE CIVIL. — 26 C. 832.

each of the three others representing a two annas share of the original estate. Of these, two, namely, *mehals* Nos. 4806 and 5513, belong to the plaintiff. Within the parent estate there was an ancient tenure called *taluk* Madarjani, which comprised a number of *mouzas* and *jalkars*. This *taluk* has now become two distinct tenures, one representing a 13¾ annas share, and the other a 2¼ annas share of the original tenure. The lands of this *taluk* were never partitioned by metes and bounds, but its rent was allotted proportionately to each of the four estates aforesaid under which it was held.

These appeals arise out of suit No. 27 of 1890, brought by one Hem Chandra Chowdhry as proprietor of estates Nos. 4806 and 5513, constituting a four annas share of Pergunnah Pukheria, against the defendants as owners of 13¾ annas share of the tenure Madarjani, for enhancement of rent payable to the plaintiff. The suit was partially decreed by the Subordinate Judge, and both the plaintiff and some of the defendants appealed from the decree of the Subordinate Judge; appeal No. 391 being preferred by the plaintiff, and appeal No. 392 by defendants Nos. 1, 2, 3, and 14.

Mr. *J. T. Woodroffe*, Babu *Sreenath Das*, and Babu *Joges Chandra Roy*, for the appellant in appeal 391 and for the respondents in appeal 392.

Sir *Griffith Evans*, Babu *Sharada Charan Mitter*, and Babu *Mohini Mohan Chakrabarti*, for the respondents in appeal 391 and for the appellants in appeal 392.

The following cases were referred to in the course of the arguments:—

For the defendants, *Gopal Chunder Das* v. *Umesh Narain Chowdhry* (1), *Panchanan Banerji* v. *Raj Kumar Guha* (2), and *Baidya Nath De Sarkar* v. *Ilim* (3).

For the plaintiff, *Surut Soonduree Debia* v. *Sumeeroodeen* [834] *Talookdar* (4), *Sarat Soondary Dabea* v. *Anund Mohun Surma Ghuttack* (5), and *Bissessuri Debi Chowdhrain* v. *Hem Chunder Chowdhry* (6).

The judgment of the High Court (MACPHERSON and STEVENS, JJ.) was as follows:—

JUDGMENT.

Pergunnah Pakheria Jainsahi originally formed an entire estate, but has now by partition become four estates, one of which represents a 10 annas share and the others each a 2 annas share of the original estate. Subordinate to the original estate there was an ancient tenure called Madarjani, the rent of which was allotted proportionately to each of the four estates, the land remaining undivided. This has now become two tenures, one representing a 13 annas 15 gundas share and the other a 2 annas 5 gundas share of the original tenure. The plaintiff as a proprietor of estates Nos. 4806 and 5513, each of which represents a two annas share of the Pergunnah, brought suits No. 29 of 1890 and No. 7 of 1891 to enhance the rent payable to him for his four annas share, and these suits, which were tried together and disposed of in one judgment, have given rise to four appeals, of which Nos. 391 and 392 of 1896 relate to suit No. 27, and Nos. 45 and 46 of 1897 to suit No. 7.

Enhancement is claimed under s. 7 of the Bengal Tenancy Act, and the plaintiff's case substantially is that he is entitled to receive as a fair

(1) 17 C. 695. (2) 19 C. 610. (3) 25 C. 917.
(4) 22 W. R. 530. (5) 5 C. 273. (6) 14 C. 133.

rent a greater share of the tenure holder's profits. It is not now disputed that the rent of the tenure is enhanceable, and indeed it was held to be so by this Court in its judgment of the 30th November 1888, in suits between the parties now before us. That judgment gives also an account of the almost continuous litigation which has been going on between the proprietors of the estate and the tenure-holders on the question of enhancement. The Subordinate Judge has decreed enhancement in both suits solely on the strength of certain road cess returns put in by the plaintiff, for he has rejected as unreliable the whole of the oral evidence bearing on the rent paid by the *raiyats*.

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[835] Appeal No. 391 is preferred by the plaintiff and appeal No. 392 by the first three defendants and defendant No. 14 in suit No. 27 for the enhancement of the rent of the 13 annas 15 gundas tenure, and we shall deal first with those appeals. The rent has been enhanced to Rs. 2,386-11 after allowing 5 per cent. as collection charges and 20 per cent. as the tenure-holder's profit, and half of that amount has been made payable to the plaintiff as proprietor of one estate and half as proprietor of the other; the enhancement has been graduated so as to take full effect at the end of the year 1301, and the rent has been made payable in four quarterly instalments. The main contentions of the defendants, appellants, are that s. 188 of the Bengal Tenancy Act precludes the plaintiff as one of several joint landlords from maintaining a suit to enhance his share of the rent; that the road-cess returns relied on are not evidence against them, and that no ground for enhancement has been established.

We see no force in the first contention. The original arrangement by which there was one tenancy under one holding of landlords came to an end when the parent estate was partitioned, and the effect of the partitions was to create separate and distinct tenancies under the proprietors of each of the estates. It cannot be said that the proprietors of the several estates were joint landlords of the tenure, for the estates were separate and the share of the rent allotted to each formed a portion of the assets of that estate alone. This was the view taken in *Sarat Soondary Dabea* v. *Anund Mohun Surma Ghuttack* (1) and *Surut Soonduree Debia* v. *Sumeeroodeen Talookdar* (2). In the cases cited for the appellants there had been no division of the tenancy consequent on the partition of the parent estate. We further think that the effect of this Court's decree of the 30th November 1888 is that the rent of the four annas share of the tenure can be enhanced, but whether the declaration in that decree was intended to relate to the whole tenure or the four annas share of it, we must hold that the suit is maintainable.

[836] The road-cess returns are Exs. 1 to 4 and 6 and 7. None of these were submitted by the appellants, and Exs. 3, 4, 6 and 7 relate, not to the tenancy under either of the plaintiff's estates, but to the tenancy under estate No. 122, which represent the ten annas share of the pergunnah, and are, we consider on that ground, inadmissible. We cannot hold that there is a separate and distinct tenancy under the plaintiff as proprietor of one estate so as to admit of his enhancing the rent payable to him, and at the same time hold that there is one and the same tenancy under him and the proprietors of estate No. 122 so as to make a statement relating to the tenancy under the latter estate admissible. If the tenancies are distinct, the statement to be admissible must, we think, relate to the tenancy which is in question. In this view all but

(1) 5 C. 273. (2) 22 W.R. 530.

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Exs. 1 and 2 must be excluded, but it is upon those and Ex. No. 3 that the Subordinate Judge has acted.

Exhibits 1 and 2 are returns relating to the plaintiff's estates No. 5513 and 4806, respectively. They were signed and submitted by Hari Narain Ghose as *am-mukhtear* of Raja Jotindra Narain Roy, whose interest has now devolved on his widow Rani Hemanta Kumari, the 23rd defendant in the suit, but not a contesting defendant. They show that in 1884 Jotindra Narain's 11 gundas 2 karas share of the tenure was let out in *ijara* for terms of three or four years to certain persons at an aggregate rent of Rs. 54-2-4 as regards each of these estates. Exhibit 3 is a return, which as already stated relates to estate No. 122. It was signed and submitted by Harendra Kumar Bose as *am-mukhtear* of Maharani Sarat Sundari Debia, who was the mother of Jotindra Narain, and whose share has also now devolved on Hemanta Kumari, and it shows that her 1 anna 14 gundas 2 karas share of the tenure appertaining to estate No. 122 was let out to the *ijaradars* mentioned in Exs. 1 and 2 at an annual rent of Rs. 813-13-0. Those returns have been made evidence against the appellant under cl. 3, s. 32 of the Evidence Act, as containing statements made by a deceased person against his pecuniary interests, and it is on them alone that the assets of the four annas share of the tenure appertaining to the plaintiff's estates have been determined and the rent enhanced. The **[837]** statements made in the returns were no doubt authorised by the Rani and Raja, respectively, and under the provisions of the Road Cess Act, were binding on them, but looking at the language and scope of s. 32, we doubt whether they can be regarded as statements made by those persons within the meaning of the section so as to be admissible against others. It is not, we think, necessary to determine this question in the present case, because, assuming that the statements are evidence against the appellants, they do not in our opinion furnish any reliable data for ascertaining the assets of the tenure, and have been given a value far beyond what they deserve.

The statements do not purport to give the rent realized in respect of the whole tenure, or to deal with more than the small shares owned by the Raja and Rani. It was, therefore, necessary to resort to a mathematical calculation, which must have assumed two things: *first*, that the *ijaras* were not of a speculative character, and that the *ijaradars* realised from the *raiyats*, at least the amount of the rent which they paid to the superior landlord ; and *secondly*, that the other tenure-holders, including the appellants, realized proportionately to their shares the same amount of rent, either from the same or other *ijaradars* or from the *raiyats* direct. We see no ground for either assumption. The returns stand by themselves, and beyond some general evidence that the *raiyats* paid all the tenure-holders at the same rates whatever those rates were, there is no evidence in support of them. Then the Rani and the Raja occupied the double position of tenure-holder and proprietor, for they were proprietors of estate No. 122. The Subordinate Judge says that the history of the previous litigation shews a determined effort on the part of the proprietors to enchance the rent of the tenure, but that there was admittedly some decision which protected the share of the tenure subordinate to estate No. 122 from enhancement, so that the Rani and the Raja would derive no advantage as proprietors by overstating the amount of the rent received by them as tenure-holders. We do not know what that decision is, but the fact that they occupied the double position remains, and certainly detracts from the value of the statements as affecting other sharers of the tenure.

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The argument that the statements carry some weight from the position [838] of the persons making them, might be of some force, if it was shown that they had personal knowledge of them. This is not shown; all that appears is that the *mukhtear* received the returns from the *amla* and signed and put them in, and it is not likely that either the Rani or the Raja would have been able to say anything about the correctness of them. The returns are certainly *prima facie* against pecuniary interest, but the pecuniary interest affected is so small that they have little value on that ground. On the other hand, notwithstanding the provisions of ss. 21 and 32 of the Evidence Act, they could not under s. 95 of the Road Çess Act be used as evidence in favour of the person submitting them.

As the case stands on the judgment of the Subordinate Judge, it is in the same position as if the plaintiff had put in and proved these returns, and no other evidence of any kind had been given. In our opinion this is not sufficient, and no decree for enhanced rent could be made on the strength of them. It is argued that it was in the power of the appellants to prove the amount of rent realized in respect of the tenure, but conceding that, it was for the plaintiff to start his case by proving under s. 7 of the Tenancy Act that the existing rent was below the customary rate payable by persons holding similar tenures in the vicinity, or that it was not a fair and equitable rent, and statements of other persons, such as those relied on, are not sufficient to throw on the appellants the burden of proving that the existing rent is fair and equitable.

It follows, therefore, that the suit must fail, unless the plaintiff succeeds in his appeal and shows that the evidence as to rates should be accepted so as to entitle him to the enhanced rent decreed, if not the greater enhancement claimed.

The Subordinate Judge disbelieved the evidence of the plaintiff's witnesses, because they were under the plaintiff's influence, and were not residents or *raiyats* of the villages concerning which they spoke, and because also he did not believe that they ever held land in those villages, or were in a position to speak as to the rates of rent prevailing there. The evidence has been read to us, and we need only say that we think the Subordinate Judge's view is correct, and that we are not prepared to take a different [839] view. It is not necessary under the circumstances to examine the evidence of the defendants' witnesses which has also been rejected as false.

The defendants also contended in their appeal that the enhanced rent could only be decreed prospectively from the date of the decree, and that the rent should have been made payable at the end of the year and not quarterly. In the view which we have taken it is not necessary to deal with these points. If it had been necessary, we should not have been disposed to interfere with the decision of the Subordinate Judge upon them.

The result is, that the defendants' appeal No. 392 succeeds, and that the plaintiff's suit is dismissed with costs in both Courts, and that the plaintiff's appeal No. 391 is dismissed.

Appeal No. 391 *dismissed*; *Appeal No.* 392 *decreed.*

M. N. R.

1899
JULY 3.

APPEL-
LATE
CIVIL.

26 C. 839=
4 C.W.N.
558.

26 C. 839=4 C.W.N. 558.

APPELLATE CIVIL.

Before Mr. Justice Banerjee and Mr. Justice Stevens.

MAHOMED YUSUF (*Judgment-debtor, Objector*) *v.* ABDUR RAHIM BEPARI AND OTHERS (*Decree-holders*).* [3rd July, 1899.]

Succession Certificate Act (*VII of* 1889), *s.* 4—*Right to maintain suit without certificate—Death, during execution proceedings, of the original mortgagee, and substitution of his heir.*

Section 4 of the Succession Certificate Act (VII of 1889) is not a bar to execution proceedings instituted on a mortgage decree upon the application of the original mortgagee, by reason of the original mortgagee having died during the pendency of the proceedings, and his legal representatives who were substituted in his place not having produced any succession certificate.

Fateh Chand v. *Muhammad Baksh* (1), dissented from.

[Diss., 10 O.C. 378 (382) (B); F., 22 B. 630 (632)=6 Bom. L.R. 582; R., 29 M. 77 (78); 34 M. 442 (446)=1 Ind. Cas. 535=5 M.L.T. 278; 7 C.L.J. 658=12 C.W.N. 145 (148).]

THIS appeal arose out of an application for execution of a mortgage decree which was passed against the defendants, including defendant No. 7, who was made a party as being a purchaser of a portion of the mortgaged property. As against defendant [840] No. 1 a personal decree was granted. The decree having been made absolute, an application was filed on behalf of the decree-holder for execution of the decree. During the pendency of the execution proceedings the decree-holder died and his heirs were substituted in his place. Defendant No. 7 objected to the execution of the decree (*inter alia*) on the ground that it could not proceed in the absence of a succession certificate. The lower Court disallowed the objection, holding that no succession certificate was necessary for the execution of a mortgage decree by the heirs of the original mortgagee.

Against this decision the judgment-debtor appealed to the High Court.

Mr. *J. R. Perceval*, for the appellant.

Babu *Horendra Narayan Mitter*, for the respondents.

The judgment of the High Court (BANERJEE and STEVENS, JJ.) was as follows:—

JUDGMENT.

BANERJEE, J.—In this appeal, which arises out of certain proceedings taken in execution of a mortgage decree, the only question raised on behalf of the appellant who was defendant No. 7 in the Court below, and was made a defendant as being the purchaser of a portion of the mortgaged property, is, whether s. 4 of the Succession Certificate Act is a bar to the execution proceedings which were instituted upon the application of the original mortgagee, by reason of the original mortgagee having died during the pendency of the proceedings and his legal representatives who were substituted in his place not having produced any succession certificate.

The learned vakil for the appellant very fairly admits that the weight of authority in this Court is apparently against his contention, but he

* Appeal from Order No. 184 of 1898, against the order of Babu Manmathonath Chatterjee, Subordinate Judge of Dacca, dated the 26th February 1898.

(1) 16 A. 259.

seeks to distinguish the cases bearing upon the point, *viz.*. *Roghu Nath Shaha* v. *Poresh Nath Pundari* (1), *Kanchan Modi* v. *Baij Nath Singh* (2), and *Baid Nath Das* v. *Shamanand Das* (3), from the present on the ground that in none of those cases was any personal decree against the mortgagor **[841]** asked for, whereas in this case such a decree was asked for and has been granted; and he relies upon the case of *Fateh Chand* v. *Muhammad Bakhsh* (4), decided by a Full Bench of the Allahabad High Court, in support of his contention.

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So far as the distinction sought to be drawn between the present case and the cases decided in this Court bearing upon the point now before us goes, it would be sufficient to say that the only defendant against whom a personal decree has been granted is defendant No. 1, and he is not one of the appellants before us, nor indeed did he raise any objection in the Court below to the execution proceedings; and as against the defendant No. 7 the appellant before us, the only decree made is not a personal decree, but a decree allowing the mortgagee to proceed against the mortgaged property in his hands; so that, as far as the appellant is concerned, the case is governed by the principle laid down in the cases of *Roghu Nath Shaha* v. *Poresh Nath Pundari* (1); *Kanchan Modi* v. *Baij Nath Singh* (2), and *Baid Nath Das* v. *Shamanand Das* (3). We agree with the view taken in those cases and respectfully dissent from that taken by the Allahabad High Court in the case of *Fateh Chand* v. *Muhammad Bakhsh* (4).

But there is another reason why we think that the contention of the appellant in this case should fail, and that is this, that s. 4, sub-s. 1, cl. (*b*), which is the only provision of the Succession Certificate Act under which the case could possibly come, can have no application to the present case. For that clause provides that no Court shall "proceed upon the application of a person claiming to be entitled to the effects of a deceased person" to execute against a debtor of such deceased person a decree or order for the payment of his debt. Now, in the present case, the Court was not proceeding upon the application of a person claiming to be entitled to the effects of a deceased person, but was proceeding originally upon the application of **[842]** the creditor himself, and it was only during the pendency of the execution proceedings that the original mortgagee, decree-holder, died, and his legal representatives, the present respondents, were brought on the record. In such a case we do not think that s. 4 of the Succession Certificate Act was any bar to the Court proceeding with the execution. This view, we think, is in accordance with that indicated by this Court in the case of *Baid Nath Das* v. *Shamanand Das* (3). The appeal, therefore, fails and must be dismissed with cost.

S. C. G. *Appeal dismissed.*

(1) 15 C. 54. (2) 19 C. 336. (3) 22 C. 143. (4) 16 A. 259.

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APPELLATE CIVIL.

26 C. 842 = 4 C.W.N. 95.

26 C. 842 = 4 C.W.N. 95.

APPELLATE CIVIL.

Before Mr. Justice Hill and Mr. Justice Rampini.

RANGO ROY *alias* RUNG LAL ROY (*Plaintiff*) *v.* HOLLOWAY AND ANOTHER (*Defendants*).* [25th April, 1899.]

Second Appeal—Cases cognizable in Courts of Small Causes—Civil Procedure Code (*Act XIV of* 1882), *s.* 586—*Landlord and Tenant—Bengal Tenancy Act* (*VIII of* 1885), *s.* 144.

A suit between landlord and tenant for the recovery by the tenant of excess payments taken by the landlord in respect of the rent of the holding and not exceeding Rs. 500 is a suit cognizable by the Small Cause Court, and under s. 586 of the Civil Procedure Code no second appeal lies. There is nothing in s. 144 of the Bengal Tenancy Act to override the provisions of s. 586 of the Civil Procedure Code, as it determines only the venue and has no bearing upon the nature of the suit.

[R., 14 C.L.J. 489 = 12 Ind. Cas. 745 (747) ; 1 L.B.R. 335.]

THIS was a suit brought under the provisions of s. 75 of the Bengal Tenancy Act, for the recovery of the sum of Rs. 113-15 annas, which the plaintiff, the tenant of the defendant, claimed in respect of excess payments taken from him in respect of the rent of his holding by the defendants.

The Munsif found that the amount claimed was twice the sum realised from the plaintiff and awarded damages at 50 per cent. with proportional costs.

On appeal by the defendants the District Judge reversed the Munsif's decree and dismissed the suit with costs.

[843] From this decision the plaintiff appealed to the High Court.

Mr. *P. O'Kinealy* (with Babu *Saligram Singh*), for the defendants, took a preliminary objection to the hearing of the appeal, that the suit being to recover a sum not exceeding Rs. 500, and being also of a nature cognizable in a Court of Small Causes, and there having been an appeal already, a second appeal was barred by s. 586 of the Civil Procedure Code.

Babu *Jogesh Chunder Roy*, for the plaintiff.—This being a suit between landlord and tenant is not cognizable by a Court of Small Causes. From s. 144 of the Bengal Tenancy Act, which provides, "The cause of action in all suits between landlord and tenant as such shall, for the purposes of the Code of Civil Procedure, be deemed to have arisen within the local limits of the jurisdiction of the Civil Court which would have jurisdiction to entertain a suit for the possession of the tenure or holding in connection with which the suit is brought," it is clear that all suits between landlord and tenant are to be regarded as suits cognizable by ordinary Courts as distinguished from Courts of Small Causes.

The judgment of the High Court (HILL and RAMPINI, JJ.) was as follows :—

JUDGMENT.

A preliminary objection has been raised by the learned counsel for the respondents to the hearing of this appeal. It is contended that the suit is a suit of the nature cognizable by a Court of Small Causes, and

* Appeal from Appellate Decree No. 1671 of 1897, against the decree of C. M. W. Brett, Esq., District Judge of Bhagulpur, dated the 1st of June 1897, reversing the decree of Babu Uma Charn Kar, Munsif of Beguserai, dated the 28th of January 1897.

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that by virtue of the provisions of s. 586 of the Code of Civil Procedure a second appeal is barred.

In answer to this objection reliance is placed by the learned vakil for the appellant on s. 144 of the Bengal Tenancy Act, where it is provided, "The cause of action in all suits between landlord and tenant as such shall, for the purposes of the Code of Civil Procedure, be deemed to have arisen within the local limits of the jurisdiction of the Civil Court which would have jurisdiction to entertain a suit for the possession of the tenure or holding in connection with which the suit is brought." And it is argued that the inference to be drawn from that section **[844]** is that all suits between landlord and tenant as such are to be regarded as suits cognizable by ordinary Courts as distinguished from Courts of Small Causes, and this being a suit between landlord and tenant as such must be treated as a suit not in its nature cognizable by a Court of Small Causes.

The suit is brought under the provisions of s. 75 of the Bengal Tenancy Act for the recovery of the sum of Rs. 113-15 annas, which the plaintiff, the tenant of the defendant, claims in respect of excess payments made by him to or taken from him in respect of the rent of his holding by the defendant, and the suit may, therefore, no doubt be properly said to be a suit between landlord and tenant as such.

But in our opinion there is nothing in s. 144 of the Bengal Tenancy Act which overrides or tends to override the provisions of the Code of Civil Procedure to which we have referred. All that s. 144 does is to determine the *venue*, but it has no bearing, so far as we are able to perceive, upon the question of the nature of the suit ; it determines the jurisdiction within which suits are to be instituted, but beyond that it does not go. That this is a suit which would ordinarily be regarded as in its nature cognizable by a Court of Small Causes we think there can be no doubt, and there being nothing in s. 144 of the Bengal Tenancy Act to lead us to qualify that view in any respect, we think the suit is within the provisions of s. 586 of the Code of Civil Procedure, and a second appeal is, therefore, not open to the appellant. We think consequently that the objection taken by the respondents must prevail and the appeal must be dismissed with costs.

M. R. M. *Appeal dismissed.*

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26 C. 845=4 C.W.N. 162.

[845] APPELLATE CIVIL.

Before Mr. Justice Wilkins and Mr. Justice Handley.

RAJ NARAIN DAS AND OTHERS (*Plaintiffs*) *v.* SHAMA NANDO DAS CHOWDHRY AND OTHERS (*Defendants*).* [6th June, 1899.]

Declaratory decree, Suit for—Suit for declaration of title—Land not properly described —Land Registration Act (Bengal Act VII of 1876), *ss.* 59, 62—*Specific Relief Act* (*I of* 1877), *s.* 42—*Subsequent suit for Possession—Practice—Amendment of Plaint.*

A person is not debarred from bringing a suit for declaration of title on the ground that the land in question is not properly described, but if an order under s. 59 of the Land Registration Act is made against him, he is precluded by s. 42

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* Appeal from Appellate Decree No. 1415 of 1897, against the decree of F.E. Pargiter, Esq., District Judge of Cuttack, dated the 12th of May 1897, affirming the decree of Babu Lal Behary Dey, Munsif of Balasore, dated the 7th of August 1896.

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of the Specific Relief Act from bringing a suit merely for declaration of his title without seeking to recover possession, although he may be in physical possession, the effect of such an order being to "settle the actual possession." The appellate Court will not grant in a case of this nature an opportunity to amend the plaint if the plaintiffs had already such an opportunity and did not avail themselves of it.

Kazem Sheik v. *Danesh Sheik*(1); *Dwarkanath Roy* v. *Jannobee Chowdhrain*(2); *Darbaree Sayal* v. *Fatu Dhalee* (3); *Mahomed Ismail* v. *Lalla Dhundur Kishore Narain* (4); *Ajoodhia Lall* v. *Gumani Lall* (5); and *Limba bin Krishna* v. *Rama bin Pimplu* (6), distinguished.

Ram Mundur v. *Janki Pershad* (7); *Omrunissa Bibee* v. *Dilawar Ally Khan*(8), and *Krishnabhupati Devi* v. *Ramamurti Pantulu* (9), referred to and followed.

[R., 28 B. 332 (336) = 6 Bom. L.R. 124; 33 C. 1362; 4 C.L.J. 568 = 11 C.W.N. 186; 135 P.R. 1906 = 117 P.L.R. 1908; 103 P.L.R. 1902; **Not Appl**, 36 M 62 (64) = 12 Ind. Cas. 170 (171) = 21 M.L.J. 1022 = 10 M.L.T. 277 = (1912) M.W.N. 161; **D.**, 9 Ind. Cas. 673 = 1 P.R. 1911 = 47 P.L.R. 1911 = 22 P.W.R. 1911; 36 C. 726 = 10 C.L.J. 189 = 1 Ind. Cas. 549.]

IN this suit the plaintiffs allege they are the proprietors, under a purchase made by their ancestor on 16th September 1842, of 30 *mans* of land in *mouza* Dagrajit, Patna. Of this area **[846]** 15 *mans* 11 *gunts* 4 *biswas* are *bahali* (or confirmed) *lakhiraj*, and the remainder is *basiafti* (or resumed) *lakhiraj*. The defendants have succeeded in getting their names registered in the Collector's books as the proprietors in possession of the *bahali* land, whilst the plaintiffs' names are registered in respect of the *baziafti* land. The plaintiffs bring this suit for a declaration of their title to the *bahali* land only. The whole 30 *mans* of land were properly described by boundaries; but there was nothing to distinguish the *bahali* from the *baziafti* land.

Without deciding the issues, the Court of first instance dismissed the suit upon the preliminary point that, admittedly and upon evidence, the *bahali* and *baziafti* lands were so mixed up as to be altogether undistinguishable, and therefore a declaratory decree would be incapable of being put into execution. The lower appellate Court also held the same view. From this decision the plaintiff appealed to the High Court.

Mr. *W. C. Bonnerjee*, and Babu *Upendra Nath Mitter*, for the appellants.—There is nothing in the Code of Civil Procedure which lays down what the plaint shall contain, which justifies this finding. The case of *Kazen Sheik* v. *Danesh Sheik* (1), supports the appellants' contention. The plaintiffs, being already in actual physical possession of the whole 30 *mans*, including the *bahali* lands now in suit, had no occasion to sue for more than a declaration of their title, which was attacked by the entry in the Collector's books of the name of the defendants.

Babu *Karuna Sindhu Mookerjee*, and *Monmatha Nath Mitter*, for the respondents.—The lower Courts are right in dismissing the suit, as the land over which the declaration of title was claimed was not properly described, and therefore the decree could not be executed; see *Dwarkanath Roy* v. *Jannobee Chowdhrain* (2); further, as the effect of an order under s. 59 of the Land Registration Act is, under s. 62, to settle the actual possession, the plaintiffs, against whom such an order has been made, are precluded by s. 42 of the Specific Relief Act from bringing a suit merely for a declaration of title without **[847]** seeking also to recover possession; see *Ram Mundur* v. *Janki Pershad* (7).

(1) 1 C.W.N. 574. (2) 19 W.R. 81. (3) 23 W.R. 285.
(4) 25 W.R. 39. (5) 2 C.L.R. 134. (6) 13 B. 548.
(7) 12 C.L.R. 139. (8) 10 C. 350. (9) 18 M. 405.

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The judgment of the High Court (WILKINS and HANDLEY, JJ.) was as follows :—

JUDGMENT.

The plaintiffs, who are the appellants before us, claim to be the proprietors, under a purchase made by their ancestor on the 16th September 1842, of 30 *mans* of land in *mouza* Dagrajit, Patna; of this area 15 *mans* 11 *gunts* 4 *biswas* are *bahali* (or confirmed) *lakhiraj*, and the defendants, in spite of the opposition of the plaintiffs, succeeded in getting their names registered in respect thereof in the Collector's books; the remaining portion is *baziafti* (or resumed) *lakhiraj*, and in respect of this the plaintiffs' own names are registered as the proprietors in possession. The plaintiffs bring this suit with the object of obtaining a declaration of their title ' whether by purchase or by long adverse possession to the *bahali* lands.

The defendants contest the claim; and the nature of their case may be gathered from the issues framed, which were as follows :—

1. Is the suit barred by limitation?
2. Whether the *kobala* (of 16th September 1842) propounded by the plaintiff is a *bona fide* and genuine document?
3. Whether the plaintiffs have acquired a right tothe lands in dispute by adverse possession?
4. Whether the purchase set up by the plaintiff was *benami* or not?

The first hearing of the suit was *ex parte*, and the Munsif awarded the plaintiffs a decree. That decree was set aside on appeal, and the case was remanded for adjudication upon the merits; and the parties then adduced a large mass of evidence, both oral and documentary, in support of their respective pleas.

The first Court, however, decided the suit upon a preliminary point—a point which, we may observe, was not advanced by either of the parties, and was not raised in any of the issues framed. [848] This point was that as admittedly and on the evidence the *bahali* lands were so mixed up with the *baziafti* lands as to be altogether undistinguishable the plaintiff was not entitled to a mere declaratory decree, which would be incapable of being put into execution. This view was also held by the lower appellate Court on appeal; and the plaintiff now comes up to this Court in second appeal.

It is contended by Mr. Bannerjee for the appellants that there is nothing in the Code of Civil Procedure, which lays down what the plaint shall contain, that justifies this finding; that the plaintiffs being already in possession, that is, actual and physical possession, of the whole 30 *mans* including that *bahali* lands now in suit, had no occasion to sue for more than a declaration of their title, which was attacked by the entry in the Collector's book of the names of the defendants in respect of these lands. And the learned Counsel relied upon the case of *Kazem Sheikh* v. *Danesh Sheikh* (1) in support of this position. That case was heard by Mr. Justice Rampini, who in the course of his judgment therein remarked (at p. 576 of the report): "I am not aware of there being any provision in the Civil Procedure Code authorizing the dismissal of a suit on the ground that the land in suit cannot be identified." It is to be remembered, however, that in the case before the learned Judge, not only was a part of the land clearly identifiable, but also the whole of

(1) 1 C.W.N. 574.

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the land in suit was apparently capable of being sufficiently identified for the purposes of the execution of the decree; so that the learned Judge's ruling relied upon, though entitled to all respect, yet was in the nature of an *obiter dictum*. In the case now before us the lands in suit are admittedly quite inseparable and undistinguishable from the other lands included in the entire area, of which the plaintiffs say they are the proprietors.

The learned pleader for the respondents relies upon the cases cited in the judgment of the lower appellate Court. In the case of *Dwarka Nath Roy* v. *Jannobee Chowdhrain* (1) the decree which was successfully objected to in special appeal was [849] a decree for a portion only of the land in suit, such portion not being specified by boundaries in the decree, which consequently was incapable of execution. But in that case, the plaintiff sued for the recovery of the land, and manifestly the decree-holder could not in execution be put into possession of that land, when there was nothing to show and no manner of ascertaining of what particular plots or area it consisted. In *Darbaree Sayal* v. *Fatu Dhalee* (2) the decree was also for the possession of a portion of the land in suit; and a Divisional Bench of this Court, following the case in 19 W. R., held that it was for a similar reason incapable of execution. These cases are therefore so far distinguishable from the case now before us, in that no decree has been asked for by the plaintiffs for possession of these *bahali* lands.

In *Mahomed Ismail* v. *Lalla Dhundur Kishore Narain* (3), the decree was also one directing that the plaintiff be put into possession of the land in suit, and it was set aside by a Divisional Bench of this Court as being incapable of execution, inasmuch as no boundaries were given of the land, which was a small area within a larger area.

The case of *Ajoodhia Lall* v. *Gumani Lall* (4) is also distinguishable; for there the plaintiff claimed to have exempted from partition certain lands which it was impossible in the absence of boundaries to define and determine. The plaintiff's decree was, therefore, inoperative.

It seems, therefore, to us that the plaintiffs in this case would not necessarily fail upon this ground, when they ask merely for a declaratory decree in respect of their title.

It was, however, further contended on behalf of the respondents that, as the effect of an order under s. 59 of the Land Registration Act is, under s. 62, to "settle the actual possession," the person against whom such an order has been made is precluded by s. 42 of the Specific Relief Act from bringing a suit merely for a declaration of his title without [850] seeking also to recover possession. In *Ram Mundur* v. *Janki Pershad* (5), a Divisional Bench of this Court certainly so held, although the objection had not been taken in either of the lower Courts. It seems to us that that case is almost, if not altogether, on all fours with the case now before us. The plaintiffs, it is true, assert that they are in actual possession of these lands; but they admit that an order under s. 59 of the Bengal Land Registration Act has been passed against them and in favour of the defendants, so that they must be held to be out of what may be called legal possession. Consequently, if the recovery of such possession is a "further relief" within the meaning of the proviso to s. 42 of the Act,

(1) 19 W.R. 81. (2) 23 W. R. 285. (3) 25 W.R. 39.
(4) 2 C.L.R. 134. (5) 12 C.L.R. 139.

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a purely declaratory decree affirming the plaintiffs' title would not in the present suit be allowed.

See also *Omurunissa Bibee* v. *Dilawar Ally Khan* (1) and *Krishnabhupati Devi* v. *Ramamurti Pantulu* (2).

Now in *Fakir Chand Audhikari* v. *Anunda Chunder Bhuttacharji* (3), it was held that the "further relief" referred to in s. 42 was further relief in relation to "the legal character or right as to any property which any person is entitled to, and whose title to such character or right any person denies or is interested to deny," and that consequently a claim for arrears of rent did not come within the expression.

But the position seems to us to be very different in the present case; here the plaintiffs seek to obtain a decree declaring their title with the evident and avowed object of going before the Collector with that decree in their hands and asking him, upon the strength of it, to expunge the names of the defendants and substitute their own in his books, as the proprietors in actual possession of these *bahali* lands. That is to say the plaintiffs' ultimate intention is to recover that legal possession, which was declared to belong to the defendants, when the order under the Land Registration Act was made. Not only, therefore, are the [851] plaintiffs "able to seek further relief," but it is their object to do so. The two forms of relief are inseparable in this case, and the plaintiffs in omitting to sue for the "further relief" have debarred themselves from obtaining a mere declaratory decree. This appears to have been pointed out to them from the very first, and yet they failed to avail themselves of the opportunity given to them of amending their plaint. Under different circumstances, we might have been inclined to give them such an opportunity now; *Limba bin Krishna* v. *Rama bin Pimplu* (4). It is under the circumstances insufficient to say, as has been said on their behalf in this Court, that the suit should have been decided upon the merits and not upon a ground not taken by the defendants and in no way misleading them.

It was also argued by the learned counsel for the appellants that the lower Courts, instead of dismissing the suit on this ground, should have treated this suit as one for a declaration of the plaintiffs' title to a fractional share in an undivided *mouza*. As, however, the first Court has pointed out, this could not be done in the face of the claim set up in the plaint. That claim was for an adjudication of their right in a particular piece of land, measuring 15 *mans* odd, and situated in a *mouza* comprising 30 *mans* in all; and that being so, it was incumbent upon the plaintiffs to specify by boundaries or otherwise the exact position of the 15 *mans* claimed.

Taking all these circumstances into consideration we think that the lower Courts rightly dismissed the plaintiff's suit. We dismiss this appeal with costs.

M. R. M.

(1) 10 C. 350. (2) 18 M. 405. (3) 14 C. 586. (4) 13 B. 548.

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CRIMINAL REVISION.

26 C. 852 = 3 C.W.N. 539.

26 C. 852 = 3 C.W.N. 539.

[852] CRIMINAL REVISION.

Before Mr. Justice Prinsep and Mr. Justice Hill.

NANDO LAL BASAK (*Complainant*), *Petitioner v.* N. N. MITTER (*Opposite-party*).* [14th June, 1899.]

Sanction for prosecution—Sanction to prosecute a Judge—Power of High Court to revise an order as to sanction under s. 197 of the Criminal Procedure Code—Criminal Procedure Code (V of 1898), s. 197 and s. 439—Charter Act (24 *and* 25 *Vict., Cap.* 104), *s.* 15.

A pleader applied to the Chief Presidency Magistrate for sanction under s. 197 of the Criminal Procedure Code to prosecute an Honorary Magistrate for using insulting and defamatory language towards him in the course of the trial of a case, and sanction was refused. On application to the High Court, *held*—Under the revisional powers conferred by the Criminal Procedure Code the High Court has no authority to interfere with an order made by a subordinate Court granting or refusing sanction under s. 197 of the Code, but it has sufficient authority for that purpose under s. 15 of the Charter Act (24 and 25 Vict., Cap. 104).

No sanction under s. 197 of the Code is necessary, unless the Judge or public servant commits an offence in his judicial or official capacity. *Reg* v *Parshram Keshav* (1), *Imperatrix* v. *Lakshman Sakharam* (2), and *In re Sreemanto Chatterjee* (3), approved of. *In re Ghulam Muhammad* (4), dissented from.

[**F.**, 30 C. 927 = 7 C.W.N. 750 (753); 25 M. 15 (23) = 2 Weir 223; 2 Bom.L.R. 1078 (1080); 32 M. 255 = 4 M.L.T. 473 = 9 Cr.L.J. 89 = 3 Ind. Cas. 387; **R.**, 13 C.P. L.R. 126 (129); **Comm.**, 29 P.R. 1904 Cr. = 9 P.L.R. 1905; **D.**, 23 P.R. 1903 (Cr.) = 130 P.L.R. 1903.]

ON the 7th of April 1899 the petitioner, who is a pleader, appeared on behalf of the prosecution in the case of *Chumroo Singh* v. *Beni Madhub Singh* before a Bench of Honorary Magistrates of the Calcutta Police Court, of which Mr. N. N. Mitter was the Chairman. After the examination of the complainant and three of his witnesses had been concluded, the petitioner applied for an adjournment of the case on the ground that two other witnesses, who had been subpœnaed, were not present in Court, but this application was refused. At this stage of the case **[853]** Mr. Mitter intimated to the petitioner that he and his colleagues were of opinion that the case ought to be dismissed, and that they were considering the propriety of calling on the complainant to show cause why he should not pay compensation to the accused. It was, thereupon, suggested by the pleader for the accused that instead of being required to pay compensation, the complainant should be prosecuted under s. 211 of the Penal Code, and Mr. Mitter then asked the petitioner whether he had anything to submit on this question for the consideration of the Court.

The petitioner stated that, in view of the adverse opinion expressed by the Court, he considered it his duty to call the complainant's wife as a witness, whereupon Mr. Mitter addressed the petitioner as follows: "You have not properly considered the matter. The application for postponement is made simply to multiply your fees."

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* Criminal Revision No. 311 of 1899, made against the order passed by T. A. Pearson, Esq., Chief Presidency Magistrate of Calcutta, dated the 20th April 1899.

(1) 7 B.H.C.Cr. 61. (2) 2 B. 481.
(3) (1881) December, 9th, Unreported. (4) 9 M. 439.

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At this stage the complainant, who was not present when the petitioner proposed to call the wife as a witness, returned to the Court and was asked by Mr. Mitter if he would call his wife as a witness, to which he replied : "Why should she come." Then the petitioner went to the complainant and informed him of the opinion expressed by the Court during his absence and expressed to him the necessity for calling his wife as a witness, and thereupon the complainant told the Court that he now thought it necessary to call his wife. The pleader for the accused then submitted to the Court that it was highly improper that the complainant should, on his pleader's advice, unsay what he had already said to the Court, and Mr. Mitter thereupon addressed the petitioner to the following effect: "You are a dishonest man; you are a disgrace to the legal profession; you tutor witnesses. You do not know good manners; when you can tutor witnesses in the presence of three Honorary Magistrates, I do not know how much you tutor behind the back of the Court; you deal in dishonesty and chicanery. I am going to report your conduct to the Chief Presidency Magistrate. You should not be allowed, dishonest fellow as you are, to practise in this Court any longer." Mr. Mitter, after a little time, again addressed the petitioner as follows: "My fit of anger is past. Dishonest pleader though you are I pardon you this time."

[854] Under these circumstances, and in respect of the language used by Mr. Mitter, the petitioner applied to the Chief Presidency Magistrate of Calcutta for sanction under s. 197 of the Criminal Procedure Code to prosecute Mr. Mitter for offences under s. 500 and s 504 of the Penal Code. The Magistrate refused the application on two grounds, *viz.*; (1) "That s. 197 of the Criminal Procedure Code relates only to those acts or omissions by a Judge or public servant which are declared by any Act or Statute relating to India to be offences when they are committed by a Judge or public servant in their capacities as such;" and (2) "that in my opinion a Judge is absolutely privileged, when acting judicially, and no statement that he may make in a case however malicious or untrue it may be, can be made the subject of any proceeding against him either civilly or criminally."

On the application of the petitioner a rule was granted by the High Court for the purpose of considering the legality of the order made by the Presidency Magistrate.

Mr. *Monier*, and Babu *Hara Kumar Mitter*, appeared for the petitioner.

The Standing Counsel (Mr. *O'Kinealy*), for the Crown.

Mr. *O Kinealy.*—The High Court has no power to revise an order granting or refusing sanction under s. 197 of the Criminal Procedure Code. Section 439, while giving the High Court, as a Court of Revision, all the powers of a Court of appeal conferred by s. 195 and other sections, makes no mention of s. 197. Section 197 relates only to offences that can be committed by Judges and public servants in their official capacity. A similar construction was adopted in a circular order of this Court, dated the 24th October 1861, with reference to s. 167 of the Code of 1861, and its principle was followed in *Reg.* v. *Parshram Keshav* (1); the same view was adopted in *Imperatrix* v. *Lakshman Sakharam* (2), a case under s. 466 of the Code of 1872, and in the case of *Sreemanto Chatterjee* (3). The case of *In re* [855] *Ghulam Muhammad* (4) is against me, but that case was wrongly decided.

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(1) 7 B.H.C.R. 61. (2) 2 B. 481.
(3) (1881) Unreported, 9th December, 1881. (4) 9 M. 439.

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A Judge is privileged, when acting judicially in the exercise of any power given to him by law; s. 77 of the Penal Code. See *Scott* v. *Stansfield* (1), *Haggard* v. *Pelicier Freres* (2), *Royal Aquarium Society* v. *Parkinson* (3), *Munster* v. *Lamb* (4). The English law on the subject has been adopted in India. *Sullivan* v. *Norton* (5), *Hinde* v. *Baudry* (6), *Manjaya* v. *Sesha Shetti* (7), *Queen-Empress* v. *Govinda Pillai* (8), *Queen-Empress* v. *Babaji* (9), *Queen-Empress* v. *Balkrishna Vithal* (10).

Mr. *Monier* for the petitioner.—The High Court has under the provisions of s. 439 of the Criminal Procedure Code the power to revise an order made in respect of s. 197, for it has that power "in the case of any proceeding, the record of which has been called for by itself." *Empress* v. *Ram Lal Singh* (11). The High Court has certainly that authority under s. 15 of the Charter Act (24 and 25 Vict., Cap. 104); *In re Mathuranath Chuckerbutty* (12).

As to the necessity for sanction the words "is accused as such Judge, &c." in s. 197 of the Code imply while sitting as a Judge and the words "any offence" would include defamation and use of insulting language. *In re Ghulam Muhammad* (13). Cr. Rev. No. 107 of 1882, Weir, 3rd. Ed., 866 note (*b*). The language of the section is different from that of the corresponding [856] sections of the earlier Codes, and under the present section sanction is necessary.

The doctrine of the absolute privilege of Judges is foreign to s. 499 of the Penal Code; see illustration to exception 7 of s. 499. Section 77 of the Penal Code has no application, for uttering defamation is not an act done "in the exercise of a power which is given to a Judge by law."

The judgment of the High Court (PRINSEP and HILL, JJ.) was as follows:—

JUDGMENT.

This rule was granted for the purpose of considering the legality of an order passed by the Chief Presidency Magistrate on the 20th April, 1899, by which he refused, on the application of the petitioner before us, to accord sanction for the prosecution of Mr. N. N. Mitter, an Honorary Magistrate, under ss. 500 and 504 of the Indian Penal Code.

It appears from the affidavit and petition put in by the petitioner in support of the rule that he is a pleader of the Judge's Court of the 24-Pergunnahs, and that on the 7th April last he appeared on behalf of the prosecution in the case of *Chumroo Singh* v. *Beni Madhub Singh*, which was brought on for trial on that date before a Bench of Honorary Magistrates, of which Mr. N. N. Mitter was Chairman. When the examination of the complainant and of the witnesses for the prosecution who were present in Court had been concluded, Mr. Mitter intimated to the petitioner that he and his colleagues were agreed in thinking that the case ought to be dismissed, and were considering the propriety of calling on the prosecutor to show cause why he should not pay compensation to the accused. It was, thereupon, suggested by the pleader for the accused that instead of being required to pay compensation, the complainant should be prosecuted under s. 211 of the Penal Code, and Mr. Mitter then asked the petitioner whether he had anything to submit to the Court on this question.

(1) (1868) L.R. 3 Exch. 220. (2) (1892) App. Cas. 61. (3) (1892) 1 Q.B.D. 431.
(4) (1883) L.R. 11 Q.B.D. 588. (5) 10 M. 28.
(6) 2 M. 13. (7) 11 M. 477. (8) 16 M. 235.
(9) 17 B. 127. (10) 17 B. 573. (11) 6 A. 40.
(12) 9 B.L.R. 354. (13) 9 M. 439.

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After this some discussion took place as to the calling of further evidence on behalf of the prosecution, and the petitioner stated, in view of the adverse opinion which had been expressed by the Court, that he considered it his duty to call the complainant's wife as a witness, whereupon [857] Mr. Mitter addressed the petitioner as follows: "You have not properly considered the matter. The application for postponement is made simply to multiply your fees." At this stage the complainant, who was not present when the petitioner proposed to call his wife as a witness, returned to the Court and was asked by Mr. Mitter if he would call his wife as a witness, to which he replied "why should she come?" Then the petitioner went to the complainant and informed him of the opinion expressed by the Court during his absence as to the merits of the case and explained to him the necessity for calling his wife, on which the complainant informed the Court that he now thought it necessary to call his wife. The pleader for the accused then intervened and submitted to the Court that it was highly improper that the complainant should on his pleader's advice unsay what he had already said to the Court, and thereupon Mr. Mitter addressed the petitioner to the following effect: "You are a dishonest man. You are a disgrace to the legal profession. You tutor witnesses. You do not know good manners; when you can tutor witnesses in the presence of three Honorary Magistrates, I do not know how much you tutor behind the back of the Court. You deal in dishonesty and chicanery. I am going to report your conduct to the Chief Presidency Magistrate; you should not be allowed, dishonest fellow as you are, to practise in this Court any longer." It is unnecessary to pursue the incident further, though it does appear that Mr. Mitter afterwards in according pardon to the petitioner when "his fit of anger was past," again addressed him as a "dishonest pleader." There is no denial of any of these allegations, and it was under these circumstances and in respect of the language so used by Mr. Mitter that the petitioner applied to the Chief Presidency Magistrate for sanction under s. 197 of the Code of Criminal Procedure to prosecute Mr. Mitter for the offences of defamation and of provoking the petitioner by intentional insult to commit a breach of the peace.

The Chief Presidency Magistrate refused the application on two grounds: *firstly*, because he considered "that s. 197 relates only to those acts or omissions by a Judge or public servant which are declared by any Act or Statute relating to India to be offences when they are committed by a Judge or [858] public servant in their capacities as such;" and, *secondly*, because in his opinion a "Judge is absolutely privileged when acting judicially, and no statement that he may make in a case, however malicious or untrue it may be, can be made the subject of any proceeding against him, either civilly or criminally."

Before us the order of the Chief Presidency Magistrate was supported by the learned Standing Counsel, who showed cause on the above two grounds, and he also raised the question of the competency of this Court sitting as a Court of Revision to review the order. He relied upon the language of s. 439 of the Code of Criminal Procedure where, the revisional powers of the Court are specified, and pointed out, that while all the powers of a Court of appeal under s. 195 of the Code are conferred on the High Courts, there is no power given to interfere in any way with a sanction granted under s. 197. To this it was replied that the Legislature, in giving the High Courts authority to exercise the power of granting or revoking a sanction to prosecute conferred on a Court of appeal by s. 195, must be taken to have given the power to grant or revoke all such sanctions

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without limitation—a general power, that is, of reviewing the action of a Subordinate Court, whether the case be one that falls under s.195 or s.197 of the Code, and it was contended that since the High Court is empowered by s. 435 to call for and examine the proceedings of all Subordinate Courts for the purpose of considering the legality and propriety of such proceedings, it is empowered implicitly to pass proper orders therein.

The question does not appear to us to be of any very great importance for we entertain no doubt that whether the provisions of s. 439 of the Code of Criminal Procedure are or are not wide enough to authorize our interference in the present case we have quite sufficient authority for that purpose under s. 15 of the "Charter Act" (24 and 25 Vic., Cap. 100). We may, however, say that in our opinion the contention of the learned Standing Counsel is correct. Section 439 of the Code of Criminal Procedure gives the High Courts, as Revisional Courts, authority to exercise any of the powers conferred on a Court of appeal by s. 195 among other sections of the Code. The [859] powers in this respect—Appellate and Revisional—are clearly co-extensive, and s. 195 does not confer on an appellate Court any authority in respect of an order made by a Subordinate Court under s. 197. So far, therefore, as concerns the revisional powers conferred by the Code we have not this power.

The next question, namely, whether the learned Magistrate was right in holding that the present case does not fall within the purview of s. 197 of the Code, is one of somewhat greater difficulty. But having given the matter careful consideration we are of opinion that the view of the learned Magistrate is correct, and that he was consequently right in refusing to grant sanction for the prosecution of Mr. Mitter.

The law relating to the prosecution of Judges and public servants, now embodied in s. 197 of the Code of Criminal Procedure, has undergone modification more than once since the introduction of the Code of 1861. We do not think it necessary to refer more particularly to these changes at present, but we are unable to agree with Mr. Monier in his contention that they are indicative of an alteration of policy, or principle, on the part of the Legislature in the direction of an enlargement of the category of offences in respect of which the protection of a previous sanction to prosecute is afforded to the servants of Government. The changes upon which Mr. Monier commented appear to us to be changes of phraseology merely and not to involve any modification of principle, and we think, speaking generally, that in point of substance the scope and intention of the law as it was enacted in 1861, and as it now exists, are the same; under the Code of 1861, a Circular order was issued by this Court (C. O. 20, 1864) for the guidance of inferior Courts as to the scope of s. 167 of that Code, the section corresponding to s. 197 of the Code of 1898. It was then pointed out that the section related to offences which could be committed by public servants as such, and which are specified in chap. IX of the Penal Code. This explanation of the law was adopted by the Bombay High Court in the case of *Reg* v. *Parshram Keshav* (1) with a modification not, however, involving any matter of principle. [860] The learned Judges said in relation to this Circular order: "If the Circular referred to be correctly quoted we cannot fully concur in it, for it seems to us impossible to hold that s. 167 does not relate to such offences as those specified in ss. 217 to 223 of the Indian Penal Code, which are not contained in chap. IX

(1) 7 B. H. C. Cr, 61.

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of the Code. But we agree with the view which was no doubt intended to be expressed in the Circular, namely, that s. 167 relates only to those acts and omissions which are declared in the Penal Code to be offences when they are committed by a public servant." This criticism of the Circular order is no doubt correct. The case of *Reg* v. *Parshram Keshav* was decided in the year 1870, and in the year 1877, the question again came before the Bombay Court. In the meantime the Code of 1861 had been superseded by that of 1872, which by s. 566 altered the law by rendering it necessary to procure the previous sanction of the specified authorities, not only in the case of offences punishable under the Penal Code, but in the case of all offences committed by a public servant in his capacity of a public servant. In the case of 1877, *Imperatrix* v *Lakshman Sakharam* (1), the principle laid down in the earlier case was followed substantially. West, J., in delivering the judgment of the Court said : " We are of opinion that the scope of s. 466 extends to all acts ostensibly done by a public servant, *i. e.*, to acts which could have no special signification except as acts done by a public servant." It may be remarked that in the observations, which immediately precede this passage in the judgment, where the learned Judge refers to the case of *Reg* v. *Parshram Keshav*, the scope of s. 167 of the Code of 1861 appears to have been overlooked, but this consideration is not really material to the present question.

Then, in the year 1881, there was the unreported case of *Sreemanto Chatterjee* in this Court (decided 9th December 1881), in which Pontifex and Field, JJ., seem to have considered the construction placed on the first paragraph of s. 466 by the Bombay Court to be correct. Pontifex, J., there said : " Now with respect to the first paragraph of s. 466 it would seem that there is room for the argument that the offences contemplated [861] by that paragraph are only the special offences which can be committed by a public servant in his capacity of a public servant, that is, offences which are peculiar to his position as a public servant, and in that view if the first paragraph only of the section were applicable, the contention of the present petitioner might be correct that a sanction would not be necessary before proceeding within his particular complaint." The learned Judge then proceeded to comment on the second paragraph of the section, and by virtue of it he held that sanction was, in the particular case, necessary. The second paragraph of the section has not, however, been re-enacted either in the Code of 1882 or in that of 1898, and so far as the present question is concerned the law, as it now stands, corresponds in substance with the first paragraph of s. 466 of the Code of 1872. Field, J., was of opinion that " the first paragraph of s. 466 was intended to apply to those cases in which the offence charged is an offence which can be committed by a public servant only, cases, that is, in which he being a public servant is a necessary element in the offence."

We are not aware of any other cases of this Court or of the Bombay Court, in which the question now before us has been dealt with. Mr. Monier, however, relied on the case of *In re Ghulam Muhammad* (2) in which Parker, J., sitting alone, held under the Code of 1882, which corresponds in material particulars with the present law, that, where a Judge was charged with using defamatory language to a witness during the trial of a suit, the complaint could not, under s. 197 of the Code, be entertained by a Magistrate without sanction, the reason assigned being that the Judge was then acting in his official capacity. That, however,

(1) 2 B. 481. (2) 9 M. 439.

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with every deference to the learned Judge, appears to us to be a reason which can hardly be said to throw much light on the question.

The weight of authority, as is obvious from this examination of the cases, is decidedly in favour of the view taken by the Chief Presidency Magistrate, and it is no doubt the view which has controlled the action of the Courts both in this and the Bombay Presidencies for a long series of years. We should hesitate, therefore, even if we were disposed to take a contrary view, to disturb an interpretation of the law so long recognized. But we [862] should ourselves, in the absence of authority, have arrived at the same conclusion. The language of the section "is accused as such Judge," &c., seems to us sufficient to indicate that the offence charged must involve, as one of its elements, that it was committed by a person filling that character, and it is not apparent why in cases outside that category, the sanction provided for by the section should be required. It is to be observed, moreover, that all public servants, who are irremoveable from office without the sanction of the Government of India or Local Government, are placed on precisely the same footing as Judges. If they are to be exempted from criminal liability for all acts amounting to offences done by them, while acting in their official capacity, unless the sanction for which the section provides can be obtained, it would lead to results which cannot, we think, have been contemplated or intended by the Legislature. There is also the consideration arising from the practically unlimited control reserved to Government by the second clause of the section over the proceedings. The clause applies equally to all cases coming within the purview of the first clause, but we think it would be unreasonable to suppose that in a case such as the present, for example, it was the intention of the Legislature that the Government should determine not only the tribunal and manner of trial, but also the offence for which the trial is to take place. The existence of the power given by this clause, which, it may be remarked, is of wider scope than the corresponding clause of the earlier Codes, militates in our opinion strongly against the view for which the petitioner contends.

We would add that an order passed under s. 197 supersedes all powers of transfer conferred on the High Court by s. 526 (see sub-s. 7 of that section).

We are then of opinion, as we have already stated, that the learned Magistrate was right in holding that sanction to prosecute under s. 197 of the Code was unnecessary in the present case, and the rule must consequently be discharged.

It is unnecessary, and we think undesirable, that we should go into the further question dealt with by the Magistrate as to the immunity of Judges from criminal liability for acts done in the exercise of their judicial powers.

26 C. 863=3 C.W.N. 653.

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CRIMINAL APPEAL.

26 C. 863= 3 C.W.N. 653.

[863] CRIMINAL APPEAL.

Before Mr. Justice Prinsep and Mr. Justice Hill.

LALA OJHA (*Accused*) *v.* QUEEN-EMPRESS (*Opposite Party*).*
[7th June, 1899.]

Attempt to commit offence—Power of Appellate Court to alter charge or finding—Prejudice to the accused—Necessity for a re-trial on the altered charge—Criminal Procedure Code (Act V of 1898), *ss.* 236, 237, 238 *and* 423.

The accused gave his pleader a copy of a document which had been falsified by an interpolation being made in it for the purpose of its being used in the trial of his suit. *Held*, that he was guilty, not of an attempt to commit an offence under s. 471 of the Penal Code, but of the offence itself.

If the prosecution establishes certain acts constituting an offence and the Court misapplies the law by charging and convicting an accused person for an offence other than that for which he should have been properly charged, and if notwithstanding such error the accused has by his defence endeavoured to meet the accusation of the commission of these acts, then the appellate Court may alter the charge or finding and convict him for an offence which those acts properly constitute, provided the accused be not prejudiced by the alteration in the finding. Such an error is one of form rather than of substance, and the alteration by an appellate Court of the charge or finding would not necessitate a retrial expressly on a charge of that offence.

[F., 13 C.P.L.R. 125 (126); 3 L.B.R. 232 (233); 3 N.L.R. 67 (70); U.B.R. (1903) 3rd Qr., Penal Code, p. 9 (12).]

ONE Sajeewan Ojha instituted a suit in the Court of the Munsif at Buxar against the present accused Lala Ojha for the recovery of possession of a strip of land. Amongst other evidence filed by the plaintiff in that suit was a certified copy of the plaint in a previous suit instituted by the present accused Lala Ojha against his brother Dhanukdari Ojha. The copy purported to have been issued from the copying department of the office of the District Judge of Buxar. During the course of the trial of Sajeewan Ojha this copy of the plaint in the previous suit was being referred to by his pleader when Lala Ojha's pleader objected that it was not correct, and referred to a copy also certified of the same plaint with which his client, the present [864] accused, had supplied him in support of his objection. On the comparison of the two copies it was found that in the copy supplied by Lala Ojha the words "*Wo Kharidan darakhtan muddai*" occurred in addition to what appeared in the other copy. The Munsif sent for the original plaint and came to the conclusion that it had been tampered with, the words "*Wo Kharidan darakhtan muddai*" having been interpolated, and he directed Lala Ojha to be prosecuted. He was convicted by the Sessions Judge of Shahabad, in concurrence with the assessors, of an offence under s. 196 of the Penal Code and an attempt to commit an offence under s. 471. Lala Ojha appealed against the order for conviction.

Mr. *P. L Roy*, and Babu *Bepin Behari Ghose*, for the appellant.

The Officiating Deputy Legal Remembrancer (Mr. *Abdur Rahim*), for the Crown.

The judgment of the High Court (PRINSEP and HILL, JJ.) was as follows:—

JUDGMENT.

The appellant was sued by Sajeewan Ojha in the Munsif's Court at Buxar for possession of a strip of land. The suit was what is known as a

* Criminal Appeal No. 274 of 1899, made against the order passed by F. H. Harding, Esq., Sessions Judge of Shahabad, dated the 20th of March 1899.

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boundary suit, as their holdings adjoined and the appellant Lala Ojha is said to have encroached on the lands of Sajeewan. At the trial of that suit, Sajeewan produced a copy of a plaint of a suit instituted four years previously in 1892 by Lala Ojha regarding the same land so as to show that he did not then claim the land in suit. Lala Ojha's pleader disputed the correctness of this copy and asked the Munsif to send for the original and he produced another copy of the plaint given to him with his brief by Lala Ojha, purporting to show that in the former suit his client claimed these very lands as indicated by the boundary stated in the words: *Wo Kharidan darakhtan muddai.* The plaint was accordingly sent for, and it was found that these words had been interpolated. The Munsif accordingly directed Lala Ojha to be prosecuted. He has now been convicted by the Sessions Judge, in concurrence with the assessors, of an offence under s. 196 of the Indian Penal Code, and an attempt to commit an offence under s. 471.

[865] In appeal the learned counsel relies principally on objections to the conviction of the appellant of these particular offences. There can be no doubt that the original plaint did not contain these words, and that these words were subsequently inserted. It is further clear that the introduction of these words was made recently, and certainly not during the trial of that suit, for we find in the decree of that suit a similar interpolation, and, lastly, that in his application for execution of his decree Lala Ojha did not enter these particular words. The certified copy of the plaint produced by Sajeewan Ojha, which does not contain these words, was made on the 30th January 1897, and we have the evidence of the copyist as to the correctness of that copy, as the original document was then before him. The other copy, which was produced by the appellant, was made in April. It seems, therefore, clear that the alteration of the plaint was made some time between these two dates. On these facts, it is for us to consider whether the appellant has been properly convicted. The alteration undoubtedly was for his benefit, and there can be no doubt that it was either made by him or that he caused it to be made for the purpose of the second suit. He has been convicted, first under s. 196 of the Indian Penal Code of corruptly attempting to use as true and genuine evidence which he knew to be false or fabricated, and he has also been convicted under ss. 511 and 471 of attempting to use fraudulently as genuine a document which he knew or had reason to believe to be a forged document. It was contended by learned counsel on his behalf that he did not so use the plaint, inasmuch as he did not himself cause the plaint to be produced in the Munsif's Court, nor did he instruct his pleader to ask to have it sent for, the petition to that effect having been made by the pleader and not by the appellant. It seems to us, however, that having, as we find he did, given his pleader a copy of a false document, that is to say, a copy of the plaint after it had been falsified by the interpolation already mentioned, for the purpose of using it in the trial of his suit he intentionally and fraudulently made use of the fabricated plaint by misrepresenting or causing to be misrepresented in the copy that the plaint as presented by him and used in the trial of that suit, was as set out in that copy. It seems **[866]** to us immaterial for the purposes of the present trial whether the appellant himself asked the Court to send for the plaint and to use it for the purposes of the suit then under trial, or whether he used it fraudulently by means of a copy given to his pleader with a brief and produced under his instructions in the course of the trial. The object was clearly by means of this copy fraudulently to use as genuine with its interpolations,

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knowing that in that state it was a forged document. Mr. Roy contends that if the appellant has not been properly convicted of "attempts," the findings cannot be altered, because they would be for a graver offence for which his client has not been tried, and that the appellant is entitled to a new trial.

There is no doubt some authority for this. In *In the matter of Dwarka Manjhee* (1) appellant had been convicted under s. 143 of being a member of an unlawful assembly, and was on appeal to the Sessions Judge convicted of rioting, an offence of a graver character with which he had not been charged at the trial. The learned Judges of the High Court on revision held that this was *ultra vires* since the accused should have an opportunity of defending himself on a charge of the offence of rioting before he could be properly convicted of that offence. That was a case under the Code of 1871, in which the powers of this Court as a Court of Revision were differently expressed. As a matter of principle we agree with this view. Section 423 of the Code of 1898 declares that "on an appeal from conviction the Court of appeal may (1) reverse the finding and sentence and acquit or discharge the accused, or order him to be retried by a Court of competent jurisdiction subordinate to such appellate Court or committed for trial, or (2) alter the finding, maintaining the sentence, &c. &c.," and the Code of 1882 was similar in this respect. It would obviously be improper and unfair to an accused that on his appeal he should be convicted of a more serious offence to which he had never pleaded on the trial, and there are many instances on which the injustice of such a course would be so patent that we need not mention them. This would particularly **[867]** be so if the offence which the appellate Court might consider to be established was not cognate to the offence of which he had been tried and convicted, and it would also be so, if there were circumstances of aggravation of an offence to which the accused had not pleaded. But there are exceptions to this rule. Some of these are referred to in ss. 236, 237 and 238 of the Code of Criminal Procedure, so that a person who has been charged only with theft may be convicted of receiving stolen property or criminal breach of trust or cheating though he may not have been charged with any of these offences; and if charged with any offence he may be convicted of an attempt to commit that offence though he may not have been charged with an attempt. So also if an accused has been charged with an offence in an aggravated form he may be convicted of a minor offence which is included in the more serious offence, though he may not have been charged with such offence. As another instance may be mentioned a case in which the prosecution has established certain acts constituting an offence, and the Court has misapplied the law to those acts by charging and convicting him for an offence other than that for which he should have been properly charged on proof of commission of those acts. Here, if notwithstanding this error the accused has by his defence endeavoured to meet the accusation of the commission of those acts, understanding the charge to mean an offence arising out and made up of those acts, his conviction for the offence which those acts properly constitute may be maintained, if the accused has not been prejudiced by the alteration of the findings. It seems to us that such an error is one of form rather than of substance, and the alteration by an appellate Court of the charge or finding to the more serious offence would not necessitate a retrial expressly on a charge

(1) 6 C.L.R. 427.

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of that offence. And it is so in the present case. Here the acts found by the Magistrate, for which he was committed for trial by the Sessions Court, for which he was tried by that Court, and defended himself, and which have been raised for our consideration on this appeal, are all one and the same, and on this point as the Court of appeal, we do not differ from the lower Court that the accused has committed them. The only difference is that as a Court of appeal we think that [868] these acts constitute the substantive offence rather than an attempt of which he has formally been charged and convicted. Consequently, so far as the actual trial, the accused has not been prejudiced. He has known the acts of the commission of which he was accused, and he has endeavoured to show that they were not committed by him, and that he was in no way responsible for them, if they were committed, but he has failed. Under such circumstances no possible good could arise from a retrial. On the other hand a retrial would be attended with much inconvenience and waste of time, and would not be necessary in the interests of a proper administration of justice. This point does not seem to have ever before been raised and fully considered in any reported case, though there are some cases which are relevant. We may refer to *In the matter of the petition of the Government Pleader* (1), where the Madras High Court held that a conviction of a particular offence under the local salt law might have been altered by the appellate Court to a conviction under another section of that law. So in *Queen* v. *Tarinee Churn Chuttopadya* (2), where the appellants had been wrongly convicted as abettors instead of as principals this High Court would not interfere.

In *Reg* v. *Raghoji bin Kanoji* (3) the accused was wrongly convicted of cheating by personation, whereas he should have been convicted of furnishing false information, and the Bombay High Court refused to interfere because the accused had not been prejudiced.

The appeal is dismissed.

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26 C. 869.

[869] CRIMINAL REFERENCE.

Before Mr. Justice Prinsep and Mr. Justice Hill.

KAILASH CHUNDER SEN AND ANOTHER (*Petitioners*) *v.* RAM LALL MITTRA (*Opposite Party*).* [20th June, 1899.]

Nuisance—Criminal Procedure Code (Act V of 1898) *s.* 133—Bona fide *question of title —Obstruction to a public way—Jury—Verdict on inspection of locality without taking evidence—Criminal Procedure Code (Act V of* 1898). *s.* 138—*Use of discretion in nomination of jurors by Magistrate.*

When the person called upon under s. 133 of the Criminal Procedure Code to show cause why an obstruction should not be removed from a public way, denies that it is a public way, it is for the Magistrate to determine whether this is a *bona fide* objection, and he cannot, in spite of the objection (unless he determines that it is not *bona fide*) refer the matter to a jury.

A jury cannot decide a matter referred to them merely on inspection of the locality without taking any evidence.

In nominating the foreman and one-half of the remaining members of the jury as required by s. 138 of the Criminal Procedure Code, the Magistrate must exercise his own independent discretion and not appoint the nominees of the parties.

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* Criminal Reference No. 98 of 1899, made by L. Palit, Esq., Sessions Judge of Jessore, dated the 16th of May 1899.

(1) 7 M.H. C. 339. (2) 3 W. R. Cr. 3. (3) 3 B. H. C. 42.

[F., 6 C.W.N. 886 (887); 19 C.L.J. 631=15 Cr.L.J. 515=24 Ind. Cas. 603; R., 2 P. R. 1903 (Cr.)]

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JUNE 20.
—
CRIMINAL
REFERENCE.
—
25 C. 869.

THIS case was referred to the High Court under s. 438 of the Criminal Procedure Code by the Sessions Judge of Jessore with the following letter of reference:—

"In this case there was a petition to the Sub-divisional Officer of Narail praying that action under s. 133 of the Criminal Procedure Code might be taken in respect of obstruction in a road alleged to be a public thoroughfare. A conditional order was made, and the present petitioners appeared and raised the objection (*inter alia*) that the road was not a public one. The Deputy Magistrate, instead of deciding the question whether the road was a public one or not, himself referred the question to a jury appointed under s. 138 of the Criminal Procedure Code.

"It has been held in *Nasarauddi* v. *Akiluddi* (1) that the Magistrate must himself decide the question whether the road is a public one or not, and that the decision of such a question cannot be left to the jury. The order of the Deputy Magistrate in this case is, therefore, an illegal one. He has made **[870]** his order absolute on the report of the jury, but as he ought himself to have decided the question whether the road was a public one or not the final order based on the jury's report is illegal, and I therefore refer the case for the orders of the High Court with the recommendation that the order complained of be set aside, and that the Magistrate be directed to proceed with the case according to law."

The judgment of the High Court (PRINSEP and HILL, JJ.) was as follows:—

JUDGMENT.

The High Court regret to have to call the attention of the Sessions Judge to the manner in which this reference has been made in disregard of the orders contained in Circular, July 22nd, 1863, General Rules and Circular Orders of the High Court (Appellate Side, Criminal p. 124.)

When the person called upon under s. 133 to show cause why an obstruction should not be removed from a public way denies that it is a public way, it is for the Magistrate to determine whether this is a *bona fide* objection, and he cannot in spite of the objection (unless he determines that it is not *bona fide*) refer the matter to a jury. The jury is not competent to decide whether the way obstructed is or is not a public way. They can merely find whether the Magistrate's order is reasonable and proper, as originally made, when the matter is properly submitted to them. The Magistrate, moreover, is mistaken in thinking that a jury can decide such a matter without taking evidence and merely on inspection of the locality. They are bound to hear the parties and such witnesses as they may desire to have heard. The order of the Magistrate must be set aside.

The attention of the Sub-divisional Magistrate is directed to s. 138, which requires him to nominate the foreman and one-half of the remaining members of the jury. This, it has been held, means that he is to exercise his own independent discretion in such nomination. He has not done so in the present instance, for he reports that he appointed "one of the petitioner's nominees to act as foreman" and nominated the others, after inquiry from the mukhtears of both sides, and from the other party.

S. C. B.

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(1) 3 C.W.N. 345.

1899
JULY 8.

PRIVY COUNCIL.

26 C. 871 (P.C.)= 26 I.A. 226= 4 C.W.N. 1= 2 Bom. L.R. 1=7 Sar. P.C.J. 578.

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[871] PRIVY COUNCIL.

PRESENT:

Lords Watson, Hobhouse and Davey, Sir Richard Couch and Sir Edward Fry.

[*On appeal from the Court of the Judicial Commissioner of Oudh.*]

DIWAN RAN BIJAI BAHADUR SINGH (*Plaintiff*) *v.* INDARPAL SINGH (*Defendant*). [21st June and 8th July, 1899.]

Onus of proof—Suit by reversionary heir—Hindu widow—Burden of proving ownership of the husband through whom title is made.

It is incumbent on a plaintiff suing as the reversionary heir of a Hindu proprietor who has died leaving a widow, to show that the property claimed in the suit, and found in her possession, has vested in the husband. There is no presumption of law arising where the late husband possessed considerable property, that property found to be in the possession of the widow after his death must have been included in that which belonged to him unless she shows that she obtained the property from another source.

[**Appl.**, 33 M. 112=5 Ind. Cas. 760 (761)=7 M.L.T. 89; **Appr.**, 3 O.C. 89 (93); **Expl.**, 22 Ind. Cas. 518; **R.**, 29 A. 244 (248) (P.C.)=4 A.L.J. 227=9 Bom. L.R. 597=5 C.L.J. 340=11 C.W.N. 417=17 M.L.J. 228=2 M.L.T. 147=34 I.A. 65; 11 Ind. Cas. 434 (435).]

APPEAL from a decree (15th December 1891) of the High Court, affirming a decree (2nd January 1890) of the District Judge of Rai Bareli.

The plaintiff, appellant, sued in 1887, as the next reversioner, to be declared entitled, after the interval of the widow's estate, to succeed to the inheritance from the last male owner Randhir Singh, decased in 1858, whose widow, Thakurain Ajit Kunwar, was the first defendant in this suit, with a co-defendant, Indarpal Singh, now the respondent. She died pending this suit.

The plaintiff claimed to establish a right to succeed to property scheduled to his plaint after the death of the widow. The general contents of the three schedules are stated in their Lordships' judgment.

Thakurain Ajit Kunwar, with whom settlement had been made in 1858 of a talukhdari, and who had received a sanad in 1859, made a document, on the 17th October 1885, whereby she declared Indarpal Singh to be the heir of all her property. This the plaintiff sought to have declared void. Among other defences [872] the ancestral character of some of the property claimed, and the details of other property, were denied.

Almost all the questions in the case were of fact, and were disposed of by the concurrent judgments of the Courts below, adversely to the plaintiff. The question now decided was whether the following was a sound contention: That where a husband has died possessed of considerable estate, and where property has been found to be in the possession of his widow, the presumption, in regard to Hindu law, is that the property in her possession is part of the estate that belonged to her husband, unless the contrary should be shown.

Mr. *A. Cohen*, Q.C., and Mr. *J. D. Mayne*, for the appellant, in support of this proposition, referred to *Bindoo Bashinee Debee* v. *Pearee Mohun Bose* (1); *Chunder Nath Moitro* v. *Kristo Komul Singh* (2); *Nobin Chunder*

(1) 6 W. R. 312.

(2) 15 W. R. 357.

Chowdhry v. *Dokhobala Dasi* (1), and the Evidence Act (I of 1872), ss. 110 and 114. 1899 JULY 8.

Mr. *M. Crackanthorpe*, Q.C., Mr. *C. W. Arathoon*, and Mr. *De Gruyther*, for the respondent, were not heard. PRIVY COUNCIL.

JUDGMENT.

26 C. 871 (P.C.) = 26 I.A. 226 = 4 C.W.N. 1 = 2 Bom. L.R. 1 = 7 Sar. P.C.J. 578.

The judgment of their Lordships was delivered by

SIR EDWARD FRY.—The plaintiff and appellant, Diwan Ran Bijai Bahadur Singh, is the head of the elder branch of a family descended from Sanbar Singh. The original first defendant, Ajit Kunwar, was the widow of Randhir Singh, the head of the younger branch of the same family. The present respondent, Indarpal Singh, claims under a will or other document executed by the late Ajit Kunwar. The original plaint in the suit now under appeal sought a declaration that Ajit Kunwar was entitled only for life in three classes of property mentioned in schs. A, B and C to the plaint, and that the document under which Indarpal Singh claims was inoperative as against the plaintiff.

The first class of property to which the suit related consisted of certain talukhdari estates in respect of which a sanad was granted to Ajit Kunwar: and it was contended for the appellant in the Courts below that by virtue of certain documents Ajit Kunwar [873] had, subject to a life interest to herself, constituted herself trustee for the appellant of his property. But the District Judge and the Judicial Commissioner's Court unanimously held all these documents to be forgeries, and counsel for the appellant with great propriety declined to argue against these concurrent findings.

The second class of property consisted of certain non-talukhdari lands mentioned in sch. B to the plaint, and the third class of property mentioned in sch. C consisted of certain moveables, which belonged to Ajit Kunwar at the time that the suit was brought. The plaintiff claimed the land in sch. B in more than one way. First he said in his plaint that it was "immoveable property which had been purchased from time to time out of funds derived from the ancestral estate," *i. e.*, the talukhdari, and that it was "considered as a part and parcel thereof" (para. 10). In this point of view it is evident that this non-talukhdari property will follow the fate of the talukhdari in respect of which the appellant's claim has failed. But the plaintiff also claimed it on the ground that the property belonged to Randhir Singh in his lifetime and that the plaintiff was the next reversioner to Randhir Singh. There is some conflict of evidence as to whether this property was originally acquired by Randhir Singh or his wife Ajit Kunwar, but counsel for the appellant, admitting that both the Courts below were adverse to the plaintiff's contention on the evidence, elected to treat the case as if there were no evidence one way or the other, and to base their client's claim on the following proposition of law. They alleged that when a widow is found in possession of property, of the acquisition of which no account is given, and it is shown that her husband died possessed of considerable property, then there is a presumption of law that the property found in the widow's possession was originally that of her husband. No authority was cited at the bar which supports this proposition, and their Lordships are not prepared to adopt it or to lay down anything inconsistent with the general rule that he who claims

(1) 10 C. 686.

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property through some other person must show the property to have been vested in that person. But even if the proposition contended for were valid, it does not apply to the present case; for there [874] is no evidence that Randhir Singh, the husband of Ajit Kunwar, died possessed of considerable or any property, and the inference to be drawn from some of the facts in evidence tends in the contrary direction. The plaintiff's claim to the real estate mentioned in sch. B therefore fails to the ground.

The third class of property mentioned in sch. C consists of moveables, some of them clothes and ornaments of a lady's person, and there being no evidence to show whether these were originally acquired by Ajit Kunwar or her husband, the plaintiff's claim to them was supported only on the same proposition of law with which their Lord ships have already dealt.

In every particular, therefore, the appellant's case fails, and their Lordships will humbly advise Her Majesty to dismiss the appeal with costs.

Appeal dismissed.

Solicitors for the appellant: Messrs. *T. L. Wilson & Co.*
Solicitors for the respondent: Messrs. *Young, Jackson Beard & King.*
C. B.

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26 C. 874 = 3 C.W.N. 564.

CRIMINAL REVISION.

Before Mr. Justice Prinsep and Mr. Justice Hill.

SOONDERJEE NANJEE (*Petitioner*) *v.* MAYLON (*Opposite Party*).*
[10th July, 1899.]

Revision—High Court's power of revision—Withdrawal of the operation of the Criminal Procedure Code—Scheduled Districts Act (*XIV of* 1874), *s.* 6—*Assam Frontier Tracts Regulation*, 1880, s. 2—*Jurisdiction of the High Court—Powerof the Supreme Council.*

The effect of the rules laid down by the Chief Commissioner of Assam under s. 6 of the Scheduled Districts Act (XIV of 1874), taken in conjunction with the notification issued by him in the exercise of the powers conferred by s. 2 of the Assam Frontier Tracts Regulation, 1880, directing that the Criminal Procedure Code should cease to operate [875] in the North Cachar Hills from the date of the notification, is to supersede all previously existing criminal authority in that district by that of the Chief Commissioner.

The power of the Supreme Legislative authority of India to remove any place or territory from the jurisdiction of the High Court is, as was said in *Empress* v. *Burah* (1), "expressly authorized and contemplated" by the Statutes and Letters Patent which affect the constitution and jurisdiction of the Court.

Semble—Notwithstanding the withdrawal of the operation of the Criminal Procedure Code from a certain district the High Court may continue to exercise appellate and revisional powers over that district.

ON the 19th of May 1899 the petitioner was arrested under a warrant of arrest issued by the Sub-Divisional Officer of the North Cachar Hills in the Assam Frontier Tracts on a charge of criminal breach of trust in respect of moneys entrusted to him for the purposes of certain works in connection with the Assam-Bengal Railway in the year 1897, at a place called Haflong in the North Cachar Hills. On the 22nd of May the petitioner applied to the High Court for a rule calling on the Deputy

* Criminal Revision No. 386 of 1899 made against the order passed by E. C. S. Baker, Sub-Divisional Officer of North Cachar, dated the 6th of May 1899.

(1) 4 C. 172 = 5 I.A. 178.

Commissioner of Cachar to show cause why the proceedings then pending in the Court of the said Sub-Divisional Officer against the petitioner should not be quashed, or in the alternative why the case should not be transferred to the Court of some other competent Magistrate for disposal on the ground that the said Sub-divisional Officer had no jurisdiction, and that the petitioner had a reasonable apprehension that he would not get a fair trial in the hands of the said Sub-Divisional Officer.

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A rule was issued calling on the Deputy Commissioner to show cause why the proceedings in question should not be quashed, or such other order passed with respect thereto as to the High Court might seem fit, and the records were sent for. The Deputy Commissioner of Cachar replied to the High Court's requisitions that "the North Cachar Hills are not within the jurisdiction of the High Court," and abstained from sending the records of the case as well as from showing cause against the rule.

Mr. *P. L. Roy*, Babu *Atulya Charan Bose*, Babu *Shama Prosunno Mozumdar*, and Babu *Soshi Shekhar Bose*, for the petitioner.

[876] Mr. *Henderson*, and Babu *Prosonno Gopal Roy*, for the Crown.

The judgment of the High Court (PRINSEP and HILL, JJ.) was as follows :—

JUDGMENT.

This was an application made on the 22nd May 1899 on behalf of one Soonderjee Nanjee for a rule calling on the Deputy Commissioner of Cachar to show cause why certain proceedings, then pending in the Court of the Sub-Divisional Officer of the North Cachar Hills against the petitioner, should not be quashed, or in the alternative why the case should not be transferred to some other competent Magistrate for disposal.

It appears that on the 19th May the petitioner was arrested under a warrant issued by the Sub-Divisional Officer on a charge of criminal breach of trust in respect of moneys said to have been entrusted to him for the purposes of certain Railway works in progress in the year 1897, at a place called Haflong in the North Cachar Hills.

There being in our opinion matter stated in the affidavit sworn by the petitioner sufficient to justify us in granting the application, we issued a rule on the 22nd May calling upon the District Magistrate to show cause why the proceedings in question should not be quashed, or such other order passed with respect thereto as to this Court might seem fit. We at the same time sent for the records of the case.

On the 2nd June the Deputy Commissioner of Cachar replied to the Court's requisitions that "the North Cachar Hills are not within the jurisdiction of the High Court," and he abstained from sending the record of the case as well as from showing cause against the rule. Subsequently the question thus raised was argued before us by Counsel on behalf of the Crown as well as of the petitioners, and we took time to consider our judgment. This was unavoidable, as the law affecting the question was not fully laid before us at the hearing, and we were consequently obliged to pursue our researches further.

The learned Counsel for the Crown in support of the position taken by the Deputy Commissioner relied exclusively on a notification issued by the Chief Commissioner of Assam on the 6th May 1884, in exercise of the powers conferred on him by [877] s. 2 of the "Assam Frontier Tracts

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Regulation, 1880," by which he directed that the Code of Criminal Procedure (among other enactments) should cease to be in force in the North Cachar Bills from the date of the notification. It was conceded that prior to this notification the North Cachar Hills were within the jurisdiction of this Court, but the contention was that by virtue of the notification they were removed from it.

The power of the Supreme Legislative authority of India to remove any place or territory from the jurisdiction of this Court is, as was said in *Empress* v. *Burah* (1), "expressly authorized and contemplated" by the Statutes and Letters Patent which affect the constitution and jurisdiction of the Court. But the notification of the Chief Commissioner does not purport to affect the jurisdiction of this Court over the North Cachar Hills, and it is quite conceivable that, notwithstanding the withdrawal of the Code of Criminal Procedure, this Court might continue to exercise appellate and revisional powers over the district in question. Indeed, under the Regulation, in pursuance of which the notification of the Chief Commissioner was issued, any alteration of the territorial limits of the Court's jurisdiction would present this difficulty, that the powers vested in the Chief Commissioner by s. 2, under which the notification was issued, are to be exercised so as not to affect the criminal jurisdiction of any Court over European British subjects.

The argument then founded on the notification appears to us to be incomplete and inconclusive.

The Chief Commissionership of Assam in which the North Cachar Hills are situated has, however, been brought under the operation of the Scheduled Districts Act (XIV of 1874), by s. 6 of which the Local Government is empowered from time to time to appoint officers to administer civil and criminal justice within the Chief Commissionership, to regulate the procedure of such officers, and to direct by what authority any jurisdiction incident to the operation of any enactment for the time being in force within the Chief Commissionership shall be exercised. By a notification issued on the 31st July 1884 in [878] exercise of these powers, the Chief Commissioner laid down rules for the administration of justice in the North Cachar Frontier Tract, which includes the North Cachar Hills. By rule 12 the ordinary administration of criminal justice is vested in the Deputy Commissioner, the Sub-Divisional Officer, and the Chief Village Authority duly authorized in this behalf. Succeeding rules provide for appeals from the decision of the Chief Village Authority and the Sub-Divisional Officer, and then rule 24 provides as follows: "No appeal shall lie as a matter of right from any sentence of the Deputy Commissioner of less than three years imprisonment. All sentences of three years imprisonment or more are appealable to the Chief Commissioner. Appeals to the Chief Commissioner must be preferred within ninety days. It shall be competent to the Chief Commissioner at any time to call for and revise, modify, or reverse, any proceedings of the Deputy Commissioner or his subordinates in any case in which it may seem necessary to do so."

Subject to the limitation in respect of European British subjects, to which class the petitioner does not belong, placed upon the powers of the Chief Commissioner by s. 2 of the Assam Frontier Tracts Regulation, 1880, we think the effect of these rules, taken in conjunction with the notification of the 6th May 1884, was to supersede in the North Cachar Hills

(1) 4 C. 172 = 5 I.A. 178.

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all previously existing criminal revisional authority by that of the Chief Commissioner. Assuming, therefore, as was argued for the petitioner, that there still resides in this Court, notwithstanding the annulment of its powers of revision, a power of interference with the proceedings of the Sub-Divisional Officer, (a question on which we think it unnecessary to express an opinion), we think that the powers we were, in the first instance, asked to exercise in this case, and in the supposed exercise of which we issued the rule, are non-existent, and we therefore discharge the rule.

S. C. B. *Rule discharged.*

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26 C. 879 (P.C.) = 26 I.A. 229 = 4 C.W.N. 65 = 7 Sar. P.C.J. 550.

[879] PRIVY COUNCIL.

PRESENT :

Lord Hobhouse, Lord Macnaghten, and Sir Richard Couch.

[*On appeal from the Court of the Judicial Commissioner of Oudh.*]*

HASAN JAFAR AND OTHERS (*Representatives of Plaintiff*) v. MUHAMMAD ASKARI (*Representative of Defendant.*)
[26th and 27th April, and 18th May, 1899.]

Oudh Estates Act (*I of* 1869)—*Settlement of Estates—A talukhdar settled with on terms imposing a trust on him—Second summary settlement.* 1858—*Effect of the confiscation—Rights of the Government.*

A sanad-holding talukhdar, whose name has been entered in lists I and II, made in conformity with the Oudh Estates Act, 1869, holds the talukh subject to such trusts as have been validly created.

At annexation, four descendants of a Muhammadan proprietor were entitled in equal shares to the ancestral estate, which, in 1858, at the second summary settlement, was settled with the only one of the four who presented himself to the Settlement Officer. The settlement with him as talukhdar which was then made was, however, made upon terms providing that the absent co-sharers on their return should obtain their shares. This accorded with his application expressing his willingness.

Held, that the question whether the talukhdar had become a trustee for the plaintiff in respect of his share depended on the terms on which the estate had been granted to the talukhdar by the Government at the second summary settlement, it having been at their absolute disposal as a consequence of the confiscation of March 1858. The trust was not affected by the sanad. No special provision as to the co-sharers' return, or admission to share, had been deemed necessary by the Chief Commissioner, who authorized the settlement with the talukhdar in reliance on his assurance. The right of the co-sharer, who returned in 1859, was accordingly established.

[R., 20 Ind. Cas. 783 (787) ; D., 33 A. 125 = 8 A.L.J. 132 = 13 Bom.L.R. 75 = 13 C.L.J. 63 (68) = 15 C.W.N. 272 = 9 Ind. Cas. 391 = 21 M L.J. 109 = 9 M.L.T. 200 = (1911) M.W.N. 127 (129) = 14 O.C. 95 ; 10 O.C. 291 (303).]

APPEAL from a decree (7th October 1895) affirming a decree (1st May 1893) of the District Judge of Lucknow.

The appellants were the grandsons of the plaintiff, Mir Sadik Husain, who died pending the suit, which was brought on the 9th June 1888, for a one-fourth share of a talukh in the Bara Banki District, named Goothia Zaidpur, formerly the talukhdari estate of Hakim Karam Ali, deceased in 1879. The daughter of Karam Ali, named Afzal-un-Nissa, was entered in the revenue [880] records as proprietor in his place ; and on her death in 1887, the defendant, Muhammad Askari, a collateral relation, claiming under her alleged will, obtained entry of his name.

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At the first summary settlement (1856-57) the estate was settled with Mir Sadik Husain, and his cousin Ali Meddi. These two, with two other cousins, Karam Ali and Abu Ali, were descended from a common grandfather Muhammad Hanif. All the four were entitled, in equal shares, to the ancestral estate.

At the second summary settlement in 1858, Karam Ali alone presented himself, and with him settlement was made. Sadik Husain was absent. In 1861 Karam Ali obtained a sanad as talukhdar. He was afterwards entered in the lists I and II under the Oudh Estates Act, 1869. On the 18th April 1859 Mir Sadik Husain returned, and received an allowance for his maintenance from Karam Ali.

The main question decided on this appeal was whether Karam Ali had held the talukh in trust for himself and Sadik Husain, who in 1888 claimed his one-fourth share from Muhammad Askari in this suit, or had held the talukh for himself alone.

The facts are stated in their Lordships' judgment.

The defendant in his written statement admitted that when Karam Ali applied to have the talukh settled with him at the second summary settlement, he offered to give to the plaintiff and Ali Mehdi their shares, on their coming back and paying what was due to him for payments of revenue made on their account. But the defence was that the settlement was in the end unconditionally made with Karam Ali, the offer on his part never having been accepted by either of them.

The principal issue raised the question whether settlement was made with Karam Ali on his own behalf exclusively, or for himself and as trustee for Sadik Husain.

The District Judge held that Karam Ali accepted a conditional trust on Sadik Husain's behalf, but the condition (which was that of satisfying the authorities as to his conduct, and paying the money due to Karam Ali) had not been fulfilled by Sadik Husain, nor had the condition been waived. The judgment said : "It [881] was of course necessary for him, if he wished to be admitted, to apply to the authorities, and satisfy the condition, or ask to have it waived. He did neither the one nor the other." The dismissal of the suit was affirmed by the appellate Court, their reasons being given as follow by the Additional Commissioner :—

"The circumstance that Karam Ali expressed his willingness, if the whole talukh were settled with him, to give the other co-sharers their shares when they returned cannot be regarded as one which of itself constituted him a trustee for them, and that is the only circumstance which can be pointed to in connection with Karam Ali's conduct at the time of the settlement. Karam Ali did not express this willingness as the result of an agreement or arrangement with the other co-sharers, that he should claim the settlement of the entire property and give them their shares subsequently. Karam Ali's willingness to give the other co-sharers their shares did not induce the Settlement authorities to settle the whole talukh with him. What induced them to settle the property with Karam Ali was the fact that the former lambardars, Ali Medhi and Sadik Husain had not taken advantage of the proclamation of the 15th March 1858 and promptly come forward and given to the Chief Commissioner their support in the restoration of peace and order, while Karam Ali had done so. The settlement authorities did not impose any trust on Karam Ali in respect of the shares of the plaintiff and Ali Mehdi. They did not say to Karam Ali, 'we settle the whole estate with you, as you desire, but we do so on the understanding that the settlement is made with you for

your co-sharers as well as for yourself.' They said, on the contrary, 'we settle the whole estate with you, but you must not understand that because we do so your co-sharers have forfeited all claim to the restitution of their former rights. If they explain their conduct later on their former rights will be restored to them.' I think that this was the only condition upon which the settlement of the entire property was made with Karam Ali, and the only condition which he accepted, and I cannot agree with the learned District Judge that it may be said that Karam Ali accepted a conditional trust on behalf of the plaintiff, on the conditions referred to by the learned District Judge, when the settlement was made with him. On the contrary, I think that at the time of the settlement Karam Ali imposed upon himself no trust of any kind, and accepted from the Settlement authorities no trust of any kind in favour of the plaintiff."

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As to the establishment of a trust against a *sanad*-holder they referred to *Ram Singh* v. *Deputy Commissioner of Bara Banki* (1).

On this appeal,—

[882] Mr. *A. Cohen*, Q. C., and Mr. *C. W. Arathoon*, for the appellants, argued that there was error in the judgment of the Courts below. The summary settlement was made with Karam Ali upon his consent given and the entry made by the Settlement Officer as to the return of the absent co-sharers. It was recorded that the names of the latter should be entered in the khewat, or register of shares, in which the names of those entitled to shares in village lands are always inserted. Karam Ali by his admissions and conduct in those proceedings placed himself in the position of a trustee for others entitled as co-sharers with him. In his admission of the 8th November 1858 he did not stipulate that the co-sharers were to return within any certain time; and the absence of the plaintiff until April 1859 did not deprive him of his right. The exclusion of the plaintiff had not been directed by the authorities; and on this point the Courts below had not correctly understood the order of the Special Settlement Commissioner, read with that of the Chief Commissioner; for in fact the order of the latter did not insist on any condition to be complied with by Sadik Husain before he could be allowed to get his share. It was sufficient for the plaintiff's case to rely on the entries in the record; and these were in accordance with Karam Ali's application and admissions. As to the constitution of a trust to be fulfilled by a talukhdar, reference was made to *Thukrain Sookraj Koowar* v *The Government* (2); and to the cases cited in *Ramanand Kuar* v. *Raghunath Kuar* (3); and *Ram Singh* v. *Deputy Commissioner of Bara Banki* (1).

From the report of the Commissioner, who examined the accounts, and the evidence connected with it, the inference was to be drawn that Sadik Husain after his return received an income proportioned to his share, and that this was accorded to him not merely as a favour, but as a right.

Mr. *J. D. Mayne*, and Mr. *G. E. A. Ross*, for the respondent contended that the judgment of the appellate Court below was right. There had been no absolute recognition by Karam **[883]** Ali of any proprietary, or beneficial, interest in the family estate as having been secured at settlement to Sadik Husain, nor was there any distinct evidence that Karam Ali intended to take the estate subject to any trust for his cousin. Also, the contention was that, as between Karam Ali and

(1) 17 C. 444=17 I. A. 54. (2) 14 M. I. A. 112. (3) 8 C. 769=I. A. 41.

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the Government, the settlement of 1858-59 was absolute when the proceedings ended. That closed the "open door" mentioned by Major Barrow. The only question that should now be raised would be this, was there a concession as between Karam Ali and Sadik Hussain that would constitute the acceptance of a trust by the former for the latter? On the evidence taken altogether, the real state of things was that Karam Ali, though he admitted the relationship of his cousins, and former family rights, petitioned for and obtained the settlement of the estate with himself, that implying a grant by the Government. Disappearance prolonged through the month of settlement meant that Sadik Hussain had joined the insurgents. In order to get the advantage of the entry in their favour, the absentees should have come back before the proceedings at settlement were concluded. It was not to be inferred that the right to return, and to be admitted to share, was extended for an indefinite period. At the settlement Sadik Husain did not return, and as the result, when he did return, in April 1859, Karam Ali had obtained the whole talukdari. Subsequent issue of a sanad, the long acquiescence of Sadik Hussain, and other circumstances, confirm this view. As to the maintenance accepted by him from Karam Ali, there were concurrent judgments to the effect that this subsequent treatment of the plaintiff, both by the talukhdar and by his daughter Afzul-un-Nissa, was not a recognition of any proprietary right in the plaintiff. There had not been an accounting to him as for the aliquot share of the profits, to which he would have been entitled if he had been dealt with as a co-sharer. On this point reference was made to the judgment in *Hyder Hossein* v. *Mahomed Hossein* (1).

Mr. *A Cohen*, Q. C., replied.

Afterwards, on the 18th May 1899, their Lordships' judgment was delivered by—

JUDGMENT.

[884] LORD MACNAGHTEN.—This appeal relates to a claim by the appellants to one-fourth share of an Oudh estate which comprises the talukh of Goothia with certain villages in Zaidpur in the district of Daryabad and is now apparently known as talukh Goothia Zaidpur.

The appellants are the representatives of one Sadik Husain, the original plaintiff, who died after the suit had been disposed of in the Court of first instance.

The respondent derives title under the will of the only child and sole heiress of one Karam Ali. Karam Ali died in 1879. His daughter died in 1887—on her death the dispute arose which led to the present litigation.

It is common ground that on the re-occupation of the Province of Oudh after the mutiny the three-year summary settlement of the estate was made with Karam Ali alone, and that the talukhdari sanad was afterwards granted to him as sole owner. The case on behalf of the appellants is that, although Karam Ali thus acquired the legal ownership of the entire estate, he became in the events which happened and was at the time of his death trustee as to one-fourth of the estate for Sadik Husain.

It appears that in September 1858 when the three-year summary settlement was in progress Karam Ali applied to have the settlement of the estate made with him. He stated that the estate was ancestral property

(1) 14 M. I. A. 401 (407).

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in which he was a co-sharer. The first summary settlement on the annexation of the Province had been made, he said, with his co-sharers Ali Mehdi and Sadik Husain, but they had absconded, fearing that they would be called upon to pay what they had collected in excess during the mutiny. Search had been made, but no clue or trace of them had been found as yet. He offered to pay what was due to Government in respect of the whole estate. At the same time he declared that if his co-sharers re-appeared and paid up what he might have paid to Government they should get their shares. In these circumstances the Settlement Officer entered the name of Karam Ali alone as mal-guzar and sent the papers up to the head office in Lucknow for confirmation. They came in the first instance before Major Barrow, the Special Commissioner of [885] Revenue. His note so far as material was in these words: "Correct, but I would leave a door open to admit the other sharers if they explain their conduct by and bye." The papers then went to the office of the Chief Commissioner, Sir Robert Montgomery. His observation on Major Barrow's note written against it in the margin was this: "The man agrees to this, R. Montgomery, Chief Commissioner, Oudh." The papers were then returned to the Settlement Officer who accordingly retained the name of Karam Ali as sole malguzar recording in the column of the summary settlement statement headed "Abstract of the Case," an abstract in English of Karam Ali's statement which so far as is material is as follows: "I am entitled to half and those two," that is, Ali Mehdi and Sadik Husain, "to the remaining half . . I want the settlement of the whole talukh. When the sharers come back if they pay up what they owe me I will willingly give up their share."

Sadik Husain seems to have come back in April 1859. It is beyond dispute that he returned openly on the invitation or by the written permission of the Government. The record contains a letter from the Commissioner at Lucknow to Daroga Wazid Ali, dated the 18th of April 1849, which, so far as material, is in the following terms: "I am in the receipt of your letter relating to the return of Sadik Ali," that is Sadik Husain, "and your request to permit him to settle himself, so I write to you that under the terms of the Queen's Amnesty Proclamation he can settle down and you are permitted to help him in doing so." There is also in the Record a parwana of the same date addressed to Sadik Husain by the Deputy Commissioner assuring him that if he had committed no offence punishable under the Queen's Amnesty Proclamation he would not be called upon to account for himself because he had not presented himself within the period specified in it. This parwana proceeds to say "you may present yourself without the least anxiety and show your loyalty and attachment to the British Government."

Following the summary settlement the sanad was granted to Karam Ali in 1862, and his name was entered in Lists I and II referred in the Oudh Estates Act (I of 1869).

[886] The question whether Karam Ali became a trustee of one-fourth of the estate for Sadik Husain upon his return depends, as it seems to their Lordships, upon the terms on which the Government made over the estate to Karam Ali. Owing to the confiscation of the province under Lord Canning's Proclamation the property was at the absolute disposal of the Government. Whatever Karam Ali took under the summary settlement and the sanad which followed it he took as a gift from the Government. It was of course competent for the Government when making the gift to impose upon the recipient of their bounty any

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terms they pleased not inconsistent with the law. If the intention of the Government is clear it cannot make the least difference whether the terms were imposed by the Government of its own motion or suggested by the grantee and assented to by the Government. Karam Ali did not found his claim to the favour of the Government on the misconduct of those who had been his co-sharers. In his view they were co-sharers still, but they had gone away or disappeared. He was on the spot a loyal man and ready to pay to the Government every farthing of its dues. He asked to have the whole estate settled with him undertaking that if his co-sharers re-appeared, that is, of course, if they came back openly, he would give them their shares. When the papers went before Major Barrow he seems to have thought that some special arrangement ought to be made with a view to the restoration of the co-sharers if they should succeed in explaining their conduct to the satisfaction of the Government. But that was not the view of the Chief Commissioner. His note is very brief, but it is tolerably plain. He differed from Major Barrow. In his view no special provision was necessary. The applicant had undertaken to re-admit the co-sharers if they re-appeared. The Chief Commissioner thought that enough. On that undertaking or agreement, as he calls it, the settlement might be made as the Settlement Officer proposed with Karam Ali alone. And in the result the matter was carried out on that footing.

Their Lordships have dwelt at some length on this part of the case because it appears to them that both the Courts below misapprehended the effect of what took place when the settlement papers of 1858 came before the authorities at Lucknow. [887] Both Courts seem to have thought that certain conditions were prescribed by Major Barrow, and that it was incumbent on Sadik Husain to show compliance with those conditions. The fact, however, seems to have been that the Chief Commissioner put aside Major Barrow's suggestions and authorised the settlement with Karam Ali in reliance on his assurances and representations.

If Karam Ali became a trustee for Sadik Husain on his return the fact that the sanad was granted to Karam Ali alone would not deprive Sadik Husain of his rights. It is not necessary to refer to authority for the purpose of establishing the proposition that the grantee under a sanad of this description takes subject to trusts which have been validly created.

It does not appear that Karam Ali or his daughter and heiress, who succeeded him, ever disputed Sadik Husain's right to share in the estate. It is satisfactory to find a statement made by Karam Ali himself after the sanad was granted to him to the effect that he was not sole and absolute owner of the whole estate. In 1862 the Government called on the talukhdars of Oudh to make a return of their history and services. In May of that year Karam Ali filled up the form which had been sent to him and stated distinctly that he had co-partners. Whether the word translated "co-partners" ought to have been translated subordinate co-partners or not the statement so far as it goes is consistent with Sadik Husain's claim, and at any rate it shows that Karam Ali did not even then consider himself to be absolute owner to the exclusion of everybody else.

The rest of the case may be disposed of very briefly. Sadik Husain alleged that he was admitted to share in the management of the estate. In that contention he failed. But it appears that from his return until the death of Karam Ali's daughter, he received a large and liberal allowance from the family estate. It was not contended by the Counsel on behalf of

the respondent that the fact that he received less than one-fourth was conclusive against his present claim or operated to bar the suit. 1899 MAY 18.

On the whole, their Lordships are of opinion that the appellants have made out their cases as to one-fourth of the estate. They will therefore humbly advise Her Majesty that the appeal [888] should be allowed. The decree of the District Judge and the decree of the Judicial Commissioner and Additional Judicial Commissioner must be set aside with costs in the Court of the Judicial Commissioner and the costs paid under either of those decrees repaid, and it should be declared that in the events which happened Karam Ali became and was as to one-fourth of the estates comprised in the sanad granted to him trustee for Sadik Husain, and that the appellants as representatives of Sadik Husain are now entitled to recover one fourth of those estates. Their Lordships think that each party ought to bear their own costs in the Court of first instance, as those costs were largely increased by certain unfounded claims on the part of the plaintiff.

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The respondent will pay the costs of the appeal.

Appeal allowed.

Solicitors for the appellants: Messrs. *Barrow Rogers & Nevil.*
Solicitors for the respondent: Messrs. *T. L. Wilson & Co.*

C. B.

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APPELLATE CIVIL.

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, and Mr. Justice Banerjee.

NEPAL CHANDRA SADOOKHAN (*Judgment-debtor*) v. AMRITA LALL SADOOKHAN AND ANOTHER (*Decree-holders*).*
[28th April, 1899.]

Limitation Act (*XV of* 1877), *sch. II, art.* 179, *cl.* (4)—*Step-in-aid of execution—Application for execution "not in accordance with law"—Subsequent application for execution—Objection to the previous application.*

An application for partial execution of a decree is a step-in-aid of execution within the meaning of cl. 4, art. 179, sch. II of the Limitation Act (XV of 1877.)

A judgment-debtor, who did not appeal against a previous order for execution of a portion of the decree and who did not dispute the validity [889] of such order, cannot, in the matter of a subsequent application for execution of the remaining portion of the decree, contend that the first application was not "in accordance with law," and that the subsequent application being presented after the lapse of three years from the date of the decree was barred by limitation.

Dulichand Bhudar v. *Bai Shivkor* (1), followed.

[R., 36 M. 104 (107) = 10 Ind. Cas. 552 = 21 M.L.J. 546 (547) = 10 M.L.T. 69 = (1911) 2 M.W.N. 93; 11 C.L.J. 83 = 14 C.W.N. 465 = 4 Ind. Cas. 408; 1 N.L.R. 61 (65).]

THIS appeal arose out of an application for execution of a decree. One Amrita Lall Sadookhan obtained a decree for recovery of possession of certain immoveable property, as well as for costs, on the 15th March 1891. On the 10th December 1894, the decree-holder applied for execution of

* Appeal from Order No. 37 of 1898, against the order of A. E. Staley, Esq., District Judge of Hooghly, dated the 3rd of December 1897, affirming the order of Babu Nalini Nath Mitter, Munsif of Howrah, dated the 30th of August 1897.

(1) 15 B. 242.

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the decree in respect of the costs. In that application the decree-holder stated that he would apply for delivery of possession of the land afterwards. No objection was taken by the judgment-debtor as to the procedure adopted by the decree-holder, and the amount was realized. On the 21st April 1897, the present application for execution of the decree for delivery of possession of the land was made, and the judgment-debtor objected to it, on the ground that it was barred by limitation, inasmuch as the decree-holder did not execute the whole decree which he ought to have done when he applied for the execution of decree for costs in 1894. The Court of first instance overruled the objection and allowed execution to proceed.

On appeal to the District Judge the decision of the first Court was upheld.

Against this decision the judgment-debtor appealed to the High Court.

Babu *Karuna Sindhu Mookerjee*, for Babu *Purna Chandra Shome*, for the appellant.

Babu *Brojo Lal Chuckerbutty*, for the respondents.

The judgment of the High Court (MACLEAN, C.J., and BANERJEE, J.) was as follows:—

JUDGMENT.

MACLEAN, C.J.—The first objection taken by the appellant is that the present application for execution of the decree is [890] out of time. I do not think it is. The decree was for costs and for delivery of possession of certain immoveable property. The decree was made on the 15th March 1891, and an application for execution of the decree in respect of the costs was made on the 10th December 1894. The application for execution, on the face of it, distinctly stated that the decree-holders would afterwards apply for delivery of possession of the land. No objection was taken by the judgment-debtor at the time to this method of procedure on the part of the decree-holder, or that he ought not to be allowed, for execution purposes, to split up his decree, or rather execute it piecemeal. Execution for costs was proceeded with, and the amount realized. The present application for execution of the decree for possession of the immoveable property was made on the 21st April 1897, and the judgment-debtor contends that the whole decree, not having been executed when the decree-holders in December 1894 took out execution for costs, the present application for recovery of possession is too late. I do not think it is. The application for execution for the costs was one to take some step in aid of execution, and seeing that the judgment-debtor raised no objection at the time to the decree being executed piecemeal—not, I admit, a desirable way of executing a decree—it does not now lie in his mouth to say that that application was not in accordance with law. This view is in accordance with that expressed by the Bombay High Court in the case of *Dulichand Bhudar* v. *Bai Shivkor* (1).

The first point fails.

As regards the other two points, *viz.*, that the property is not properly described, and that the decree is incapable of execution, I do not propose to say anything more than that I agree with the view taken of them by both the lower Courts. The appeal must be dismissed with costs.

BANERJEE, J.—I concur.

S. C. G. *Appeal dismissed.*

(1) 15 B. 242.

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[891] ORIGINAL CIVIL.

Before Mr. Justice Stanley.

NISTARINI DASSI *v.* NUNDO LALL BOSE AND ANOTHER.*
[14th June, 1899.]

Fraud—Pleading fraud—Power of Court at instance of innocent party to treat decree of another Court obtained by fraud as a nullity—Jurisdiction—Administration suit—Acts of mal-administration regarding immoveable property outside jurisdiction—Power of Court to set aside leases of immoveable property outside its jurisdiction—Leave to sue—Letters Patent, High Court, cl. 12—Misjoinder of causes of action—Code of Civil Procedure (Act XIV of 1882), *s.* 44, *Rule* A.

An innocent party may be allowed to prove in one Court that a decree obtained against him in a different proceeding in another Court of concurrent jurisdiction was obtained by fraud, and if the Court be of opinion that such decree so obtained in the other Court cannot stand it has jurisdiction to treat that decree as a nullity and render its effect nugatory.

In an administration action the fact that amongst other things leases of immoveable property granted by the executors to themselves are sought to be set aside on the ground that such leases are acts of mal-administration does not make the action one for the recovery of immoveable property, and leave under s. 44, Rule A is not necessary. If the High Court has jurisdiction to entertain such an administration action the fact that the property comprised in the leases complained of is wholly outside the limits of its ordinary original civil jurisdiction does not preclude it from setting aside such leases, and leave for that purpose under cl. 12 of the Charter is not necessary. The Court assumes jurisdiction in regard to immoveable properties situate outside the jurisdiction in cases where it can act *in personam* either to compel the owner to give effect to legal obligations into which he has entered or to a trust reposed in him.

Where the suit is one to administer the assets of a deceased person, and in the claim various dealings by the executors of the estate are complained of as acts of mal-administration and sought to be redressed, such dealings do not constitute separate causes of action, and such a suit is not multifarious.

[Affir., 30 C. 369=7 C.W.N. 353; 33 C. 180 (P C.)=7 Bom.L. R. 887=2 C.L.J. 189=9 C.W.N. 961=32 I.A. 193=15 M.L.J. 331=8 Sar. P.C.J. 831; N F., 14 C L J. 648 (650)=10 Ind. Cas. 536; F., 25 A. 48=A W.N. (1902) 179; 26 A. 272= A.W.N. (1904) 25 ; 23 M. 216 (218) ; 5 C.W.N. 559 ; 8 Ind. Cas. 1179 (1180)=6 N.L R. 177 ; R., 24 A. 242=22 A.W.N. 38; 29 A. 418 (422, 423)=4 A.L.J. 392= A.W.N. (1907) 112 ; 37 C. 197 (202)=11 C.L.J. 250=14 C.W.N. 507 ; 27 M. 157 (158) ; 6 C.L.J. 401 (408)=11 C.W.N. 489 ; 11 C.L.J. 636 (637)=14 C.W N. 695 =5 Ind. Cas. 648 ; 13 C.L.J. 404=16 C.W.N. 805 (810)=10 Ind. Cas. 90 ; 16 C L.J. 41=16 Ind. Cas. 447 (448) ; 16 C.L J. 552 (553)=14 Ind. Cas. 713 ; 7 Ind. Cas. 11 (14) ; 37 P.R. 1903 ; D., 31 C. 233 (238) ; 28 M. 216 (221) ; 29 M. 239 (n) (252)=11 M.L.J. 91 (100).]

ONE Rai Mohendra Nath Bose died on 16th August 1874, leaving him surviving his widow, the plaintiff Nistarini Dassi, his mother Thakurani Dassi, his sister Kadumbini Dassi, and two brothers, Nundo Lall Bose and Pashupati Nath Bose. Mohendra Nath by his will, dated 9th August 1874, bequeathed one-third of his estate to his brother Nundo Lall Bose, one-third [892] to his brother Pashupati Nath Bose, and, after bequeathing various legacies and annuities, including one of Rs. 100 per month to his widow Nistarini Dassi, directed that the surplus income of the remaining one-third should be applied in the purchase of Government securities, the interest whereof was to be paid to his widow Nistarini Dassi for her life, and after her death such securities were to go to the person or persons who might then be the heir or heirs of the testators. Mohendra Nath Bose appointed his brothers, Nundo Lall Bose and Pashupati Nath Bose, and one Kali Churn Bhattacharji, executors of his will.

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Probate of the will was taken out by Nundo Lall Bose and Pashupati Nath Bose, on 4th September 1874. Kali Churn Bhattachaji did not take out probate of the will, nor did he take any part in the administration of the testator's estate.

By an Indenture, dated 24th May 1877, and made between Nundo Lall Bose and Pashupati Nath Bose of the first part, the same persons, as the executors of the will of Mohendra Nath Bose, of the second part, Kadumbini Dassi and Thakurani Dassi of the third part, Nundo Lall Bose and Pashupati Nath Bose, in their private capacity and in their capacity as executors, purported to convey all their property to Kadumbini Dassi and Thakurani Dassi, as trustees to hold it subject to certain trusts declared in the Indenture.

In 1889 a reference was made to certain arbitrators, who by an award, dated 16th July 1889, purported (*inter alia*) to partition the family property. The award was signed by Nundo Lall Bose, Pashupati Nath Bose, Thakurani Dassi, Kadumbini Dassi, and the plaintiff. After the award was made Nundo Lall Bose applied to the Subordinate Judge at Alipore to make the award a decree of Court, the plaintiffs amongst others being made a party to such application. A petition, bearing amongst others the signature of the plaintiff, was filed in that Court, consenting to the application, and the award was made a decree of Court by the Subordinate Judge at Alipore, the decree being dated the 12th September 1889. In accordance with the award Nundo Lall Bose and Pashupati Nath Bose, as executors of the will of Mohendro Nath Bose, purported to grant, with the privity **[893]** and concurrence of the plaintiff, two *mukurrari* leases, one to Nundo Lall Bose, and the other to Pashupati Nath Bose, of certain immoveable property allotted by the arbitrators to the residuary estate of Mohendra Nath Bose. Both leases were dated 1st March 1891, and both bore the signature of the plaintiff.

The plaintiff, who was thirteen years old when her husband Mohendro Nath Bose died, brought this suit as the widow and heiress of her husband against Nundo Lall Bose and Pashupati Nath Bose in their private capacities and as the executors of the will of her husband, and Kadumbini Dassi, the surviving trustee of the deed of trust of 24th May 1877. In her plaint the plaintiff alleged that her signature had been obtained by the defendant Nundo Lal Bose, to various documents in connection with the reference, the award, the decree made on the award, and the leases, without her knowing the nature and meaning of such documents, and that she had had no independent legal advice with respect to such documents. She charged the defendants, the Boses, with various breaches of trust in their conduct as executors, and in addition to asking for the construction of her husband's will and the administration of his estate and for accounts from the defendants, the Boses, she prayed that the deed of trust, the award, the decree made on the award, and the leases, be declared to be fraudulent and void as against her, and in no way binding upon her, and so far as they purported in any way to deal with her husband's residuary estate, be set aside and cancelled. At the filing of the plaint leave to institute the suit in the High Court under cl. 12 of the Charter had been obtained on the ground that the plaintiff's cause of action arose partly within and partly without the local limits of the ordinary original civil jurisdiction of that Court.

The defendants, Nundo Lall Bose and Pashupati Nath Bose, filed separate written statements. Kadumbini Dassi did not enter appearance to the suit. In his written statement Nundo Lall Bose admitted that

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the plaintiff had had no independent legal advice, but took several preliminary objections to the suit. He pleaded (*a*) that in so far as the suit sought to set aside the decree of the Alipore Court the High Court had no jurisdiction to entertain it; (*b*) that as the immoveable property covered by the leases was [894] wholly outside the local limits of the ordinary original civil jurisdiction of the High Court, the suit, in so far as it sought to set them aside, did not lie in that Court, and it had no jurisdiction to entertain it; (*c*) that the suit was bad for multifariousness, misjoinder of causes of action and parties, and for joinder of claims against the defendants, the Boses, as executors of the will of Mohendra Nath Bose, and against them personally, in that it wrongly joined claims for the construction of the will and the administration of the estate of Mohendra Nath Bose with claims to avoid the trust deed, award, decree, and leases; (*d*) that all the *cestuis qui trustent* under the trust deed ought to be parties to the suit; (*e*) that on account of the award the claim for the construction of the will of Mohendra Nath Bose, as regards any rights of the plaintiff thereunder, was *res judicata*; (*f*) that the suit included causes of action in respect to moveable property and to immoveable property, and as no leave had been obtained under s. 44, Rule A of the Civil Procedure Code, the suit was not maintainable; (*g*) that as part of the immoveable property the subject-matter of the suit was outside the ordinary original civil jurisdiction of the High Court, and as no leave had been obtained in respect thereof under cl. 12 of the Charter, the suit was not maintainable in that Court.

When the suit came on for hearing counsel for the defendant, Nundo Lall Bose, took these preliminary objections by way of demurrer, and the following preliminary issues were framed:—

1. Has this Court jurisdiction in this suit to set aside the decree of the Subordinate Judge of Alipore, dated the 29th August 1889?

2. Is that decree binding on the plaintiff?

3. Has this Court jurisdiction under the Charter to set aside leases of immoveable property outside the local limits of its ordinary civil jurisdiction?

4. Is the plaintiff entitled in the absence of all the persons beneficially interested under the deed of trust, dated 24th May 1887, to a declaration that it is fraudulent and void as against her, and to have it set aside as against her?

5. Can the plaintiff maintain this suit without having [895] obtained leave under s. 44, Rule A of the Code of Civil Procedure?

Is the suit defective by reason of misjoinder of different causes of action?

The Officiating Advocate-General (Mr. *J. T. Woodroffe*), Mr. *W. C. Bonnerjee*, Mr. *Dunne*, Mr. *J. G. Woodroffe*, and Mr. *K. S. Bonnerjee*, for the plaintiff.

Mr. *Hill*, Mr. *O Kinealy*, Mr. *Chackravarti* and Mr. *B. C. Mitter*, for the defendant, Nundo Lall Bose.

Mr. *Jackson* and Mr. *Allen*, for the defendant, Pashupati Nath Bose.

Mr. *Hill*.—The first point that arises is whether, when *A* and *B* are parties to a decree, *B* in a subsequent suit can impeach that decree on the ground of its being fraudulent and ask for it to be treated as a nullity. A decree cannot be treated as a nullity until it is set aside. It would impede justice, if while a Court was executing its decree another Court of concurrent jurisdiction was deciding that the decree was a nullity. A decree can only be set aside by a bill impeaching it in the Court

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which pronounced that decree. In *Mussel* v. *Morgan* (1) the only question decided was that a decree obtained by fraud cannot be set aside by a petition, but the remarks of the Lord Chancellor dismissing the petition clearly show that when a suit is brought to set aside a decree obtained by fraud, it must be brought in the Court which passed the decree complained of. *Aushootosh Chandra* v. *Tara Prasanna Roy* (2), *Meadows* v. *Kingston* (3) shows the difference between a stranger and a party to a decree. A stranger cannot set aside the original decree, and is therefore allowed to impeach it in a subsequent proceeding, but a party to a decree must go to the Court which passed it. Kerr on Frauds, pp. 326-327. I am not aware of any case in which a party was allowed to set aside a decree in a subsequent proceeding in another Court. [STANLEY, J., referred to the case of **[896]** *Priestman* v. *Thomas* (4).] In *Bandon* v. *Becher* (5) the person seeking to impeach the decree was not a party to it. Lord Brougham's language at p. 509 of that report, though very vague, must be taken to refer only to the facts before him; the person in that case seeking to impeach the decree was not a party to the suit, but a remainderman. [STANLEY, J.—Suppose *A* and *B*, parties to a suit, collude to defraud *C*, an infant also a party, and get a guardian *ad litem* who is in league with them appointed for *C* and obtain a decree and thereby defraud *C*. Do you say *C* cannot go behind that decree?] No, he may do so, but not in another Court. Besides an infant in that case is not really a party. The guardian *ad litem* does not really represent him if he is in league with others to defraud him. But an adult is in a totally different position, *Flower* v. *Lloyd* (6). The old practice was to file a bill in the Court in which the original decree was passed to set aside the decree. To ask this Court to set aside the decree would be treating this Court as a Court of Appeal from the Alipore Court; *Allen* v. *McPherson* (7). *Priestman* v. *Thomas* (4) does not touch the point I am dealing with, namely, that one Court will not set aside the decree of another Court of concurrent jurisdiction. [STANLEY, J.—Surely setting aside a decree in its entirety and declaring it not binding as regards a particular individual are two different things.] As far as that individual is concerned it would be setting aside the decree *quoad* him. In the case of a party he must go to the Court which passed the decree. In *Priestman* v. *Thomas* (4) the Court of Chancery only set aside the compromise. [STANLEY, J.—Was not the effect of that to set aside the whole proceedings? What did the Probate Court do when the parties came back?] The Court set aside the decree as the Alipore Court can in this case. It would be a great scandal if the Alipore Court could execute the decree, while this Court was setting it aside, and neither Court could stop the **[897]** other. In *Solomon* v. *Abdool Aziz* (8) it was held that as the former suit was bad in this Court, and proceeded to a decree, and as the principal portion of the prayer was to set aside the decree, this Court alone had jurisdiction. [STANLEY, J.—Referring to *Shedden* v. *Patrick* (9) my recollection of that case is that it is there stated that any Court, however inferior, may go behind a decree even of the House of Lords, if such decree has been procured by fraud.] The question is as between whom? It may be by a person not a party, but not by a party. Persons not parties may treat the

(1) (1790) 3 Bro. Ch. C. 73 (78).
(2) 10 C. 612 (614).
(3) (1775) 2 Amb. 756 (762).
(4) (1884) L.R. 9 P.D. 70, 210.
(5) (1835) 3 Cl. & Fin. 479 (509).
(6) (1877) L.R. 6 Ch. D. 297 (302).
(7) (1847) 1 H.L.C. 191 (224, 234)=(1841) 5 Beav. 469.
(8) 4 C.L.R. 366.
(9) (1854) 1 Macq. H.L.C. 607.

decree as a nullity, but parties to it may not. *Ahmedbhoy Hubibhoy* v. *Vulleebhoy Cassumbhoy* (1). The Court will have to deal with the question as to what effect the Evidence Act has on this. See Evidence Act, s. 44, *Ahmedbohy Hubibhoy* v. *Vulleebhoy Cassumbhoy* (1), Phipson on Evidence, p. 382, and Stephen's Digest on Evidence, p. 55, art. 46. Till the decree is set aside it cannot be treated as a nullity between the parties. It would be a monstrous position, if a person who had obtained a decree by fraud, should be allowed to set up that fraud in a subsequent proceeding. But the words in s. 44 of the Evidence Act seem wide enough to admit of this being permitted. The Evidence Act, however, does not of itself confer any rights. In *Shedden* v. *Patrick* (2) there was no real suit and no real representation of the infant; the guardian *ad litem* colluded with the other party to defeat the infant. With regard to jurisdiction there is a distinction between setting aside a decree and enquiring into the proceedings of another Court. *Gunnesh Pattro* v. *Ram Nidhee Koondoo* (3) has no bearing on this case. There the Revenue Court, into whose proceedings the Civil Court made an enquiry, had no jurisdiction to entertain a suit for title. A decree that is still subsisting and has not been set aside cannot be treated as a nullity by a party to it. *Bansi Lal* v. *Ramji Lal* (4), *Morrison* **[898]** v. *Morrison* (5). In Taylor on Evidence, p. 1132, s. 1713, it is stated that a party can apply to the Court which passed the decree to vacate it. Can the plaintiff, being a party to the suit in the Alipore Court, claim in this suit to treat the decree in that suit as a nullity? *Unnoda Dabee* v. *Stevenson* (6); *Hoghton* v. *Fiddey* (7).

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In *Priestman* v. *Thomas*(8) the Court had no reason to enquire into the compromise, the plaintiffs simply withdrew their opposition. The Alipore Court by its decree has turned the award into a decree of Court. The Probate Court did not by granting probate make the compromise a decree of Court. In the suit in the Alipore Court the award has become merged in the decree. In this case, while the Alipore Court's decree stands, this Court cannot treat it as a nullity. The fraud in *Priestman* v. *Thomas* (8) was the forgery. The fraud here is not the award but the way in which it was obtained.

The leases were from the defendants to themselves, but the plaintiff was a party to them. Under those leases, the defendants, the Boses, are in possession. To set aside the leases brings the plaintiff into possession. This is a suit for possession, and therefore a suit for land. It cannot be said that, although this is an administration suit, the plaintiff is entitled to sue for land outside the jurisdiction without leave. *Jairam Narayan Raje* v. *Atmaram Narayan Raje* (9). Though she does not ask for possession the result is to take the possession from one and give it to another. Has this Court ever attempted to set aside a lease of lands outside its jurisdiction? [STANLEY, J.—In a case of a lease of land by a trustee to himself your proposition is that if the lands are outside the jurisdiction you cannot bring a suit in this Court to set aside the lease although the trustee is subject to the jurisdiction of this Court?] Yes, it is a suit for the declaration of title. A Court of Chancery will not make a declaration of title to lands outside its jurisdiction.

(1) 6 B. 703 (707, 714, 715).
(2) (1854) 1 Macq. H.L.C. 607.
(3) 22 W. R. 361.
(4) 20 A. 370.
(5) (1838) 4 My. & Cr. 215 (228).
(6) 22 W.R. 290.
(7) (1874) L.R. 18 Eq. 573.
(8) (1884) L.R. 9 P.D. 70, 210.
(9) 4 B. 482.

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[899] It may take away a personal right, such as a right of redemption. It is submitted that this Court cannot compel the defendants to re-assign the leases. *Delhi and London Bank* v. *Wordie* (1), *In re Hawthorn; Graham* v. *Massey* (2). In *Kellie* v. *Fraser* (3) the question of title did not arise. So far as this suit seeks to set aside the leases, it is a suit affecting the title of land, and is therefore a suit for land. The relief sought cannot be granted in this suit, without leave under the Charter, and the plaintiff cannot now ask for leave.

As to the question of non-joinder, this is a case between the *cestuis qui trustent* themselves; a trustee cannot represent them. Section 437 of the Civil Procedure Code does not apply to a case like this. See rules of the Supreme Court, order XVI, rule 8. *Hamond* v. *Walker* (4), *Read* v. *Prest* (5); all the *cestuis qui trustent* must be joined, or that portion of the claim must be struck out. The defendant Kadumbini Dasi has executed a release and is no longer a trustee.

A suit to set aside a deed of trust is a purely personal matter and stands on a totally different footing from a suit for the general administration of an estate. There are different parties concerned, and two such claims cannot be joined in one suit. The plaintiff in this suit is seeking to have her title declared to immoveable property acquired subsequent to the death of her husband, and to the premises, No. 13, Mohendra Bose's Lane, on behalf of her husband's estate, also to recover personal property said to have been misappropriated by the executors. She cannot join such claims, except with the leave of the Court. Such leave must be obtained before she brings her suit. She cannot bring her suit first and then make it good by obtaining leave afterwards Civil Procedure Code, s. 44, rule A: *Lutifunnissa Bibi* v. *Nazirun Bibi* (6); *The Oriental Bank Corporation* v. *Gobind Lall* [900] *Seal* (7). See the judgment of Trevelyan, J., 21st May 1891, in *Soshi Bhusan Sreemani* v. *Kali Kristo Sreemani*, an unreported case, and *Pilcher* v. *Hinds* (8).

The Advocate-General contra.—I will deal with the objections in the reverse order in which they have been argued. This is in the nature of an administration suit, the object being the due administration of the estate, which was of Mohendra Nath Bose. Section 44, rule A, deals with claims to moveable and immoveable property based on the same title. *Giyana Sambandha Pandara Sannadhi* v. *Kandasami Tambiran* (9). That case I submit furnishes the law as to that section. In order to make out that s. 44, rule A applies, the defendants have to make out that this is a suit for the recovery of immoveable property or declaration of title to immoveable property. It is submitted that it is not so. The Madras case shows that no leave is necessary, and there is no decision to the contrary. As regards leave having to be obtained at the time of filing of this suit, there is no such hard and fast rule. There is nothing to prevent the Court from granting the leave now. *Clark* v. *Wray* (10). The plaintiff says there has been mal-administration. Her title to both moveable and immoveable property is one and the same. Section 44, rule A does not apply to a case like this, where the title is the same and the wrong or infringement of right is the same.

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(1) 1 C. 249 (262).
(2) (1883) L. R. 23 Ch. D. 743.
(3) 2 C. 445 (463).
(4) (1857) 3 Jur. N.S 686.
(5) (1854) 1 K. & J. 183.
(6) 11 C. 33.
(7) 9 C. 604 (608).
(8) (1879) L. R. 11 Ch. D. 905 (907).
(9) 10 M. 375 (506).
(10) (1885) L. R. 31 Ch. D. 68.

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With regard to the non-joinder of the *cestuis qui trustent* under the trust deed of 24th May 1877, there is nothing in the Indian Code analogous to order XVI, rule 8, Annual Practice, 1898. The defendants' case is that the trust deed has been wiped out, and by the parties interested in it. They say they have nothing to do with it. If that is so, well and good. But they have treated it to a certain extent as governing this suit. They say if you set aside the award and decree you revive the trust deed. If so, among whom would it be revived? If it is shown that the deed does affect the plaintiff's husband's estate, then she asks that it be **[901]** set aside so far as it does affect that estate. If the trust deed can be revived it may stand perfectly good as regards the trustees and the parties to it. But if it is shewn that it does affect the residuary estate, the plaintiff says that it is an act of mal-administration. and asks that it be set aside so far as it is shewn to affect that estate. It is in no way necessary to have all the beneficiaries before the Court.

With regard to cl. 12 of the Charter it is submitted that leave has been obtained, and the defendants do not say it was improperly obtained. Such leave having been obtained the Court now has jurisdiction to determine all the issuea arising in this suit. *Jairam Narayan Raje* v. *Atmaram Narayan Raje* (1), *Prasannamayi Dasi* v. *Kadambini Dasi* (2). The immoveable property in this suit is partly within and partly without the local limits. Leave was applied for and obtained.

The Bombay case was cited to show that where immoveable property was wholly without the local limits, leave could not be given, but that is wholly outside this case. Is this a suit for land? A suit for land has been construed as a suit for the possession of land. This is not a suit for the possession of land. The residuary estate of Mohendra Nath Bose and the legal title to it is vested in the defendants, the Boses, as his executors. Whatever property may in the course of the administration of that estate be found to belong to it will vest in them. There will be no change of title and no taking away the possession of any part of the estate from the persons in whom it is vested. In a suit of this nature the Court proceeds *in personam*. *Bagram* v. *Moses* (3); s. 16 of the Civil Procedure Code; *Juggodumba Dossee* v. *Puddomney Dossee*(4); *Land Mortgage Bank* v. *Sudurudeen Ahmed*(5); *Kellie* v. *Fraser*(6); *Ramdhona Shaw* v. *Nobumoney Dossee* (7). This is not a suit for land. When the law allows a suit to be **[902]** brought in a particular Court, you cannot pick out a specific item in order to try to make out that the suit is not maintainable in that Court. As to the order which can be made with regard to these leases, the Court could declare them acts of mal-administration, and that they impede the due administration of the estate. The defendant may be directed not to set them up, or to execute a reconveyance. The possession of the lands will not be changed in any way, nor do we ask that it should be changed. With reference to the issue of jurisdiction what is the nature of this suit? I have submitted it is a suit for administration. The answer of the defendants is, you can only get partial administration, as it has already been administered to a certain extent. They are setting up the decree and the award in answer to the plaintiff's claim. To go to the Alipore Court would only be delaying the evil day.

The question in *Solomon* v. *Abdooe Aziz* (8) was whether that particular plaint could remain on the files of this Court, and has no bearing

(1) 4. B. 482. (2) 3 B.L.R. O.C. 85. (3) (1862) 1 Hyde 284.
(4) 15 B. L. R. 318. (5) 19 C. 358. (6) 2 C. 445.
(7) (1865) Bourke, 218. (8) 4 C.L.R. 366 (369).

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on this case. It has not been suggested that it has been anywhere actually decided in England that an innocent party to a decree obtained by fraud cannot obtain relief except by bringing a suit to set aside the decree in the Court which passed it. *Mussel* v. *Morgan* (1) is one of the class of cases deciding procedure. There was no question there as to the jurisdiction of any Court. The only question was could you come in by the cheaper method of a motion? In *Mirali Rahimbhoy* v. *Rehmoobhoy Habibbhoy* (2) the question was also one of practice not of jurisdiction. In neither of these cases did the question arise whether one Court could interfere with the decree of another Court. In *Aushootosh Chandra* v. *Tara Prasanna Roy* (3) the only question was whether the proper course was to proceed by review or by a regular suit. Fraud vitiates all proceedings. When a decree is set forward as a bar, it may be shewn that it was obtained by fraud. **[903]** *Shedden* v. *Patrik* (4), *Price* v. *Dewhurzt* (5), *Bandon* v. *Beecher* (6). In the case of *Allan* v. *McPherson* (7) the plaintiff brought his suit in Chancery, alleging that in the Ecclesiastical Court he had not been allowed to adduce evidence regarding undue influence on the testator. That case is quite distinct from this case. The only remedy for the plaintiff there was to appeal on the ground that evidence had been improperly rejected or accepted. The assistance invoked here is wholly different. To make that case applicable the defendants must show the plaintiff is seeking relief against the decree of the Alipore Court on the ground that it had improperly rejected or admitted certain evidence, which is not the case. *Flower* v. *Llyod* (8) was a motion in the appeal Court asking that Court to set aside the decree made by the appeal Court after they had heard the matter. The appeal Court said they had no original jurisdiction and were *functus officio*. When the matter came before the appeal Court again [*Flower* v. *Lloyd* (9)] the only question to be decided was whether, owing to the alleged fraud of one of the parties, imperfect evidence had been adduced, and the appellate Court held on the facts that no fraud had been practised. At no stage has that case any bearing on this. If evidence has been improperly admitted or rejected the proper procedure is to go to the Court of appeal; but in this case the fraud the plaintiff alleges goes to the root of the matter, there being no real contest in the former proceeding; *Gunnesh Pattro* v. *Ram Nidhee Koondoo* (10), *Unnoda Dabee* v. *Stevenson* (11), *Mewa Lall Thakur* v. *Bhujhun Jha* (12). The cases cited under s. 295 of the Code of Civil Procedure have a useful bearing on this point. It has been decided that when an application has **[904]** been made by a decree-holder it is competent for the Court executing the decree to enquire whether the holders of decrees for money are holders of real decrees; *In re Sunder Dass* (13) and *Chhaganlal* v. *Fazarali* (14). The Court has power to see whether a holder of a decree for money has obtained it *bona fide* or by fraud; *Subramanian Pattar* v. *Panjamma Kunjiamma* (15), *Chogalal* v. *Trueman* (16), *In re South American and Mexican Co.* (17), *Huddersfield Banking Co.* v. *Lister and Son* (18).

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(1) (1790) 3 Bro. Ch. C. 73.
(2) 15 B. 594.
(3) 10 C. 612.
(4) (1854) 1 Macq. H.L. C. 607.
(5) (1837) 8 Sim. 279 (304).
(6) (1835) 3 Cl. & F. 479 (509).
(7) (1847) 1 H. L. C. 191 (209); (1841) 5 Beav. 469.
(8) (1877) L. R. 6 Ch. D. 297.
(9) (1878-79) L. R. 10 Ch. D. 327.
(10) 22 W R. 361.
(11) 22 W.R. 290.
(12) 13 B.L.R. App. 11=22 W.R 213.
(13) 11 C. 42.
(14) 13 B. 154.
(15) 4 M. 324.
(16) 7 B. 481.
(17) (1895) L.R. 1 Ch. 37 (47).
(18) (1895) L.R. 2 Ch. 273 (281).

An order or decree passed by consent may be set aside formally or treated as of no account, if it can be shown that the compromise upon which the consent decree was passed has been entered into by mistake. Was the plaintiff a party to the suit? Was she sufficiently and properly represented in the case? The argument proceeds on the facts stated by us, and that is that the plaintiff, a *purdah* lady, knew nothing of these matters; she was admittedly without independent legal advice.

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As to the position of *purdah* women—*Manohar Das* v. *Bhagabati Dasi* (1), and *Kanai Lal Jowhari* v. *Kamini Debi* (2)—it is a recognised rule that *purdah* ladies must be most carefully protected. It is admitted in this case that the plaintiff had no independent legal advice; *Ashgar Ali* v. *Delroos Banoo Begum* (3), *Buzloor Ruheem* v. *Shumsoonnissa Begum* (4), *Behari Lal* v. *Habiba Bibi* (5).

The Court has power, and if the facts the plaint alleges are proved will set aside and treat as a nullity the Alipore Court's decree so far as the plaintiff's husband's estate is affected. The Court has full power to entertain the suit. *Kali Prosanno Ghose* v. [905] *Rajani Kant Chatterjee* (6). In this connection it may be noted that although s. 522 of the Civil Procedure Code lays down that no appeal shall lie against a decree passed on an award, except in so far as it is in excess of or not in accordance with the award, yet it has been held that under certain circumstances an appeal does lie from such a decree, although it was not in excess of and was in accordance with the award.

Mr. *Hill* in reply.—An administration suit does not stand on any particular footing. If in the course of administration there is an attempt to include property, which another person claims, it is a suit for land. There can be no question of curtailing the Court's jurisdiction. Leave under s. 44, rule A, can always be asked for. Whatever the form of the suit may be, if in fact you are seeking to recover property for an estate, it is, even if that matter be ancillary, nevertheless a suit for land. It is submitted leave under s. 44, rule A, is necessary. Leave cannot be given afterwards. See the judgment of Trevelyan, J., dated 21st May 1861, in the unreported case of *Soshi Bhusan Sreemani* v. *Kali Kristo Sreemani*. As regards land wholly outside the jurisdiction no leave can be obtained. The conveyances pass the title to such lands. The plaintiff joined in the conveyances. A *cestus qui trust* can join with one trustee in conveying to another trustee to express his concurrence. As regards the deed of trust, if they say it affects them, the other *cestuis qui trustent* must be made parties. Kadumbini, the trustee, does not properly represent the other *cestuis qui trustent*.

As regards the main point my argument is not that a decree obtained by fraud cannot be set aside, but the question is by what Court? It is submitted that it must be by the Court which pronounced the decree. The case of *Huddersfield Banking Co.* v. *Lister and Son* (7) does not help the other side. It shows that a regular suit may be brought, but it does not say in what Court the decree must be set aside by an action, *Flower* v. *Lloyd* (8), and the question is in what Court does such an action lie. The [906] argument of inconvenience is one of a very strong character. Suppose this Court makes its decree, and the Alipore Court in a subsequent proceeding holds the decree to be fraudulent and therefore invalid, and this Court sends the decree down to the Alipore Court to be executed; the

(1) 1 B.L.R. O. C. 28. (2) 1 B.L.R. O. C. 31 note. (3) 3 C. 324.
(4) 11 M.I.A. 551 (585). (5) 8 A. 267. (6) 25 C. 141.
(7) (1895) L.R. 2 Ch. 273. (8) (1877) L.R. 6 Ch. D. 297.

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Alipore Court would have to execute it; and the inconvenience would be enormous.

Price v. *Dewhurst* (1) dealt with foreign judgments. These stand on their own footing and are not on the same footing as judgments of a Court in this country. In this country the Courts derive their power from the English Crown. Section 14 of the Code of Civil Procedure recognizes this distinction. When a fraud has been practised on a Court and a decree is made in consequence of the fraud the decree is a nullity. But where there has been a real suit, and one of the parties has been defrauded, then the decree subsists until it is set aside. The argument on s. 44 of the Evidence Act by the Advocate-General has never suggested itself to any one else; that section has never been so construed by any Court in the country. When you have to construe a section you have to see whether the construction sought to be put upon it will lead to an uprooting of the common principles of equitable jurisdiction or not. "Party" in that section must be read as meaning "party in that proceeding against whom the judgment is set up" and not "a party to the proceeding in which the judgment was made," otherwise there would be no such thing as *res judicata*.

The judgment of the Court was as follows :—

JUDGMENT.

STANLEY, J.—A number of preliminary objections to the maintenance of this suit have been raised by the defendant Nundo Lall Bose. The first and most serious of them is that this Court has no jurisdiction to set aside the decree of the Alipore Court. The plaintiff in her statement of claim alleges that the joint property of her late husband Mohendra Nath Bose, and of the first and second defendants, which was undivided joint family property, was partitioned by arbitrators under an agreement to which her consent was fraudulently obtained, and that by the fraud of the same defendants, a decree upon the award was subsequently passed by **[907]** the Subordinate Judge of the 24-Pergunnahs. In her claim, which is for the administration of the estate of the late Mohendra Nath Bose, the plaintiff seeks among other things a declaration that the award and the decree made thereon are fraudulent and void, as against her, and in no way binding upon her, and so far as they purport in any way to deal with the residuary estate of Mohendra Nath Bose that the same may be set aside and cancelled. For the purpose of the objection the defendant Nundo Lall Bose admits that the award and decree were fraudulently obtained, but his counsel contends that, even admitting this, inasmuch as the plaintiff was a party to the decree-proceedings in the Court at Alipore, she is estopped by that decree, and cannot in this Court set it aside; that whatever relief she may be entitled to in respect of the decree-proceedings must be taken in the Court which pronounced the decree, and the relief which she claims cannot be granted in this Court; and that a bill to set aside a decree for fraud is in the nature of a bill of review, and must be filed in the Court in which the decree was obtained.

A number of text books and authorities have been cited, and as is not unusual opinions and decisions somewhat conflicting are to be found as to whether or not an innocent party would be allowed to prove in one Court that a judgment against him in another Court was obtained by fraud. It is clear that a guilty party would not be permitted to defeat a judgment

(1) (1837) 8 Sim. 279 (304).

by showing that in obtaining it he had practised an imposition on the Court; but can an innocent party, who may apply directly to the Court which pronounced the judgment to vacate it, apply to another Court to set it aside? The author of Taylor on Evidence suggests a doubt as to this, p. 1133, 9th edition, as does also the author of Kerr on Frauds. In the case of *Aushutosh Chandra* v. *Tara Prassanna Roy* (1) the Court held that for the purpose of setting aside a decree passed in pursuance of a compromise come to out of Court there were two available modes of procedure—(1) by suit; (2) by a review of the judgment sought to be set aside, the latter being the more regular mode of procedure. In that case Wilson, J., abstained from saying whether, if a suit were brought **[908]** it ought to be brought in the Mofussil where the decree was obtained, or on the original side of this Court. The principles upon which judgments are set aside for fraud is tersely and forcibly stated by Lord Chief Justice De Grey in *Meadows* v. *Kingston* (2) thus: "Fraud is an extrinsic collateral act which vitiates the most solemn proceedings of Courts of Justice." In the *Queen* v. *Saddlers' Company* (3) Willes, J., says: "A judgment or decree obtained by fraud upon a Court binds not such Court nor any other, and its nullity upon this ground, though it has not been set aside or reversed, may be alleged in a collateral proceeding." In applying this rule it matters not whether the impeached judgment has been pronounced by an inferior tribunal or by the highest Court of Judicature in the realm; in all cases alike it is competent for every Court, whether superior or inferior, to treat as a nullity any judgment, which can be clearly shown to have been obtained by manifest fraud, *Shedden Patrick* (4), *Fabula, non judicium hoc est, in scena non in foro res agitur.* In the case of *Bandon* v. *Becher* (5), where sales of estates had fraudulently taken place under decrees of the Court of Exchequer in Ireland obtained by collusion between the tenant-for-life, the mortgagor, the person in whose favour a charge had been created, and the purchaser, and where the interests of the tenant in remainder had not been protected, the Court of Chancery in Ireland on the tenant in remainder coming into possession granted him relief on a bill filed to redeem. The House of Lords affirmed that decree, and held that though the Court of Chancery cannot review or correct a decree of the Court of Exchequer, yet where such decree has been obtained collusively and fraudulently a party whose interests are affected by it may raise in the Court of Chancery either as actor or defender a question as to its validity. In this case the remainder man was not a party to the collusive proceedings; the tenant-for-life represented the estate of the mortgagor.

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[909] In the case of *Flower* v. *Lloyd* (6), which is relied on by the defendant, where final judgment had been pronounced by the Court of appeal dismissing an action with costs, it was held that the plaintiff was not entitled by motion in that action to apply to the Court of appeal for leave for the rehearing of the appeal on the ground of the subsequent discovery of facts showing or tending to show that the order of the Court of appeal was obtained by fraud practised on the Court below. That application was, however, refused on the ground that the Court of appeal having once determined an appeal was *functus officio* and had no further jurisdiction in the matter. The Court, however, intimated that the plaintiffs had another proceeding open to them, namely to bring an independent

(1) 10. C. 612.
(2) (1775) 2 Amp. 756.
(3) (1863) 10 H. L. C. 404 (431).
(4) (1854) 1 Macq. H.L.C. 607.
(5) (1835) 3 Cl. &. Fin. 479.
(6) (1877) 6 L.R. Ch. D. 297.

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action to set aside the decree for fraud. Such action was subsequently brought before Vice Chancellor Bacon, who gave judgment for the plaintiffs. On appeal the Court of appeal was of opinion that fraud was not proved, and dismissed the action ; *Flower* v. *Lloyd* (1). On this appeal a doubt was expressed by James, L. J., as to whether or not an action was maintainable to impeach a judgment on the ground alleged by the plaintiffs, namely, falsehood and fraud practised upon an expert named by the plaintiffs and not objected to by the defendants for the purpose of inspecting the defendants' process for printing on metal plates.

"Where" said he (James L. J.,) " is litigation to end if a judgment obtained in an action fought out adversely between two litigants *sui juris* and at arm's length could be set aside by a fresh action on the ground that perjury had been committed in the first action or that false answers had been given to interrogatories."

Baggallay, L. J., declined to express an opinion on this question, and stated that he should much regret to feel himself "compelled to hold that the Court had no power to deprive the successful but fraudulent party of the advantages to be derived from what he had so obtained by fraud." Brett, L.J. **[910]** in a later case commenting on the doubts expressed by James, L. J., in *Flower* v. *Lloyd* (1) says " It seems to me the fraud alleged in that action was probably fraud on the part of certain servants of the party and not fraud brought home to the party himself ; *Abouloff* v. *Oppenheimer & Co.* (2)." It is to be observed in passing that in the case of *Flower* v. *Lloyd* (1) the plaintiff and the defendant were at arm's length fighting out a real suit.

In the present case the fraud alleged is the fraud of the first defendant in procuring the plaintiff's consent to the agreement to refer to arbitration and her consent to a decree upon the award, the true fact being that she was a mere puppet in the hands of the defendants and knew not what she was doing ; that in fact the defendants deceived the Court by their fraudulent conduct. I have been referred by counsel for the first defendant to the statement of Phipson in his useful book on Evidence, where he says : " Proof of fraud however can in general only be taken advantage of by a stranger to the judgment who is in no way privy to the fraud and not by a party, since if the latter were innocent he might have applied to vitiate the judgment and if guilty he cannot escape the consequence of his own wrong." This no doubt, as a general proposition, is true. The judgment of a Court of competent jurisdiction is in general undoubtedly conclusive proof in subsequent proceedings between the same parties or their privies of the matter actually decided. Likewise foreign judgments *in personam* are, subject to certain grounds of impeachment, conclusive between parties and privies, yet it has been held that a foreign judgment obtained by the fraud of a party to the suit in the foreign Court cannot be enforced by him in an action brought in an English Court. In the case of *Abouloff* v. *Oppenheimer & Co.* (2), to which I have referred, it was held that even although the question whether the fraud had been perpetrated was investigated in the foreign Court, and it was then decided that the fraud had not been committed, the judgment would not be enforced in England. In that case to an **[911]** action claiming the value of goods and brought upon a foreign judgment whereby the defendants were ordered to return to the plaintiff the goods or to pay to her their value, the defence was that the judgment was obtained

(1) (1878-79) L.R. 10 Ch. D. 327. (2) (1882) L. R. 10 Q. B. D. 295 (307).

by the false representation to the foreign Court by the plaintiff that the goods were not then in her possession and by fraudulent concealment by the plaintiff from the Court that the goods then were in her possession. Lord Coleridge, C.J., commenting on the argument, that upon the pleadings in that case it must be taken that the allegations of fraud were brought before the foreign Court and that the foreign Court came to a conclusion against the defendants, and that whether this conclusion was right or wrong on the matters of fact the question of the plaintiff's alleged fraud could not be tried in the Courts of this country, says : " I may state the arguments for the plaintiff also in somewhat different words, namely, that although the Russian Courts at Tiflis were led to decide against the defendants through believing a false state of facts to exist owing to the fraud of the plaintiff, nevertheless the defendants are not now at liberty to say that the judgments against them were procured by that fraud. Certainly this contention seems unreasonable. Many authorities from *Meadows* v. *Kingston* (1) down to our own time have been cited during the argument, but not one of them throws a doubt on the broad proposition that where a judgment has been obtained by the fraud of a party to a suit in a foreign country, he cannot prevent the question of fraud from being litigated in the Courts of this country, when he seeks to enforce the judgment so obtained." Brett, L. J., in that case says: " I cannot help thinking that the same doctrine which is now asserted with regard to a foreign judgment would be applicable to an action brought on a judgment obtained in an English Court other than the Court in which the action is brought. There may be a difference where it is sought to enforce by the process of a Court a judgment of that very Court, because if that judgment has been obtained by improper means the objection does not arise in a new action brought on that judgment, but it arises with regard to the process [912] of the Court to enforce a judgment of its own. In a case of that kind it was perhaps formerly necessary to proceed in a Court of Equity in order to get rid of the judgment, but I doubt whether it was necessary, because, at least in my opinion, a Court of Common Law would have in the exercise of its own jurisdiction set aside a judgment procured from it by deception." And again : " With one exception none of the authorities cited before us in the least militate against our decision ; they all seem to show that the fraud of a party to a suit is an extrinsic and collateral act which will vitiate the judgment. That exception is to be found in the doubts expressed by James, L. J., with the assent of Thesiger, L. J., in *Flower* v. *Lloyd* (2). It seems to me that the fraud alleged in that action was probably fraud on the part of certain servants of the party, and not fraud brought home to the party himself. Moreover it was, as I understand, fraud committed, not before the Court itself at the trial of the action, but previously to the case being brought to a hearing before the Court. If it is to be taken that the doubts of James and Thesiger, L. JJ., related to a fraud of a party to the action, committed before the Court itself for the purpose of deceiving the Court, I cannot, after having heard the present argument, agree with the doubts expressed by them. These doubts are not binding, and no decision as to the effect of fraud was pronounced by these Lords Justices in *Flower* v. *Lloyd*(2)."

Again in the case of *Vadala* v. *Lawes*(3), in which an action was brought by the plaintiff in the English Courts upon a judgment obtained

(1) (1775) 2 Amb. 756.
(2) (1878-79) L. R. 10 Ch. D. 327.
(3) (1890) L. R. 25 Q. B. D. 310.

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in the Court of Palermo, the Italian action was brought upon certain bills of exchange, and the defence raised in the Italian action was that the bills were given in respect of gambling transactions by an agent of the defendant without his authority. It was held that the defendant might raise the defence that the judgment was obtained by the fraud of the plaintiff, even though the fraud alleged was such that it could not be proved without retrying the question adjudicated upon by the foreign Court. Lindley, L. J., in the course of his [913] judgment says: "But we now come to another and a more difficult question, and that is whether this defence can be gone into at all. There are two rules relating to these matters which have to be borne in mind, and the joint operation of which gives rise to the difficulty. First of all there is the rule which is perfectly well established and well known that a party to an action can impeach the judgment in it for fraud. Whether it is the judgment of an English Court or of a foreign Court does not matter; using general language, that is a general proposition unconditional and undisputed. Another general proposition which, speaking in equally general language, is perfectly well settled, is that when you bring an action on a foreign judgment you cannot go into the merits which have been tried in the foreign Court. But you have to combine those two rules and apply them in the case where you cannot go into the alleged fraud without going into the merits."

The case of *Carew* v. *Johnston* (1) is an instructive illustration of the power which a Court of concurrent jurisdiction will assume in a matter of this kind. In that case a decree for foreclosure on sequestration in 1777 against an absent mortgagor known by the plaintiff to be of weak and feeble understanding and incompetent to conduct his affairs, where advantage had been taken in the account of the estate of the defendant and of his absence and of his having no one to manage his defence, and a sale had in 1780 in pursuance of such decree to the person under whose directions the proceedings were taken, were set aside as fraudulent on an original bill filed for that purpose by the heir of the mortgagor in 1785. Lord Redesdale in the course of his judgment says: "On the whole I think it is impossible for me to hold the decree, which has been pronounced conclusive on the party. If I should be of opinion that the party has brought himself completely within the saving of the Act I cannot pay any attention to the decree, I must treat it as a nullity; but if I should think that he has not brought himself precisely within the saving of the Act by the allegation in his bill, then I must decide on the ground of unconscientious advantage being (by means of a Court of Justice) taken [914] of the imbecility and of the absence of this man, by which gross injustice has been done, and in fact a fraud practised on the Court. That would not be a ground for relieving against trifling errors or little inaccuracies, but it will be a ground for relieving against palpable injustice, such as could not have existed, if anybody had appeared for this man to state his rights, and the Court or the Master had entered into considerations of the subject, and acted upon the instruments which were the foundations of the proceedings."

The statement of Lindley, L.J., in *Vadala* v. *Lawes* (2) is consistent with the view of Vice-Chancellor Shadwell expressed in the case of *Price* v. *Dewhurst* (3), namely: "The Court by means of the injunction set aside

(1) (1805) 2 Sch. and Lef. 280.
(2) (1890) L.R. 25 Q.B.D. 310.
(3) (1837) 8 Sim. 279.

the judgment of a foreign Court, and the ground on which the Court proceeded was that the foreign judgment had been obtained by fraud." "Now I take that to be quite consistent," says the Vice-Chancellor, "with the principles on which this Court acts; and it is of no consequence where the judgment is given if it appear to have been obtained by fraud; in every such case the Court will consider it as a nullity." In *Cole* v. *Langsford* (1) a judgment which had been obtained by fraud was set aside in an action brought for that purpose. In *Priestman* v. *Thomas* (2), which was an action in the Probate Division, in which C. Thomas and E. Gunnell propounded an earlier and H. W. Priestman propounded a later will, the action was compromised and by consent a verdict and judgment were taken for establishing the earlier will. Priestman discovered that the earlier will was a forgery, and in an action in the Chancery Division, to which Thomas and Gunnell were parties, obtained the verdict of a jury to that effect, and judgment that the compromise should be set aside on the ground that the compromise was obtained by the fraud of Thomas and that the will was a forgery. In another action in the Probate Division for revocation of the probate of the earlier will, it was held affirming **[915]** the decision of the President of the Probate Division that Thomas and Gunnell were estopped from denying the forgery.

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In the case of *Eshan Chunder Safooi* v. *Nundamoni Dassee*(3), it was held that where a person acting for a minor has fraudulently withdrawn the minor's suit under s. 97 of Act VIII of 1859 without obtaining leave to bring a fresh suit, and by such withdrawal an absolute statutory prohibition is imposed on the minor from bringing a fresh suit, it was open to the minor to relieve himself from the consequences of the fraud in one of three ways: (1) by an application to the Court in the suit in which the withdrawal took place; (2) by a regular suit to set aside the judgment founded upon the withdrawal; or (3) by bringing a fresh suit for the same purpose and setting up the fraud as an answer to the statutory bar.

The latest English case on the subject is that of *Wyatt* v. *Palmer* (4), where Lindley, L. J., says: "The proposition that an action would not lie to set aside a judgment by default on the ground that it had been obtained by fraud could not be sustained. There was no reason for saying that because the rules (that is the English Judicature rules) provided a summary method of setting aside such a judgment, it was no longer possible to have recourse to the older method of setting it aside by action. This procedure did not interfere with the old jurisdiction of the Court of Chancery, under which a decree or judgment might be impeached on the ground of fraud by filing a bill."

Nowhere, however, is there to be found a clearer exposition of the law on this subject than in the judgment of Lord Brougham in *Bandon* v. *Becher* (5). "The first ground," says he, "of objection assigned appears to be one of form, but in fact it is one of substance, for it goes to the jurisdiction. It is said that the whole of these proceedings spring from a decree of the Court of Exchequer in Ireland, and that that decree being pronounced by a Court of competent jurisdiction, upon parties legally before it **[916]** cannot now be questioned in another Court of co-ordinate jurisdiction; but if brought into dispute at all, should be brought into dispute in the Court where it was originally pronounced. I agree generally to the

(1) (1898) 2 Q. B. 36. (2) (1884) L.R. 9 P.D. 70, 210. (3) 10 C. 357.
(4) W. N. (20 May 1899), p. 74. (5) (1835) 3 Cl. & Fin. 479.

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proposition, but I must add to it this one qualification, that you may at all times in a Court of competent jurisdiction,—competent as to the subject matter of the suit itself—where you appear as an actor, object to a decree made in another Court, upon which decree your adversary relies; and you may, either as actor or defender, object to the validity of that decree, provided it was pronounced through fraud, contrivance or covin of any description, or not in a real suit; or if pronounced in a real and substantial suit, between parties who were really not in contest with each other. That it is undeniably true that the Court of Chancery has no right to review a decree of the Court of Exchequer; that nothing but a Court of Appeal can give redress if such decree is erroneous, is clear, and indeed nothing can be more true than such a proposition; but it is equally true, that if the decree has been obtained by fraud it shall avail nothing for or against the parties affected by it, to the prosecution of a claim, or to the defence of a right. These two propositions are undeniably true; they are recognised in practice; they are independent of each other, and they stand well together." And then he quotes the language of Mr. Solicitor General Wedderburn summing up all the authorities, *viz.*: "A sentence is a judicial determination of a cause agitated between real parties upon which a real interest has been settled; in order to make a sentence there must be a real interest, a real argument, a real defence, a real decision. Of all these requisites not one takes place in the case of a fraudulent and collusive suit: there is no Judge, but a person invested with the ensigns of a judicial office is misemployed in listening to a fictitious cause proposed to him; there is no party litigating, there is no party defendant, no real interest brought into question."

I should refer to the case of *Allen* v. *Macpherson* (1), which has been strongly relied upon by the defendant's counsel. That was the case of a will in which the Ecclesiastical **[917]** Court had exclusive jurisdiction. The Courts of Equity were bound to receive as testamentary a will in all its parts which had been proved in the proper spiritual Court, though in certain cases they might affect with a trust a particular legacy or residuary bequest which had been obtained by fraud. Also where probate has been obtained by fraud on the next-of-kin, Equity interferes and either converts the wrong-doer into a trustee in respect of such probate or obliges him to consent to a revocation of the grant of probate in the Court in which it was obtained (Mitford's Pleas of the Crown, 257, 4th ed). In *Allen* v. *Macpherson* (1), the plaintiff unsuccessfully resisted the admission to probate of a codicil, which revoked a bequest to him on the ground that the codicil had been obtained by fraud. He thereupon filed a bill in Chancery to set aside the probate. A majority of the House of Lords held that this was in effect an attempt to review the decision of a Court of Probate by the Court of Chancery, and that the proper course would have been to appeal to the Judicial Committee of the Privy Council. If there had been an appeal to the Privy Council the Judicial Committee of the Privy Council might have beenput in conflict with the House of Lords, they both being Courts of the last resort.

Now, the fraud charged in this action being admitted for the purposes of this preliminary objection, let us see how the facts alleged which constitute the fraud stand. The plaintiff is a *purdanashin* lady, wife of the deceased Mohendra Nath Bose and sister-in-law of the first and second defendants. She lived with the defendants and Nundo Lall Bose had and

(1) (1841) 5 Beav. 469; (1847) 1 H. L. C. 191.

exercised considerable influence over her. While she was living under his care and guardianship he both personally and through his son induced her to put her name to documents, the purport and effect of which were not explained to her, and none of which she understood. Nundo Lall Bose was a man who professed to lead a strictly religious life, and the plaintiff was under the belief that he was incapable of doing anything to hurt her interest. She had entire confidence in him, and relied upon his assurances that he would properly safeguard her rights, and that the documents and papers did not in any [918] way injuriously affect her interests. Her signature to the agreement to refer to arbitration and to the petition upon which the decree was granted was thus obtained, and she had no independent advise or assistance. The matters dealt with in the award were of an involved and intricate nature and required a knowledge of the circumstances of a large family estate.

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In consequence of their helpless and dependent position the Courts of this country have found it necessary to extend special protection to *purdanashin* women. In the case of *Kanai Lal Jowari* v. *Kamini Debi* (1) Mr. Justice Phear says at p. 32 : "I may remark that I have more than once felt myself obliged to hold that a Hindu *purda*-woman is entitled to receive in this Court that protection which the Court of Chancery in England always extends to the weak, ignorant, and infirm, and to those who, for any other reason, are specially likely to be imposed upon by the exertion of undue influence over them. The undue influence is presumed to have been exerted unless the contrary be shown. It is, therefore, in all dealings with those persons who are so situated, always incumbent on the person who is interested in upholding the transactions to show that its terms are fair and equitable. The most usual mode of discharging this *onus* is to show that the lady had good independent advice in the matter, and acted therein altogether at arm's length from the other contracting party."

The position of the plaintiff, if her case be true—and I must assume for the purposes of this argument that her case is true—is much the same as that of the party of weak intellect referred to in the case of *Carew* v. *Johnston* (2), whose helplessness was taken advantage of by the mortgagee and his estate foreclosed. No intelligent consent was given by her to the institution or carrying out of the award or to its embodiment in the decree of the Alipore Court.

If the plaintiff's case be true, I am of opinion that a decree so obtained cannot stand, and that this Court has jurisdiction if not [919] to set it aside at least to treat it as a nullity and render its effect nugatory.

There is another aspect of the question. Can it be said that there was, so far as the plaintiff is concerned, any real suit between her and the defendants? The matters in difference were between Nundo Lall Bose and Pasupathi Nath Bose. This is so recited in the agreement to refer to arbitration. The plaintiff took no active part in the arbitration proceedings. She was not represented at them by any adviser. She lent her name to the proceedings by signing documents at the instance of the defendant Nundo Lall Bose, and without understanding their import. Was this a real proceeding between her and the defendants, or was it a sham? An interesting case having a bearing on this question is the case of *Girdlestone* v. *Brighton Aquarium Co.* (3). In that case the defendants kept open the Brighton Aquarium on a Sunday, and so incurred a penalty under the

(1) (1867) B. L. R. O. C. 31, note. (2) (1805) 2 Sch. & Lef. 280.
(3) (1878) L R. 3 Exch. D. 137.

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Statute, 21 Geo. 3, chap. 49. One Rolfe, at the request of the defendants, their object being to protect themselves from all actions in respect of penalties, brought an action against the Company, at the same time verbally agreeing that the defendant Company should be at liberty to make any use they pleased of the action, and that he would not issue execution or claim penalties. Judgment was obtained in Rolfe's action. In a subsequent action by Girdlestone against the Company for penalties, the Company pleaded in bar the previous judgment, and the plaintiff replied that the judgment was obtained by fraud and collusion. It was held that the first judgment was obtained by covin and collusion, and that such a fictitious judgment is no judgment at all to affect the rights of third parties. In the Court of appeal (*Girdlestone* v. *Brighton Aquarium Co.* (1)) it was held that the judgment recovered was no bar to an action for the same offence by a different plaintiff, by Thesiger, L. J., on the ground that it was procured by covin and collusion, by Brett, L. J., on the ground that the judgment had been recovered in an action in which the defendants were in truth both plaintiffs and defendants, and by Cotton, L. J., on both grounds.

[920] In the course of his judgment Brett, L. J., says: "The defect in the judgment which was obtained seems to me to have arisen from the over-caution of the defendant's solicitor. If he had asked the person Rolfe to bring the action, and if Rolfe had instructed a solicitor to bring the action, and he had brought it, although he had bound himself, as it is said, in honour not to insist upon the payment of the penalty, in the absence of a finding of any fraud by the jury, I should have thought that judgment was valid, and that it could not have been set aside under a plea of covin and collusion, because the plea of covin and collusion is not proved in its legal effect, unless the jury find there was something wrong in the mind of the parties who had agreed to the judgment. I should think the jury would have to find that there was something wrong in the minds of both the parties. The defendant's solicitor asked Rolfe to allow him, the defendant's solicitor, to bring an action against the defendant's using Rolfe's name, and the supposed plaintiff did not exercise any judgment upon the action. He exercised no control. He did not instruct anybody, he did not become liable to anybody for what was done; he did not know of the course of the action, he did not, in fact, so far as I see, know whether the action was brought or not. The only thing that happened was that he was asked whether he would lend the defendant's solicitor his name in order that the defendant's solicitor might bring an action against the defendants. It shows to my mind that Rolfe never was a plaintiff, and that the only plaintiff in that suit was the defendant's Company. Therefore the defendant's Company were the plaintiffs in that suit, and they were also the defendants; therefore the judgment recovered in form was no judgment—no judgment which can be said to have been recovered by a third party."

It appears to me that there is some analogy between that and the present case. The plaintiff was in truth no party to the proceedings. So far as she was concerned there was no matter of difference; there was "no real argument, no real prosecution, no real defence, no real decision. *Fabula non judicium hoc est, in scena non in foro. res agitur.*" I am of opinion, for the foregoing reasons, that the defendant's contention is wholly unsustainable.

(1) (1879) L. R. 4 Exch. D. 107.

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[921] I now come to the other preliminary objections which have been raised.

It is objected that no leave under s. 12 of the Charter can be obtained to set aside leases of property situate outside the jurisdiction of this Court, the suit being one for land outside the jurisdiction. This has reference to the allegation in the plaint that the defendants Nundo Lall Bose and Pasupathi Nath Bose made leases to themselves of portion of the estate of Mohendra Nath Bose, and to the claim that these leases were irregular, and as against the estate of Mohendra Nath Bose should be set aside. Mr. Hill contends that the relief so sought converts this suit into one partly for immoveable property, or at any rate for a declaration of title to immoveable property ouside the jurisdiction. This is not so in my opinion. The suit is one for the administration of the real and personal estate of Mohendra Nath Bose, a portion of whose immoveable property is without the jurisdiction, while other portions are within the jurisdiction of this Court. The suit is merely to have this property administered under the direction of the Court, and for this purpose, if it be found that the trustees or executors have been guilty of misappropriation of assets or mal-administration of the estate, to compel them personally to make amends. This does not turn the suit into one for the recovery of immoveable property. If the trustees had assigned some of the properties to a stranger, and recovery of the property from such stranger had been sought in the action, a question of jurisdiction might arise; but here it is the executors, in whom the property was vested by the will of the deceased, who are alone sought to be made responsible for an alleged act of mal-administration, namely, the granting of leases of part of the trust estate to themselves. Counsel for Nundo Lall Bose points out that the plaintiff was a party to the leases, and that this alters the complexion of the matter. It is true that she was a party to the leases, but she says that her concurrence was obtained by fraud of the defendants, and, if this be so, the defendants cannot rely upon her concurrence. The Court assumes jurisdiction in regard to immoveable properties situate outside the jurisdiction in cases where it can act *in personam*, either to compel the owner to give effect to [922] legal obligations into which he has entered or to a trust reposed in him. All that is sought here is that the Court in administering this estate shall act *in personam* and compel the trustees and executors to fulfil their obigations. This objection, therefore, in my opinion is unsustainable.

The next objection is that the plaintiff's claim to set aside the trust deed of 1877 is bad on the ground of non-joinder of the parties beneficially entitled under the deed. The surviving trustee is a party to the action, as are also two beneficiaries, namely, the defendants. This deed purports to deal with the estate of Mohendra Nath Bose, but is very obscure in its language. It may be necessary for the Court to determine whether or not the estate is affected by it, and possibly it may be necessary hereafter to direct an independent action to be brought to have it set aside. I fail to see, however, that there is any substance in the objection as to non-joinder now raised.

The next question is that leave under s. 44 of the Code has not been obtained to join the several causes of action. Such leave, in my opinion, is entirely unnecessary. There are not several causes of action; the suit is one to administer the assets of a deceased person, and the fact that in the claim acts of mal-administration are complained of, and sought to be redressed, does not render it multifarious.

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In the case of *Pointon* v. *Pointon* (1) where three out of four testator's children, residuary legatees (the fourth being out of the jurisdiction) filed a bill against their mother, the tenant-for-life, and their uncle (who had carried on business in partnership with their father) and who were executrix and executor and trustees of the will, alleging that the uncle had possessed himself of and employed the estate of the testator and had occasioned great loss to it; that he had mismanaged the partnership business; that he intended to get in and to apply the outstanding debts to his own use; and that he had bought at a valuation a portion of the estate, but had not paid the purchase-money; and praying for accounts of the estate of the testator, and of what the uncle had or but for his wilful default and neglect might have received; **[923]** and that he might be charged with what was now due from him in all respects, and with all losses occasioned by his mismanagement, and for a receiver and for an injunction, a demurrer by the uncle for multifariousness and for want of parties was overruled.

The frame of that suit is not unlike that of the present suit.

In the course of his judgment the Vice-Chancellor says: "Next, as to the question of multifariousness, I think that there is no more in the objection on that ground than there is in that for want of parties. There are three analogous vices to which bills in equity are subject—misjoinder of plaintiffs, misjoinder of defendants, and multifariousness or misjoinder of subjects of suit. It is the last which is imputed to this bill. Multifariousness, properly so called, exists when one of the defendants is not interested in the whole of the relief sought, as the old form of the demurrer for multifariousness shows. Misjoinder of subjects of suit is where two subjects distinct in their nature are united in one bill, and for convenience sake the Court requires them to be put in two separate records. The case of *Salvidge* v. *Hyde* (2), in which the bill was for the administration of a testator's estate, and to set aside a sale made of part of it by the executor, was an instance of this. There the Court refused to allow the two subjects to be united, although the plaintiff was interested in each, and the defendants were liable in respect of each. In the present case the misjoinder is of this nature; the suit is first an ordinary suit against the devisees in trust and executors for the administration of the real and personal estates of the testator; and, secondly, the plaintiffs claim to have the partnership accounts taken as between the testator's estate and the defendant William Pointon the testator's partner and one of the executors and trustees; and then the suit is further complicated in this way: It is alleged that William Pointon has sold to himself or taken possession of the partnership assets at a valuation under a power in the will, and that he has not paid for them. It is suggested that not only is the price of such assets in his hands, but that he having sold to himself without payment, what was purported to be **[924]** sold remains assets of the testator till the price is paid. If a trustee, who is entitled to take property at a valuation has a valuation made, but does not pay the money, nothing passes; until the money has been paid he has no interest in the property. It is not necessary to consider whether the plaintiffs are or are not entitled to all the relief which they ask; but the question is whether the various subjects as to which relief is sought are such as if fit for discussion can be properly dealt with in one suit. This is, of course, a matter of discretion. The Court will not allow distinct subjects to be mixed up in one suit when it would be inconvenient to the Court or unfair to some

(1) (1871) L.R. 12 Eq. 547. (2) (1821) Jacob 151=5 Madd. 138.

one or more of the parties to it ; but not one of these considerations or of those mentioned in the case of *Campbell* v. *Mackay* (1) applies to the present case."

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Again in *Coates* v. *Legard* (2), the same principle is laid down.

I have now dealt with all the preliminary objections. As to the costs of the arguments it seems to me that it would be wrong to make the estate bear these costs, and I, therefore, order the first defendant to pay the plaintiff the costs of this argument and to abide his own costs. The costs of the second defendant I reserve.

Attorney for the plaintiff : Babu *Romesh Chandra Basu.*

Attorney for the defendant Nundo Lall Bose : Babu *Hirendro Nath Dutt.*

Attorney for the defendant Pasupati Nath Bose : Messrs. *G. C. Chunder & Co.*

D. S.

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26 C. 925.

[925] APPELLATE CIVIL.

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, and Mr. Justice Banerjee.

DURGA CHARAN NASKAR (*Defendant*) v. DOOKHIRAM NASKAR (*Appellant*).* [28th April, 1899.]

Pauper suit—Application for leave to appeal as a pauper—Time of presentation of memorandum of appeal—Consent of the applicant to pay sufficient Court-fee after the statutory period of limitation—Sufficient cause—Limitation Act (XV of 1877), *s.* 5—*Civil Procedure Code (Act XIV of* 1882), *s.* 582*A.*

A suit was brought *in forma pauperis* on behalf of a minor represented by his next friend in the Court of the Munsif, and it was dismissed under some alleged compromise. An appeal was preferred to the District Judge within time, but the memorandum of appeal was insufficiently stamped. An application was also filed with the memorandum of appeal for leave to appeal *in forma pauperis.* At the time of the hearing of the said application objection having been taken by the respondent that the minor had become entitled to certain immoveable property, those representing the minor offered to pay proper Court fees on the memorandum of appeal within a month. The Court allowed that to be done in the presence of both parties and admitted the appeal. The Court fees were also paid within the time allowed. On an objection by the defendant, appellant in the High Court, that the appeal by the plaintiff in the lower appellate Court was out of time.

Held that, inasmuch as the appeal was admitted by the District Judge without any objection from the defendant, the case came either under s. 5 of the Limitation Act or under s. 582A of the Civil Procedure Code, and, therefore, the appeal was not out of time.

[**F.**, 13 Ind. Cas. 73=52 P.L.R. 1912=34 P.W.R. 1912; **Rel.**, 16 C.P.L.R. 91; **R.**, 1 C.L.J. 500 (508); 159 P.L.R. 1901; 21 Ind. Cas. 866.]

THIS appeal arose out of an action brought by the plaintiff, a minor, *in forma pauperis* for recovery of possession of certain immoveable property which was sold by his mother to defendant No. 1, on the allegation that the *kabala* executed by her was a fraudulent and collusive document, and that she had no legal necessity for the said sale. After the trial had gone on to a considerable length the suit was dismissed under some alleged

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* Appeal from Order No. 399 of 1898, against the order of Babu Balloram Mullick, Subordinate Judge of 24-Pergunnahs, dated the 28th of July 1898, reversing the order of Babu Soshi Kumar Ghose, Munsif of Alipur, dated the 2nd of September 1897.

(1) (1837) 1 My. & Cr. 603. (2) (1874) L.R. 19 Eq. 56.

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compromise by [926] the Munsif on the 2nd September 1897. The decree was passed on the 13th September. Against this order an appeal was filed on the 25th September 1897 by a different guardian of the minor appointed under the order of the District Judge, but the memorandum of appeal was insufficiently stamped. With the memorandum of appeal an application was also filed for leave to appeal *in forma pauperis*. At the time of the hearing of this application before the District Judge, an objection having been taken on behalf of the defendant that the minor had become entitled to certain immoveable property, the guardian offered to pay the proper Court fees on the memorandum of appeal within a month. The Court allowed that to be done in the presence of both parties and admitted the appeal. The Court fees were paid within the time allowed. The appeal was transferred from the file of the District Judge to the Subordinate Judge. A preliminary objection was taken on behalf of the respondent to the hearing of the appeal on the ground that it was filed out of time. The Subordinate Judge overruled this objection, and on the merits he found in favour of the plaintiff and remanded the case to the Court below for proper trial.

Against this order of remand the defendant appealed to the High Court.

Dr. *Ashutosh Mookerjee*, for the appellant.

No one appeared for the respondent.

The following judgments were delivered by the High Court (MACLEAN, C. J., and BANERJEE, J.) :—

JUDGMENTS.

MACLEAN, C.J.—This is an appeal from a decision of the Subordinate Judge of the 24 Pergunnahs, dated the 28th July 1898, and the only point discussed before us is that of limitation, in other words, was the appeal out of time ?

The following are the admitted facts. The decree in the suit, in which the present appellant, a minor, suing by a next friend and *in forma pauperis*, was plaintiff, was passed on the 13th September 1897, and the suit under some alleged compromise, was dismissed. The memorandum of appeal was filed on the 25th September 1897, and the memorandum was stamped, but not [927] sufficiently stamped. With this memorandum was filed an application on behalf of the appellant for leave to appeal *in forma pauperis*. There appears to have been some delay, or perhaps negligence, on the part of those acting for the minor in bringing on this application, and it was not heard until the 23rd December 1897, when notice was ordered to be served upon the defendants, including the present appellant. Notice was served, but they did not appear until the 12th March 1898, when they alleged that the infant had become entitled to certain immoveable property, and that consequently he ought not to be allowed to prosecute the appeal *in forma pauperis*. The matter came on for hearing on the 21st March 1898, before the District Judge, when those representing the minor, not desiring, possibly, to contest the allegation as to the infant having property, offered to pay the proper Court fees on the memorandum of appeal within a month, and, in the presence of both parties, the Court allowed that to be done, and admitted the appeal, and the Court-fees were actually paid on the 19th April 1898.

It is now said that the appeal is out of time, and that it must be taken to have been filed as on the date when the Court-fees were actually paid, *i.e.*, on the 19th April 1898, which would be out of time, and not on the 25th September 1897, when the memorandum of appeal was filed.

There is some conflict of view upon the point in the reported cases in the various High Courts. The appellant is supported by the cases of *Abbasi Begam* v. *Nanhi Begam* (1) and *Balkaran Rai* v. *Govind Nath Tiwari* (2), and also relies upon the case of *Duncan* v. *Bhoyro Prosad* (3). The respondent is not represented before us, but the case of *Bai Ful* v. *Desai Manorbhai Bavanidas* (4), has been referred to by the learned vakil for the appellant as a distinct authority in his favour, whilst possibly he may place some reliance upon the principle of the Privy Council case of *Skinner* v. *Orde* (5). But having regard **[928]** to the particular circumstances of this case, I scarcely think it is necessary to go into these cases. We are here dealing with the case of a minor not of an adult litigant. A minor of tender years—in the present case it does not appear what his age is, though it is said he is near his majority—can know nothing about his property, and those acting for him may not know much more. Here the minor had been allowed to conduct the suit *in forma pauperis*, and there is nothing to show that those acting for him knew that he had come into any property when the appeal was presented. It is not unreasonable that his advisers, seeing he had been allowed to sue in the first Court *in forma pauperis*, may have supposed that the same liberty would be given as regards the appeal, and that the memorandum of appeal was insufficiently stamped on this view. Again, the District Judge has admitted the appeal without any objection from the present appellant. No objection was then taken that the appeal ought not to be admitted on the ground that it was out of time. Under these circumstances it must, I think, be taken that the District Judge thought that the appeal ought to be admitted, and that a case had been made out under s. 5 of the Limitation Act of 1877 for its admission, or that it came within the purview of s. 582A of the Code of Civil Procedure. Under these circumstances I am not disposed to hold that the appeal was out of time. The present appeal must be dismissed.

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BANERJEE, J.—I am of the same opinion. The only point urged before us is that the appeal before the lower appellate Court was barred by limitation. The ground upon which the learned vakil for the appellant contends that that appeal was barred if, that the appeal was originally presented upon an insufficiently stamped paper, along with an application for leave to appeal *in forma pauperis*, and the deficiency in the Court fee stamp was not supplied until after the time for appealing had expired.

I do not consider this contention sound. For, though the lower appellate Court had not, under the present law, the same power that a Court of appeal had under s. 371 of Act VIII **[929]** of 1859, of allowing an applicant for leave to appeal *in forma pauperis*, after the application was rejected, a reasonable time for preferring the appeal on a proper stamp, it had power, under s. 582A of the present Code of Civil Procedure, to grant such reasonable time when the insufficiency of the stamp upon the memorandum of appeal was caused by mistake on the part of the appellant. It had power also under s. 5 of the Limitation Act to admit the appeal out of time if there was sufficient cause shown for the delay. And the question is, whether it can be said that, in the present case, the insufficiency of the stamp was caused by a mistake on the part of the appellant, or whether it can be said under the circumstances of the case that there was sufficient cause shown for the delay.

(1) 18 A. 206 (208). (2) 12 A. 129 (144). (3) 22 C. 891.
(4) 22 B. 849 (855). (5) 8 I. A. 126 = 2 A. 241.

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Now this is how the facts stand. The appellant in the Court below, who is a minor represented by his next friend, and who was the plaintiff in the first Court, was allowed to sue *in forma pauperis* in that Court. He preferred the appeal on an insufficient stamp, along with an application for leave to appeal *in forma pauperis*; an objection was taken by the other side against his being allowed to do so, on the ground of his having acquired some property subsequent to the institution of the suit; he then offered to put in the necessary Court fee; and time was allowed to him to do so. The insufficiency of the stamp upon the memorandum of appeal was evidently caused in this instance by the appellant thinking, erroneously as it now turns out to be, that he was entitled to appeal *in forma pauperis*, and I do not see any reason why a case like this should be deemed not to come within the scope of either s. 582A of the Code of Civil Procedure or of s. 5 of the Limitation Act. As I understand those provisions of law, they are evidently intended to cover a case like this, as well as other cases, where the insufficiency of the stamp upon the memorandum of appeal is due to mistake, or where there is other good and sufficient cause for not presenting an appeal in proper form in time. For if the case of an unsuccessful application for leave to appeal *in forma pauperis* were held to be outside the scope of these provisions, the result will be this, that, however honest the impression of an applicant for leave to appeal *in forma pauperis* **[930]** may be, that he ought to be allowed to appeal as a pauper, unless his application is either granted or rejected before the time for appealing expires, his appeal will be altogether barred by limitation and he will have no chance of preferring an appeal upon a proper stamp. It would be unreasonable to hold that every applicant for leave to appeal as a pauper must anticipate the decision of the Court, and that he must lose his right to appeal altogether unless he can be sure that his application for leave to appeal as a pauper will be granted. The case, therefore, comes either under s. 582A of the Code of Civil Procedure or under s. 5 of the Limitation Act.

It was lastly argued that the lower appellate Court has not found that the insufficiency of the stamp on the memorandum of appeal was in this case caused by mistake; or that there was sufficient cause shown for the delay in presenting the appeal on a proper stamp. To that the answer is, that the appeal was admitted by the District Judge in the presence of the pleaders of both parties, and no exception was then taken. The Court admitting the appeal had power to do so under s. 582A of the Code of Civil Procedure, or under s. 5 of the Limitation Act; and under the circumstances of this case I do not think it is open to the appellant before us now to contend that, because the lower appellate Court has not expressly found that the insufficiency of the stamp was caused by mistake, or that there was sufficient cause shown for the delay in presenting the appeal on a proper stamp, we are to hold that the appeal was barred.

There is no suggestion, nor can there be any, that the appeal was presented on an insufficient stamp, on behalf of the minor appellant, otherwise than under an honest mistake. We must take it that in admitting the appeal, the District Judge exercised the power that he possessed under s. 582 A of the Code of Civil Procedure or under s. 5 of the Limitation Act. The view I take is to some extent supported by the case of *Bai Ful* v. *Desai Manorbhai Bhavanidas* (1). The case of *Aubhoya Churn Dey* v. *Bissesswari* (2), cited for the appellant, is distinguishable

(1) 22 B. 849. (2) 24 C. 889.

from the present, as that was a case not of an appeal, but of a suit to which the provisions [931] of s. 582A of the Civil Procedure Code, and of the second paragraph of s. 5 of the Limitation Act do not apply. The same remarks apply to the case of *Abbasi Begam* v. *Nanhi Begam* (1), cited for the appellant. And as regards the case of *Balkaran Rai* v. *Gobind Nath Tiwari* (2), cited for the appellant, I would observe that that was decided before s. 582A was enacted, and the facts of that case were such as excluded the application of the second paragraph of s. 5 of the Limitation Act to it.

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S. C. G. *Appeal dismissed.*

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26 C. 931=3 C.W.N. 614.

APPELLATE CIVIL.

Before Mr. Justice Macpherson and Mr. Justice Stevens.

E. CHRISTIEN *(Plaintiff) v.* P. J. DELANNEY *(Defendant).**
[16th June, 1899.]

Foreign Court, Jurisdiction of—Private International Law—Suit in British Court on foreign judgment—Territorial jurisdiction—British subject—Domicile—Nationality—Indian Evidence Act (I of 1872), *s.* 38—*Decree of Foreign Court, as evidence in Court in British India—Civil Procedure Code (XIV of* 1882), *s.* 13.

A foreign Court has no jurisdiction over a person who is a British subject domiciled and residing in British India, who was not within the territorial jurisdiction of that Court either at the time when a suit was brought against him or previously, and who never subjected himself by any act of his, such as by appearing and defending the suit, to the jurisdiction of that Court. A decree passed by a foreign Court against such a person cannot be given effect to in a Court in British India.

Even if there be in such a case any special territorial legislation giving jurisdiction to the foreign Court, such legislation cannot be recognised by a Court in British India.

Nationality is determined by birth on the soil and not by citizenship by descent.

A statement contained in an unauthorised translation of the Code Napoleon as to what the French law is on a particular matter, is not relevant under s. 38 of the Evidence Act.

There is a distinction between a case in which a defendant puts forward a foreign judgment as a bar to a suit under s. 13 of the Code of Civil [932] Procedure, and a case in which a plaintiff seeks to enforce a foreign judgment. In the former, it may fairly be supposed that the parties submitted to the jurisdiction of the foreign Court.

Gurdyal Singh v. *Raja of Faridkot* (3), followed.

JOSEPH PIERRE DELANNEY, son of a French subject, who had come to the district of Comilla and acquired property in that district, was born and resided permanently in the same district. His father died in Comilla, but was buried at Chandernagore, a French territory. Joseph Pierre Delanney died in France, to which country he had proceeded for a cure, but his body was brought to Chandernagore and buried beside that of his father. He died on the 23rd December 1876, having made a will and a codicil, whereby he appointed his wife Eleanor Jessie Delanney, executrix,

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* Appeal from Appellate Decree No. 36 of 1898, against the decree of B. G. Geidt, Esq., District Judge of Tipperah, dated the 18th of November 1897, reversing the decree of Babu Gopal Chunder Banerjee, Subordinate Judge of that District, dated the 26th of March 1895.

(1) 18 A. 206. (2) 12 A. 129. (3) 22 C. 222=21 I.A. 171.

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and Mr. J. S. Thorpe, executor thereof, and probate of the same was granted by the High Court at Calcutta on the 4th April 1877, to the said Eleanor Jessie Delanney alone. The testator left a son, Pierre Joseph Delanney, the defendant in the present suit, and two daughters. The son was born in Comilla, and has been permanently living there. He calls himself a British subject, and does not, it appears, even know the French language. Although it was provided in his father's will that he was to be appointed executor on his attaining his 22nd year, and although he was 29 years of age at the time of the suit, no probate was granted to him, and his mother was still acting as executrix, though he was managing the estate for her.

By the said will, the testator directed the payment of the sum of Rs. 100 per month to Madam Verjinie Montie, a lady residing at Chandernagore, for her life. Madam Montie died in July 1893, and at that time there was due to her the sum of Rs. 2,500, on account of the annuity payable under the will.

The plaintiff, Emilie Christien, a resident of Chandernagore, brought a suit against the present defendant in the French Court at Chandernagore, for the said sum of Rs. 2,500, on the allegation that she was the universal legatee of the said Madam Montie under a will made by her. The defendant was served with a summons, but did not appear, and judgment was given against **[933]** him in his absence on the 16th September 1893 for the sum claimed with interest and costs.

Upon this judgment and decree passed by the French Court at Chandernagore, the plaintiff instituted the present suit in the Court of the First Subordinate Judge of Tipperah for recovery of the sum of Rs. 2,727-10-0 from the defendant. The defendant, amongst other things contended that the Chandernagore Court had no jurisdiction to make the said judgment, which was not binding on him, and that no decree could be passed against him, as he was not yet legally in actual possession of the estate left by his father. The Subordinate Judge decreed the suit, holding that the French Court had jurisdiction to make the said judgment, which was binding on the defendant, but disallowed the interest decreed by the French Court.

Thereupon the plaintiff appealed to the District Judge against the order disallowing interest, and the defendant also preferred a cross-appeal on the main ground that the decree of the French Court was made without jurisdiction. The District Judge decreed the cross-appeal and dismissed the plaintiff's appeal, holding on the facts that "the defendant is a British subject, and that therefore any jurisdiction which the French Courts assume to exercise over him while outside their territory, cannot be recognised in our Courts."

The plaintiff appealed to the High Court.

Babu *Nil Madhub Bose* and Babu *Shib Chunder Palit*, for the appellant.

The Officiating Advocate-General (Mr. *J. T. Woodroffe*) and Babu *Baikant Nath Dass*, for the respondent.

In the course of the arguments, Babu *Nil Madhub Bose* relied upon arts. 10, 15 and 17 of an English Translation of the Code Napoleon, by Robert Samuel Richards, Esq., M.A., Barrister-at-law, published in London, but not under the authority of the French Government.

The *Officiating Advocate-General* objected that, under s. 38 of the Evidence Act, the book could not be referred to in Court.

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[934] The judgment of the High Court (MACPHERSON and STEVENS, JJ.) was as follows:—

JUDGMENT.

This suit was brought to enforce a judgment which the appellant had obtained against the respondent in the French Court at Chandernagore. The District Judge, reversing the decision of the Subordinate Judge, dismissed the suit on the ground that the Chandernagore Court had no jurisdiction over the respondent, who is a resident of the Tipperah district.

The appellant and her aunt Madame Montie resided in Chandernagore, which is a French territory. Madame Montie was entitled under the will of the respondent's father to a monthly allowance of Rs. 100, and at the time of her death Rs. 2,500 was due to her on that account. The appellant, claiming to be entitled to that sum under her aunt's will, brought an action against the respondent in the Chandernagore Court and obtained the judgment which it is sought to enforce in the present suit. The respondent was served with a summons, but did not appear in the Chandernagore Court and the judgment was given against him in his absence.

The respondent never resided in the French territory at Chandernagore or subjected himself by any acts of his to the jurisdiction of the French Court established there, and he is, the Judge finds, a British subject domiciled in British India. It is found that the respondent's grandfather was a French subject, who came to Comilla, acquired property in the Tipperah district, and died there, but was buried at Chandernagore; that the respondent's father was born and permanently resided in the Tipperah district, but died in France, to which country he had proceeded for a cure, and that his body was at his own request brought to Chandernagore to be laid beside that of his father; that the respondent was born and lives permanently in Comilla, does not even know the French language, and calls himself a British subject.

On these facts we think the District Judge was right in finding that the respondent was a British subject domiciled in British India. In Westlake on Private International Law, 3rd ed., p. 323, it is said: "British nationality results from birth in the [935] British dominions, except in the case of a child born to an enemy father at a place in hostile occupation." Birth on the soil and not citizenship by descent determines the nationality. It is argued, however, that the respondent, although he may be a British subject, is still a Frenchman, who owes allegiance to the French Government, and that as such the French Court at Chandernagore had jurisdiction over him, wherever he resided. In support of the contention that he is still a Frenchman we were referred to a passage in an unauthorized translation of the Code Napoleon. This is not a work to which under s. 38 of the Evidence Act we are in a position to refer, and no authorized edition of that Code had been put before us. Assuming, however, that according to French law he is still a Frenchman owing allegiance to the French Government, he is domiciled in British India and is, according to the passage quoted from Westlake, a British subject. No authority has been shown us for the contention that the Chandernagore Court has jurisdiction over him, even if he is a Frenchman residing in British India, much less if he is a British subject domiciled there. We do not know what the French law on the subject is, as there is no evidence about it. The respondent was not within the territorial jurisdiction of the Chandernagore Court, either at the time

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when the suit was brought or previously, and if there is any special territorial legislation giving jurisdiction to the Chandernagore Court over persons permanently residing in foreign territory, it has not been brought to our notice, and it would, moreover, be a legislation which could not, we think, be recognized by a foreign Court within the jurisdiction of which the respondent resided.

Section 13 of the Code of Civil Procedure enacts that where a foreign judgment is relied on the production of the judgment duly authenticated is presumptive evidence that the Court which made it had competent jurisdiction. That section relates to matters of *res judicata*, and there is, we think, a distinction between a case in which a defendant puts forward a foreign judgment as a bar to a suit and a case in which a plaintiff seeks to enforce a foreign judgment. In the former it may fairly be supposed that the parties submitted to the **[936]** jurisdiction. But even if there is any presumption in the present case in favour of the jurisdiction of the Chandernagore Court, that has, we consider, been sufficiently rebutted by the facts found.

This case is undistinguishable from the case of *Gurdyal Singh* v. *Raja of Faridkot* (1) in all respects save this, that in the latter case the defendant was unquestionably not a subject of the foreign State, in the Court of which the judgment sought to be enforced was passed. We think that on the facts found in this case and in the absence of any evidence to prove that the French Court had jurisdiction over the respondent, there is no ground for drawing any distinction. It is difficult, moreover, apart from all other considerations, to understand how the Chandernagore Court had any jurisdiction over the cause. The obligation under which the money was payable was not incurred in the Chandernagore territory, and it cannot be said that the money was payable there merely because the donee resided there. We may add also that the decree is not one which a Court in British India could properly have made against the respondent. His mother was the executrix of his father's will; she had taken out probate of it, was still living in the Tipperah district, and apparently acting as executrix. The respondent was only one of the beneficiaries under the will, and if he was assisting his mother in the management of the property or even actively managing it, he was not the person who was in law responsible for the debt.

It is enough, however, to confirm the judgment of the District Judge on the ground on which it proceeded, *viz.*, that the Chandernagore Court had no jurisdiction over the respondent, or at least no jurisdiction which a Court in British India would recognize.

The appeal is dismissed with costs.

M. N. R. *Appeal dismissed.*

(1) 22 C. 222 = 21 I.A. 171.

26 C. 937 = 3 C.W.N. 742.

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26 C. 937 = 3 C.W.N. 742.

[937] APPELLATE CIVIL.

Before Mr. Justice Macpherson and Mr. Justice Stevens.

SADAGAR SIRCAR AND ANOTHER (*Principal Defendants*) *v.* KRISHNA CHANDRA NATH (*Plaintiff*).* [30th June, 1899.]

Sale for arrears of rent—Bengal Tenancy Act (*VIII of* 1885), *chap. XIV and ss.* 65, 188 *—Sale of occupancy-holding in execution of decree for rent by one of several joint landlords—Arrears of rent of separate share—Execution of decree for rent—Joint landlords—Transferability of occupancy holding—Bengal Act VIII of* 1869. *ss.* 59, 64*—Landlord and tenant—Want of saleable interest in judgment-debtor—Rights of purchaser.*

The Bengal Tenancy Act does not contemplate or provide for the sale of a holding at the instance of one only of several joint landlords who has obtained a decree for the share of the rent separately due to him; such a sale must be under the provisions of the Civil Procedure Code, and would not carry with it the special incidents attaching to a sale under the Bengal Tenancy Act.

When, therefore, an occupancy-holding, not transferable by custom or local usage, is sold in execution of a decree obtained by one of several joint landlords for the share of the rent separately due to him, the purchaser acquires nothing by his purchase, the judgment-debtor having no saleable interest in the holding.

Beni Madhub Roy v. *Jaod Ali Sircar* (1), followed.

Jawadul Huq v. *Ram Das Saha* (2), distinguished.

Bhiram Ali Shaik Shikdar v. *Gopi Kanth Shaha* (3), and *Hari Charan Bose* v. *Runjit Singh* (4), referred to.

[F., 4 C.L.J. 68 = 10 C.W.N. 176; 3 C.W.N. 747; R., 29 C. 54 = 5 C.W.N. 763; 37 C. 687 (691) = 12 C.L.J. 169 (171) = 14 C.W.N. 779 = 6 Ind. Cas. 452; 1 C.L.J. 500 (508); 14 C.L.J. 620 (625) = 10 Ind. Cas. 417; 5 Ind. Cas. 385 (386).]

AN estate in the District of Mymensingh, Pargana Hossain Shahi, belonged to five proprietors, and two persons, Nilmohun Nath and Nilkomul Nath, had an occupancy-holding in the estate. One Harro Kishore Dey held an *ijara* lease of a 13-anna and odd gunda share under some of the proprietors of the estate. He obtained a decree against the Naths for arrears of rent due on account of his share, and in execution of the decree the said [938] holding was sold and purchased by one Krishna Chandra Nath in the name of the said Harro Kishore, on the 28th January 1889, corresponding to the 16th Magh 1295.

The plaintiff Krishna Chandra Nath instituted three suits, out of which these appeals arise, in the Court of the Munsif of Kishoregunge, against several defendants, on the allegation that he was dispossessed on different dates by the defendants from three out of the seven plots of land composing the entire holding he had purchased, and of which he had obtained possession. Each suit related to one plot of land, and the dispossessions were alleged to have been effected, in suit No. 155, in Baisak 1297, in suit No. 156, in Bhadra 1298, and in suit No. 74, in Falgun 1300. The plaintiff prayed for declaration of his title and recovery of possession of the disputed lands. The suits were instituted on the 18th Bhadra 1302, corresponding to the 4th September 1895.

The contesting defendants in the several suits alleged, amongst other things, that the suits were not tenable in the absence of the landlords who were not made parties; that the *jote* was not saleable either by custom or

* Appeal from Appellate Decree No. 1590 of 1897, against the decree of Babu Gopal Chunder Bose, Subordinate Judge of Mymensingh, dated the 15th of May 1897, reversing the decree of Babu Tincori Chowdhry, Munsif of Kishoregunge, dated the 15th of June 1896.

(1) 17 C. 390. (2) 24 C. 143. (3) 24 C. 355. (4) 25 C. 917, note.

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by law; that the plaintiff's purchase was never acknowledged by the landlords; and that they, the defendants, held the lands under settlements made by the landlords. In suits Nos. 155 and 74, the further defence was made that they were barred by limitation. The plaintiff in the course of the pleadings further alleged that his purchase had been recognised by the landlords prior to the several dispossessions, and that they had received rent from him.

All the suits were dismissed by the Munsif, who held that although the suits were not barred by limitation, they must fail, as the plaintiff was unable to prove that he purchased in auction the right of the Naths to the lands in dispute, and that he was recognized by the landlords, as the occupancy-holding in dispute was not transferable by custom or usage, and as the landlords had not been made parties to the suits.

The plaintiff appealed to the Subordinate Judge of Mymensingh, who set aside the decrees of the Munsif and decreed the [939] suits on the grounds mentioned in the judgment of the High Court.

The defendants appealed to the High Court.

Babu *Dwarka Nath Chakravarti* and Babu *Joygopal Ghosa*, for the appellants.

Babu *Gobind Chunder Dey Roy*, for the respondent.

The judgment of the High Court (MACPHERSON and STEVENS, JJ.) was as follows:—

JUDGMENT.

The respondent in each of these cases claimed a plot of land which formerly formed a part of the holding of persons called Naths who had a right of occupancy in it. The holding appertained to an estate, of which there were five proprietors having different shares. The *ijaradar* of a 13-anna odd gunda share belonging to some of those proprietors got a decree against the Naths for the rent due on account of his share, and in execution of that decree the holding was sold on the 28th January 1889 (16th Magh 1295) and purchased, as the Subordinate Judge finds, by the respondent. The respondent said he got into possession of these plots and held possession as a recognised tenant till he was dispossessed by the appellant and others in one case in Bysack 1297, and in the other in Bhadra 1298. The suits were instituted on the 18th Bhadra 1302, but none of the landlords of the holding are parties to them. The appellants claimed to be in possession under settlements obtained from the landlords and denied the respondent's alleged possession or dispossession. They also said that the respondent having purchased a non-transferable holding had acquired nothing by his purchase; that the landlords were necessary parties to the suits; and that the suits not having been brought within two years of the alleged date of dispossession were barred by limitation under art. 3, sch. III of the Bengal Tenancy Act.

The Munsif dismissed the suits, but the Subordinate Judge has reversed his decision and given the respondent a decree in each case, holding that the suits were within time; that the landlords were not necessary parties; and that the respondent, although he purchased at a sale in execution of a decree obtained by one of several joint landlords for a fractional share of the rent, [940] purchased the occupancy-holding and got a good title to it. The correctness of his decision in all these points is now questioned.

We must take it that the Naths had no transferable right in the holding in question. The Munsif found this on an issue raised. The

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Subordinate Judge says the question is immaterial and does not deal with it, but we gather from his judgment that he did not intend to disturb the Munsif's finding, and it is not at all clear that the correctness of this was challenged. The case seems to have been argued on the assumption that the holding was not transferable by custom or local usage.

It is hardly necessary to cite authority for the general proposition that an occupancy-holding only becomes transferable by custom or local usage, but we may refer to the recent case of *Bhiram Ali Shaik Shikdar* v. *Gopi Kanth Shaha* (1), in which a non-transferable holding was sold in execution of a decree for money, not rent, obtained by a creditor against the tenant. That case does not, however, touch the question now raised as to the effect of a sale of a non-transferable occupancy-holding in execution of decree obtained by one of several joint landlords against the tenant for the share of the rent separately payable to him in respect of the holding. If this was a sale under the Tenancy Act, authorized by s. 65 of that Act, the purchaser undoubtedly purchased the holding and got a good title to it. If it was not such a sale the purchaser is, it seems to us, in the same position as any other person who purchases at an auction-sale a property in which the judgment-debtor to whom it belonged had no transferable interest.

There may be cases in which all the persons under whom a raiyat holds land are not joint landlords within the meaning of the Tenancy Act, but this is not one of them, and no such question has been raised. The circumstances that the *ijaradar* collected separately from the raiyats his share of the rent did not have the effect of creating a separate and distinct tenancy under him. The holding, notwithstanding that, continued to be one entire holding on all the joint landlords. This principle was recognised **[941]** in the recent case of *Hari Charan Bose* v. *Runjit Singh* (2) and there is apart from that case ample authority for it. Under the former Tenancy Act (Bengal Act VIII of 1869) an occupancy raiyat could be ejected from his holding in execution of a decree for arrears of rent due in respect of it. Sections 59 and 64 of the same Act made under-tenures which were transferable by the title-deeds or custom of the country saleable in execution of decrees for arrears of rent due in respect of them; but s. 64 expressly provided that when such an under-tenure was sold in execution of a decree obtained by a fractional shareholder for money due to him on account of his share of the rent, it should be sold not under the provisions of the Act, but under the ordinary procedure of the Court, and that the sale should have all the incidents attached to such a sale. Section 65 of the present Tenancy Act prohibits ejectment for arrears in the case of a tenant who is a permanent tenure-holder, a raiyat holding at fixed rates, or an occupancy raiyat, and enacts that "his tenure or holding shall be liable to sale in execution of a decree for the rent thereof, and the rent shall be a first charge thereon." Chapter XIV contains provisions for the sale of tenures and holdings in execution of such decrees, and undoubtedly, we think, relates only to sales of the kind authorized by s. 65. This section makes no distinction between transferable and non-transferable holdings and tenures, and the Act contains no special provisions for the sale of a tenure or holding in execution of a decree obtained by one of several joint landlords for money due to him in respect of his share of the rent of such tenure or holding. Section 188 enacts, however, that when there are several joint landlords they must all join in doing anything which

(1) 24 C. 355.

(2) 25 C. 917, note.

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under the Act a landlord is authorized or required to do. Reading this section, as we consider it must be read, in connection with s. 65 and chap. XIV, it follows that the sale authorized by s. 65 is a sale of the tenure or holding at the instance of all the joint landlords in execution of decree obtained by them for the rent of it, and that the proceedings required to be taken under chap. XIV must similarly be proceedings taken by all of them. The Act does not, we think, contemplate or provide for the sale [942] of a tenure or holding at the instance of one only of several joint landlords, who has obtained a decree for the share of the rent due to him. Such a sale must, it seems, be under the provisions of the Civil Procedure Code, which by s. 143 are applicable to all suits under the Act except when declared inapplicable, and it would carry with it all the incidents attached to such a sale, and not the special incidents attaching to sale under the Act.

This view of the law seems also consistent with the general scope and policy of the Tenancy Act, which is to make all the joint landlords act together, and not to allow any one of them to act as if he was the sole landlord. The construction which the Subordinate Judge has put upon s. 65 would lead to much litigation and many difficulties.

The decision of the Full Bench of this Court in *Beni Madhub Roy* v. *Jaod Ali Sircar* (1) has also an important bearing on this case. There a fractional co-sharer attached a tenure in execution of a decree which he had obtained for his share of the rent of it, and it was held that the attachment was not one contemplated by s. 170 of the Tenancy Act. Petheram, C.J., said, citing s. 188, "where landlords are seeking to take the benefit of this Act, they must act in concert; and where one of several co-sharers in a zemindari thinks fit to pursue his remedies to recover his share of the rent, he must pursue them under the ordinary law of the country, and independently of the Bengal Tenancy Act." It must follow that a sale in execution of such a decree is not a sale under the Act. We say nothing, it not being necessary, as to the possible effect of a decree obtained by one of several joint landlords in the presence of all of them for the entire rent of a holding or tenure.

The Subordinate Judge has cited as an authority in support of this view the case of *Jawadul Huq* v. *Ram Das Saha* (2), and it has also been referred to here. That was not a Full Bench case, but it was decided by a Bench of five Judges. All that was decided was that if one of several co-proprietors of an estate purchased an occupancy-holding, that occupancy-right ceased to exist by the operation of s. 22, sub-s. 2 of the Bengal Tenancy Act; [943] but that the holding was not annulled. That case has no application to the present one. It was never suggested in that case that the occupancy-holding, which had been sold in execution of a decree obtained by the purchaser for his share of the rent was not a transferable one.

We find then that this holding was not and could not have been sold under the provisions of the Tenancy Act in execution of the decree which the *ijaradar* had obtained against the tenant for his share of the rent. It was sold in the same way that any other property would be sold in the execution of a decree of a Civil Court, and as the judgment-debtor to whom it belonged had no transferable right, the purchaser acquired nothing by his purchase. It may be said of course that the *ijaradar* by causing the holding to be sold consented to the sale, but the consent of

(1) 17 C. 390. (2) 24 C. 143.

one of several joint landlords cannot bind the others or persons claiming under them, and it is not even found that in such a matter and in this case the consent of the *ijaradar* would bind his lessors, some of whom, so far as we can gather from the confused facts, appear to be supporting the defendants.

We cannot on the facts as found interfere with the Subordinate Judge's decision on the question of limitation, but we must say that is not easy to understand what really happened on the position of the parties with reference to the landlords, and also that he has dealt rather summarily with the evidence which was criticised at great length and disbelieved by the Munsif. The landlords are not necessary parties in the sense that the suit could not be tried in their absence, but if the defendants are in possession under a settlement secured from the landlords a decree against the defendants alone may not be of much use.

Although the plaintiff's title by purchase fails the Munsif says he claimed also under a settlement obtained from the landlords. This was considered at some length and found not to be proved. The Subordinate Judge has not gone into this part of the case. He found a title by purchase, and said that the question of recognition or non-recognition by the landlords was immaterial. Apparently, however, judging from what he says on the question of limitation, he considered that there had been some sort of recognition on the part of some of the landlords or their agents, **[944]** but by whom, or what this amounted to, it is impossible to say. We think the plaintiff is entitled to have his decision on this part of the case. If before any settlement was made with the defendants his tenancy under the purchase was recognized by all the landlords, or if a settlement was made with him by the landlords on the strength of his purchase, he may be entitled to a decree against the defendants who, the Subordinate Judge says, turned him out before they became themselves tenants. We think it right, however, to say that the mere "inducing some of the landlords' agents to receive rent" is not sufficient proof of recognition by the landlords, and that the question which we now direct to be tried must be decided on the whole evidence, the Court not being bound by the Subordinate Judge's decision or opinion on subordinate facts bearing on the question of limitation. We set aside the decree and remand the case for a decision on the question of title by recognition or settlement. As the appeal succeeds the appellant must get his costs in this Court.

Appeal allowed : case remanded.

M. N. R.

1899
JUNE 19.

APPELLATE CIVIL.

26 C. 944 = 4 C.W.N. 101.

26 C. 944=4 C.W.N. 101.

APPELLATE CIVIL.

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, and Mr. Justice Banerjee.

AMRITA LAL GHOSE (*Petitioner*) *v.* SHRISH CHUNDER CHOWDHRY AND OTHERS (*Opposite Party*).* [19th June, 1899.]

Appeal—Indian Companies Act (VI of 1882), s. 58—*Appeal in a case where no issue as to title was raised.*

An appeal lies from an order passed under s. 58 of the Indian Companies Act (VI of 1882), although no issue has been directed upon a question of title.

[R., 14 C.L.J. 489=12 Ind. Cas. 745 (747).]

THIS appeal arose out of an application made by one Amrita Lal Ghose under s. 58 of the Indian Companies Act. The allegation of the petitioner was that he had purchased certain shares in the Mohesh Chunder Land Reclamation and Agricultural Improvement Company, Limited, from one Tara Podo Chowdhry, the executor and residuary legatee to the estate of the late Mohesh Chunder Chowdhry, in whose name the [945] shares stood; that he having applied to the Directors of the said Company to enter his name as a member and shareholder in the register of members kept by the said Company, they refused to do so, and hence this application was made. The Directors of the Mohesh Chunder Land Reclamation and Agricultural Improvement Company, Limited, contested the application mainly on the ground that the said Tara Podo Chowdhry, being only one of the executors of the will of the late Mohesh Chunder Chowdhry, had no power to transfer the shares without the consent of the other co-executor, who had served a notice on the Company and published a public notice denying the vendor's authority to do so. The District Judge declined to interfere and dismissed the application.

Against this order the petitioner appealed to the High Court.

Dr. *Ashutosh Mookerjee*, for the appellant.

Mr. *B. C. Mitter*, and Babu *Manmatho Nath Mitter*, for the respondent.

Mr. *B. C. Mitter*, for the respondent, took a preliminary objection to the hearing of the appeal on the ground that no appeal lay, inasmuch as under s. 58 of the Indian Companies Act no issue was directed upon a question of title.

The judgment of the High Court (MACLEAN, C.J., and BANERJEE, J.) was as follows:—

JUDGMENT.

MACLEAN, C.J.—On the preliminary question whether an appeal lies, I see no reason for confining the last sentence of s. 58 of the Companies Act, 1882, to the case suggested by respondent's counsel, namely, the case in which an issue has been directed upon a question of title. The words apply to the whole section. The case of *In the matter of the petition of Luchmee Chand* (1) was a case of an appeal, and it was not suggested that an appeal did not lie. I admit that is not an authority against the present respondent, as the point was not raised. In my opinion the appeal lies.

* Appeal from Order No. 71 of 1898, against the order passed by F. F. Handley, Esq., District Judge of 24-Pergunnahs, dated the 4th of December 1897.

(1) 8 C. 317.

1899 JUNE 19. — APPELLATE CIVIL. — 26 C. 944 = 4 C.W.N. 101.

Upon the merits, I think that, without deciding upon this appeal any question of title one way or the other, the learned [946] Judge in the Court below, in the exercise of his judicial discretion, was amply justified in refusing the application. He could only make the order asked for, if satisfied "of the justice of the case," and, I think, there was quite sufficient upon the undisputed facts to throw doubt upon that. In this view, it is unnecessary to go into the facts which are set out in the petition of the Directors of the Company—facts as to which there is apparently no substantial dispute. The Judge was right in refusing the application to register, and the question of title must be fought out in a regular suit. The appeal is dismissed with costs.

BANERJEE, J.—I concur.

S. C. G. *Appeal dismissed.*

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26 C. 946.

APPELLATE CIVIL.

Before Mr. Justice Macpherson and Mr. Justice Stevens.

NIL KAMAL MUKERJEE AND OTHERS (*Plaintiffs*) v. JAHNABI CHOWDHURANI (*Defendant*).* [15th May, 1899.]

Civil Procedure Code (Act XIV of 1882), ss. 13, 224—Question for Court executing decree —Execution of decree—Plea taken by defendant in separate suit—Res judicata.

When an issue arising out of the execution of a decree has not been raised and determined under s. 244 of the Civil Procedure Code, there is nothing in that section to prevent a defendant, in a separate suit subsequently brought, from raising that issue in that suit.

Bhiram Ali Shaik Shildar v. *Gopi Kanth Shaha* (1), followed.

[F., 7 C.W.N. 607 ; 19 M.L.J. 1=4 M.L.T. 285=1 Ind. Cas. 193.]

NIL KAMAL MUKERJEE and Saroda Prosad Ganguli, plaintiffs Nos. 1 and 3, in the present suit, as trustees to the estate of the late Babu Dwarka Nath Tagore, brought a suit No. 82 of 1883, in the Court of the Subordinate Judge of Mymensingh, against the present defendant Jahnabi Chowdhurani and others, for recovery of possession of lands which they alleged had reformed on the original site of *mouza* Argoyla, belonging to their zemindari, Dehi, Shahazadpore, and from which they had been dispossessed by the defendants. The plaintiffs obtained an *ex parte* decree which was in these terms:—

[947] "That the suit be decreed; that the plaintiffs do obtain possession of the remaining portion of *mouza* Argoyla which the Civil Court Amin has marked in the map prepared by him, and get the cost of Court from the defendants, &c."

The map, which was prepared by the Amin in suit No. 82 of 1883, did not make any allowance for the magnetic variation of the compass, and accordingly gave an incorrect boundary line of *mouza* Argoyla, represented by the blue dotted line in the map prepared in the present suit, the true (Revenue Survey) boundary line being represented by the red dotted line in the latter map. When, however, the Amin, in execution

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* Appeal from Original Decree No. 76 of 1898, against the decree of Babu Dwarka Nath Bhuttacharjee, Subordinate Judge of Mymensingh, dated the 31st of December 1896.

(1) 24 C. 355.

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of the decree in suit No. 82 of 1883, proceeded to give delivery of possession to the plaintiffs, it struck him that his map was wrong and he asked instructions from the Court as to how he should proceed. Thereupon the Court passed the following order on the 5th February 1886 :—

"It is needless now to discuss previous matters. The Amin shall do as he thinks proper, looking into the maps, other papers, as also the state of things on the spot. There is no necessity for any instructions from the Court."

The Amin, however, gave possession of some 148 and odd *bighas* of land, which lay outside the boundary line fixed by him. They were marked in the map prepared for the present suit by the letters A, B, and C, lying beyond the blue dotted lines, but within the red dotted lines. Subsequently on the 10th June 1886, the Court passed the following order on the application of the plaintiff for the rectification of the map of the Amin.

"The decree-holder's prayer for rectifying the former map of the Amin, according to which a decree has already been passed, cannot be granted in the Execution Department, but, as the decree-holder has taken possession of less quantity of land, I see no objection to the same."

It was not shown that these orders were passed, or that the execution proceedings were taken, in the presence of the defendant in the present suit or in that of any of her servants who knew that the plaintiffs were taking possession of lands not covered by the decree. On the other hand, in a suit for mesne profits brought by the present plaintiff in 1887, the claim in respect of this excess land was disallowed.

The present suit was instituted by the plaintiffs for recovery of possession of 613 and odd *bighas* of land, including the aforesaid [948] plots situated between the red and blue dotted lines in the Amin's map, being reformation on the original site of *mouzah* Argoyla, on the ground of recent dispossession.

The Subordinate Judge found that 496 and odd *bighas* of *mouzah* Argoyla were above water, but gave the plaintiff a decree for the recovery of possession of 391 and odd *bighas* of land only, deducting 104 and odd *bighas* which he found was the area of the portions situated between the red and blue dotted lines in the Amin's map and marked by the letters A, B, and C. As regards this area, the Subordinate Judge held that the plaintiffs' claims thereto was barred by s. 13 of the Civil Procedure Code, and that s. 244 of the same Code was no bar to the defendant raising such objection in the present suit.

Against this decree, the plaintiffs appealed to the High Court.

Babu *Sarada Charan Mitter*, Babu *Prosanna Chandra Roy*, and Babu *Mohendra Coomar Mitter*, for the appellants.

Babu *Basanta Kumar Bose*, and Babu *Kritanta Kumar Bose*, for the respondent.

The judgment of the High Court (MACPHERSON and STEVENS, JJ.) was as follows :—

JUDGMENT.

The facts of this case are fully and clearly stated in the judgment appealed from and need not be repeated. The question argued before us is purely one of law.

Shortly stated the case stands thus : In 1883 the appellants brought a suit against the respondent to recover certain land, including the plots A, B, and C, which form part of the land now in dispute. They obtained

a decree for some of the land exclusive of those plots in May 1884. They executed the decree, and in execution they took possession, with the aid of the Court, and without any objection on the part of the respondent, of the plots A, B, and C, which, as already stated, were not part of the land decreed, and omitted to take possession of a part of the land which was decreed. About a year after that the respondent dispossessed them of the whole of the land, of which they had taken possession, and the present suit is brought by the appellants to recover it.

[949] The question is whether the appellants can recover the plots A, B, and C, which they unsuccessfully claimed in the previous suit, although with the aid of the Court they took possession of them in execution of the decree in that suit without any objection on the part of the respondent. The appellants' title to the land is found to be proved, but we consider that they cannot now rely on their original title, it being shown that their claim with regard to those plots was rejected in the suit of 1883. If they have any title at all, it is a title which must, in some way, have been since acquired.

The respondent says that s. 13 debars the appellants from claiming those plots, which they unsuccessfully claimed in the suit of 1883. The appellants say that the respondent is estopped by s. 244 from saying that this land is not part of the land decreed in that suit. Obviously it seems that the respondent's contention must succeed unless that of the appellants prevails.

Conceding that s. 244 would debar the respondent from bringing a suit to recover this land, on the ground that, although it was not part of the land decreed in the suit of 1883, the appellants wrongfully took possession of it with the aid of the Court in execution of that decree, is there anything in that section which would debar the respondent who has recovered possession from raising such a question in a suit brought against her by the appellants? The scope and effect of the section was considered in the case of *Bhiram Ali Shaik Shikdar* v. *Gopi Kanth Shaha* (1). The view taken of it then was that, although it barred a suit brought for the determination of any of the questions referred to in it, it did not bar the trial of any issue involved in those questions, if the issue was raised at the instance of the defendant in a suit brought against him; and it was pointed out that s. 244 differed from s. 13 in this respect that the latter section barred not only the trial of a suit or issue, where the suit or issue had been previously heard and determined, but also the trial of an issue which should have been raised in a previous suit by either party. It is clear that the question now raised was not raised and determined under s. 244; and we think **[950]** that, although the facts of the case which we have cited were different from the facts of the present case, the view which was taken of s. 244 is correct. In our opinion the question not having been raised and determined under s. 244, the defendant is not now debarred from contending that the plots claimed were not covered by the decree in the suit of 1883. The case is a hard one, as the action of the plaintiffs throughout has been straightforward and *bona fide*. On the other hand, although the respondent ought to have looked after her own interests in the execution proceedings, and although a servant of hers was present when possession was given to the appellants, the Subordinate Judge finds that there was nothing to indicate to that servant, who represented the respondent, that the appellants were taking possession of land which was not

(1) 24 C. 355.

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covered by the decree. It seems also that in a subsequent suit the appellants claimed mesne profits on account of these plots, but the Court refused to allow it on the ground that the land was not part of the land decreed.

The decision of the Subordinate Judge, therefore, seems to us correct, and we accordingly dismiss this appeal with costs.

M. N. R. *Appeal dismissed.*

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26 C. 950 = 3 C.W.N. 657.

APPELLATE CIVIL.

Before Mr. Justice Macpherson and Mr. Justice Stevens.

DUKHADA SUNDARI DASI (*Plaintiff*) v. SRIMONTO JOARDAR AND OTHERS (*Defendants*).* [30th June, 1899.]

Benami transaction—Certified purchaser—Civil Procedure Code (Act XIV of 1882), s. 317—Sale in execution of a decree—Suit against heirs or mortgagee of the certified purchaser.

Section 317 of the Civil Procedure Code is no bar to a suit against any person claiming through or under the certified purchaser, such as his heir or mortgagee.

Buhuns Koonwur v. *Lalla Buhoree Lall* (1), and *Lokhee Narain Roy Chowdhry* v. *Kallypuddo Bandopadhya* (2), referred to.

[951] *Raj Chunder Chuckerbutty* v. *Dina Nath Saha* (3), and *Theyyavelan* v. *Kochan* (4), followed.

[N.F., 31 B. 61 (65) = 8 Bom.L.R. 873; F., 5 C.W.N. 341 (343); 19 Ind.Cas. 909 (910) = 19 C.L.J. 330; R., 8 C.W.N. 476 (478) (F.B.); 12 A.L.J. 1145.]

THE plaintiff, Dukhada Sundari Dasi, alleged that her late father Srimonto Mondul, owned a holding in Mouzah Hukahara, Azimgunj; that in execution of a decree against the said Srimonto the said holding was sold and purchased by the judgment-debtor in the name of one Sridhur Mondul; that Srimonto continued to enjoy the property; and that he subsequently took a loan from one Srimonto Joardar, the defendant No. 1, on usufructuary mortgage of the holding in dispute, the deed of mortgage being executed by the said Sridhur Mondul. The plaintiff further alleged that the amount due to the defendant No. 1 under the mortgage bond had been paid off out of the profits, and accordingly instituted the present suit for a declaration that the late Srimonto Joardar was owner of the immoveable property in dispute and for the recovery of possession of her share of the same to the extent of one-half of the property, the other half belonging to her sister Khokunmoni Dasi, defendant No. 5. The heirs of the deceased Sridhur Mondul were also made defendants in the suit, being defendants Nos. 2, 3 and 4.

The defence was that Sridhur Mondul was the real purchaser and not a *benamidar* of Srimonto; that the mortgage loan was contracted really by Sridhur; that the mortgage debt had not yet been paid off, and that at any rate the suit was barred by s. 317 of the Civil Procedure Code.

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* Appeal from Appellate Decree No. 625 of 1897, against the decree of Fred. B. Taylor, Esq., District Judge of Moorshedabad, dated the 13th of January 1897, reversing the decree of Babu Jogendra Nath Ghose, Munsif of Berhampore, dated the 10th of September 1895.

(1) 14 M.I.A. 496 = 10 B.L.R. 159 = 18 W.R. 157. (2) 2 I.A. 154 = 23 W.R. 358.
(3) 2 C.W.N. 433. (4) 21 M. 7.

The Munsif decreed the suit, but on appeal, the District Judge set aside the decision of the Munsif and dismissed the suit. 1899 JUNE 30.

The plaintiff appealed to the High Court.

Babu *Srinath Das* and Babu *Haran Chandra Banerji*, for the appellant. APPELLATE CIVIL.

Babu *Madhabanand Basak*, for the respondents.

The following judgments were delivered by the High Court (MACPHERSON and STEVENS, JJ.) :— 26 C. 950 = 3 C.W.N. 657.

JUDGMENTS.

STEVENS, J.—In the suit out of which this appeal arises, the plaintiff alleged that the property in question, which had originally [952] belonged to her father and had been sold in execution of a decree against him, had been purchased by him at the auction sale in the name of one Sridhur Mondul and had afterwards been mortgaged by him in the name of Sridhur Mondul to the defendant Srimonto Joardar. As against that defendant, she sought to recover possession of the properties in question on the allegation that the mortgage debt had been more than satisfied out of their profits. She also joined the heirs of Sridhur Mondul as defendants in order to establish as against them the *benami* character of the auction-purchase made ostensibly by Sridhur, and consequently her own right as heiress to her father to the extent of one half of his estate.

One of the grounds of defence was that the suit was not maintainable in view of the provisions of s. 317 of the Code of Civil Procedure. The Court of first instance held that the suit was maintainable and decreed the plaintiff's claim, but the lower appellate Court, taking the contrary view, dismissed the plaintiff's claim, and hence she has preferred the present second appeal.

The question before us relates to the construction of the first sub-s. of s. 317 of the Code of Civil Procedure, which is as follows: "No suit shall be maintained against the certified purchaser on the ground that the purchase was made on behalf of any other person, or on behalf of some one through whom such other person claims."

Does the statutory protection afforded to the certified purchaser extend to a person claiming through or under him, as in the present case, his heirs and his mortgagee?

The Court of first instance relied on the case of *Buhuns Koonwur* v. *Lalla Buhoree Lall* (1). The judgment of the lower appellate Court is not perfectly clear, but it would seem that the learned District Judge overlooked the case as against the heirs of Sridhur Mondul and considered it only as against the mortgagee defendant. He says: "The defendant is in the position of Sridhur, and if no suit would lie against Sridhur or his representatives by inheritance, I do not see how a suit can lie against his representatives by transfer.

[953] It would thus appear that the District Judge, losing sight of the fact that he had to decide the question with regard to Sridhur's heirs, took for granted that it could not have been decided otherwise than adversely to the plaintiff in respect of them, and argued from thence that it must be decided adversely to her also in respect of the mortgagee.

I think that the weight of authority is against the assumption and the decision alike of the lower appellate Court.

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(1) 14 M.I.A. 496 = 10 B.L.R. 159 = 18 W.R. 157.

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In the case relied upon by the Court of first instance the precise point now in question was not before their Lordships of the Privy Council for decision. The question in that case was whether the fact of a plaintiff's title being certified as auction-purchaser was conclusive by s. 260 of Act VIII of 1859 (which corresponded to s. 317 of the present Code of Civil Procedure) to debar the defendant who was in possession from pleading that he was the real purchaser, and that the purchase was made *benami* for him by the certified purchaser. The grounds on which that question was decided in the negative were that *benami* transactions were not *per se* illegal; that the enactment in s. 260 of Act VIII was clear and definite; that there was nothing from which it could be inferred that more was meant than was expressed; that it was "confined to a suit brought *against* the certified purchaser;" and that the object which the framers of the Code appeared to have had in view was "to prevent judgment-debtors becoming secret purchasers at the judicial sales of their property and to empower the Court selling under a decree to give effect to its own sale without contention on the ground of *benami* purchase by placing the ostensible purchaser in possession of what it had sold, and of insuring respect to that possession by enacting that any suit brought against him on the ground of *benami* shall be dismissed."

That case seems to be so far in point in the case now before us in that (i) it lays down that s. 260 of Act VIII must be construed strictly and literally, and (ii) what their Lordships regarded as the object of the section would not apply to the facts of a case like the present.

The case of *Buhuns Koonwur* v. *Lalla Buhoree Lall* was **[954]** followed by their Lordships of the Judicial Committee in a somewhat similar case, that of *Lokhee Narain Roy Chowdhry* v. *Kallypuddo Bandopadya* (1), in which the earlier case was referred to as laying down among other things that s. 260 of Act VIII "should be construed strictly and literally."

There is a case decided by the Madras High Court since the present case was dealt with by the Courts below which is exactly in point. In the case of *Theyyavelan* v. *Kochan* (2) it was held that the protection given to a certified purchaser could not be transferred by him, and accordingly a person taking an assignment from him could not under s. 317 of the Code of Civil Procedure object to the maintainability of a suit to recover the property purchased on the ground that the purchase was made *benami*.

There is also a recent decision of this Court in the case of *Raj Chunder Chukerbutty* v. *Dina Nath Saha* (3), the principle of which is applicable to the present case, though the provision of law with which it dealt was not s. 317 of the Code of Civil Procedure, but an analogous provision in the Revenue Sale Law, namely, s. 36 of Act XI of 1859. It was held by a majority of two to one of the Judges who constituted the Bench which tried that case in appeal that the statutory protection afforded by s. 36 to the certified purchaser at a revenue sale did not extend to his assignee. The two Privy Council cases noticed above were referred to, not as being directly in point, but as indicating clearly that a section of the nature of s. 36 of Act XI of 1859 must be construed literally, and as throwing a light upon the principle applicable to the case then under decision. It was held that regard being had to the penal character of s. 36,

(1) 2 I. A. 154 = 23 W. R. 358. (2) 21 M. 7. (3) 2 C.W.N. 433.

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a Court construing it ought not to go beyond the strict letter of the language used, or to put a construction upon that language which would have the effect of materially extending the operation of the section. At p. 447 of the report the learned Chief Justice says in his judgment: "In a section of this class it is, in my judgment, safer to [955] adhere to the words actually used than to import in the section words which are not there. The section ought to be construed strictly and literally. Doubtless this construction may lead to anomalies, *e.g.*, that the certified purchaser cannot be sued though his heir may, but the existence or possibility of such anomalies ought not, I conceive, to warrant us in reading the words otherwise than literally." These observations appear to me to apply with equal force to the case now before us.

On the whole, having regard to the authorities which I have noticed, I must hold that the present suit is not barred by the provisions of s. 317 of the Code of Civil Procedure.

The decree of the lower appellate Court is set aside and the appeal is remanded for disposal on the merits. Costs will abide the result.

MACPHERSON, J.—I agree. In the case of *Raj Chunder Chuckerbutty* v. *Dina Nath Saha* (1), which has been referred to, I put a different construction upon the analogous provision in the Revenue Sale Law; but that construction was not adopted by the Appellate Bench, the decision of which I am of course bound to accept. There is certainly no ground for putting a wider construction on the terms of s. 317 of the Civil Procedure Code.

M. N. R. *Appeal allowed*; *case remanded.*

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26 C. 955.

APPELLATE CIVIL.

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, and Mr. Justice Banerjee.

SURJA NARAIN MUKHOPADHYA (*Defendant*) *v.* PRATAP NARAIN MUKHOPADHYA (*Plaintiff*).* [16th May, 1899.]

Compromise of suit—Effect of compromise—Interest Act (XXXII of 1839)—Interest on certain amount payable on the happening of an event and at certain time—Sum agreed to be paid to defend a suit—Effect of compromise of suit on liability to pay.

[956] *A* brought a suit against *B* and *C*. *B* wrote a letter to *C* proposing that counsel should be engaged to defend the suit, and that *C* should contribute Rs. 900 only for it. *C* agreed to the proposal and consented to pay the amount within ten days. Counsel was engaged and Rs. 4,000 were paid to him. After several hearings the case was compromised. *B* then demanded from *C* the amount which he had promised to contribute, and also interest on it. *C* refused to pay and a suit was brought by *B* to recover the said amount with interest. *C* pleaded that he was not liable to pay the amount inasmuch as the case was compromised, and also pleaded that he was not liable to pay interest on it, as the debt was neither certain in amount nor payable at a certain time.

Held, that *B* was entitled to recover the amount as there was a promise by *C* to pay it on the happening of a certain event which had happened.

Held, also, that *B* was entitled to get interest on the amount, inasmuch as the debt was not uncertain, the date of payment was defined, and *C* knew that the contingency, upon which he became liable, had occurred.

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* Appeal from Appellate Decree No. 45 of 1898, against the decree of A. E. Staley, Esq., District Judge of Hooghly, dated the 1st of December 1897, affirming the decree of Babu Kali Prasanna Mukerjee, Subordinate Judge of that district, dated the 20th of January 1897.

(1) 2 C.W.N. 433.

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[F., 4 C.W.N. 369 (386); Rel., 16 C.L.J. 264=16 Ind. Cas. 246 (249); R., 1 S.L.R. 179 (181); D., 3 C.L.J. 541 (543).]

THIS appeal arose out of an action brought by the plaintiff in the Court of the Subordinate Judge of Hooghly to recover a certain sum of money from the defendant, his younger brother. The allegation of the plaintiff was that in a suit to set aside a partition in which he and his brother, the defendant, were defendants, it was thought necessary to engage counsel. He wrote a letter to the defendant about this, and asked him to contribute Rs. 900 only, to which the defendant gave the following reply: "I think you ought to engage a counsel in suit No. 15 of 1892 in the Court of the third Subordinate Judge, Hooghly. I accept the proposal made by you for the counsel's fee, shall pay you Rs. 900 only, I shall be able to pay you that sum and not more for the counsel, if you so require I shall pay the money within ten days from this date." Counsel was engaged, and Rs. 4,000 were paid to him. The suit to set aside the partition came on for trial, and after several hearings it was compromised. The plaintiff then demanded from the defendant the money which he had promised to pay, and on his refusing to do so, brought the present suit for the recovery of the said amount with interest. The defence was that the plaintiff was not entitled to get the money inasmuch as the suit was compromised, and that he was not entitled to interest, for the amount was neither certain nor payable at a certain time. The Court of first instance overruled the objections and decreed [957] the suit. On appeal to the District Judge of Hooghly, Mr. A. E. Staley, the decision of the first Court was affirmed.

Against this decision the defendant appealed to the High Court.

Dr. *Rash Behary Ghose*, and Babu *Dwarka Nath Chuckerbutty*, for the appellant.

Dr. *Ashutosh Mookerjee*, and Babu *Surendra Nath Roy*, for the respondent.

The following judgments were delivered by the High Court (MACLEAN, C. J., and BANERJEE, J.):—

JUDGMENTS.

MACLEAN, C. J.—This case has been so fully argued that I do not think any useful object would be attained by our further considering the matter.

This is a suit by one brother against another for recovery of Rs. 900 with interest thereon, at the rate of Rs. 10 per cent., and the litigation arises under the following circumstances. The two brothers, the plaintiff and defendant in this suit, were co-defendants in another suit, in the Court of the third Subordinate Judge of Hooghly, a suit brought by another brother to set aside a certain deed of partition, and in that suit the present plaintiff thought it advisable to engage the services of counsel, and in that view the present defendant concurred, and the following correspondence took place between the two brothers. On the 6th May 1893 the plaintiff wrote this letter to the defendant (omitting the formal parts): "I have thought proper to engage a counsel in our suit No. 15 of 1892 in the Court of the third Subordinate Judge of Hooghly. I shall bear the whole costs of the counsel except that I shall charge from you Rs. 900 only. I won't ask any more money for the counsel's fee. The rest I shall pay from my own pocket. I shall take from Bhuni Rs. 600, please accept the proposal and pay the money;" to which the defendant replied on the same date: "I think you ought to engage a

counsel in suit No. 15 of 1892 in the Court of the third Subordinate Judge, Hooghly. I accept the proposal made by you for the counsel's fee, shall pay you Rs. 900 only, I shall be able to pay only that sum and not more for the [958] counsel, if you so require, I shall pay the money within ten days from this date."

Counsel was retained, the suit to set aside the partition came on for trial, and, after continuing for several days, was ultimately settled. The plaintiff did pay counsel's fees, some Rs. 4,000, and asked his brother to contribute the Rs. 900 which he promised to pay. This, apparently, he did not do; and then the present suit was brought.

The two questions we have to decide are: *First*, whether the defendant is liable for the Rs. 900, and, *secondly*, if liable, whether he is liable for interest upon that amount.

Both Courts have decided against the defendant; and hence the present appeal. As regards the principal debt of Rs. 900, it is perfectly clear that the defendant is liable for that sum to the plaintiff, and we did not hear any serious argument upon the question of that liability.

As regards the question of interest it hinges upon the construction of the two letters, and upon the true meaning of the Indian Statute (Act XXXII of 1839). That Statute says this: "It is, therefore, hereby enacted that upon all debts or sums certain, payable at a certain time or otherwise, the Court before which such debts or sums may be recovered, may, if it shall think fit, allow interest to the creditor at a rate not exceeding the current rate of interest from the time when such debts or sums certain were payable, if such debts or sums be payable by virtue of some written instrument at a certain time." * * * *

I need not read the rest of the section which has no application to the present case.

It is contended for the appellant that, although there was a written instrument within the meaning of the Statute, the debt was neither certain in amount nor payable at a certain time, and consequently that the Statute does not apply. It is urged that the liability was a liability contingent only upon the payment of the fee to counsel, and, therefore, being a contingent liability, it was neither a debt nor amount certain, payable at a certain time.

Upon the construction of the defendant's letter, I am inclined to say that it was an absolute, and not a conditional [959] promise or undertaking to pay, but, if so, the appellant contends that it was a promissory note within the meaning of s. 4 of Act XXVI of 1881, and that not having been properly stamped the action must necessarily fail. In other words the appellant says that the plaintiff is on the horns of this dilemma: if it were a conditional promise to pay, it was not a contract for the payment of a certain sum at a certain time (within the meaning of the Statute), and if it were an unconditional promise to pay, then it is not properly stamped.

To the latter argument, however, sub-s. 3 of s. 34 of the Stamp Act of 1879 is a conclusive answer.

But in the lower Court, to get out, doubtless, of the stamp difficulty, the plaintiff's case was urged upon the footing that the promise to pay was conditional only, and I will treat the case on that footing.

It appears to me that the appellant's argument is based upon some confusion between the question of liability for a debt, and the question of whether or not, if the liability be established, it is in respect of a debt or sum certain payable at a certain time. The question of liability is one

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thing, the question of whether the liability is for a debt or sum certain, payable at a certain time, is another. If the liability be contingent or conditional, and the contingency do not happen, or the condition be not complied with, there is an end of the matter, and the liability is gone; but if a liability in its inception contingent, become, by the happening of the specified event, an absolute liability, then we must refer to the document which creates the liability, and try to discover from that document what the liability actually was, and whether it was in respect of a debt or sum certain payable at a certain time. If, then, we apply that principle to the present case, we find that the contingent liability became an absolute liability, and in respect of a debt or sum certain payable at a certain time, for, upon the construction of the defendant's letter, I entertain no doubt but that the latter requisites are complied with. In my opinion the case is within the Statute.

[960] Dr. Rash Behary Ghose, for the appellant, relied upon the case of *The London Chatham and Dover Railway Co.* v. *The South Eastern Railway Co.* (1) in the House of Lords, where Lord Herschell stated the law in these words: "In order, therefore, to justify the allowance of interest, it must be shown that there is a debt or sum certain payable at a certain time by virtue of some written instrument. Unless that can be established, the case does not come within the words of that part of the section."

I quite agree that before interest can be allowed under the Statute the requisites stated by Lord Herschell must be forthcoming.

The appellant relies mainly upon certain observations of the Judicial Committee of the Privy Council in the case of *Juggomohun Ghose* v. *Manick Chund* (2), and there are, doubtless, some observations which do give colour to his contention. But the facts of that case are very different from those of the present case, and I think the observations in question must be regarded as made in connection with the particular facts of that case rather than as intended to have so wide and general an application as the appellant contends for. That was a suit based upon a wager contract upon the average price that opium would fetch at the next sale, and that was held not to be within the scope of Act XXXII of 1839. Their Lordships say at p. 279 of the report: "The Statute by the qualifications which it imposes of certainty in time and amount, by requiring that this certainty and the obligation itself to pay the principal should be created by a written instrument, by making the interest run from the time at which the principal is payable, and, finally, by giving the jury a discretion as to the allowance of interest, even where all the circumstances concur, seems to have been framed, not simply on the principle of compensation to the creditor, but—" and on these words the learned vakil for the respondent places greater stress—"also on that of penalty to the debtor for not paying punctually at a time when he must have known the debt or sum, specific in amount, was to be paid."

[961] There can be no question that in the present case the debtor did know that he had to pay the debt, which was certain in amount, and he knew the date within which he promised to pay it. If then he did not pay the money punctually why should he not pay the penalty in the shape of interest? Their Lordships then proceed: "Obviously the most honest and punctual debtor may be unprepared to pay an uncertain amount

(1) (1893) L.R. App. Cas. 434. (2) 7 M.I.A. 263 (278—280).

which may not be due for months or years, or only on the happening of a contingency, the falling in of which he may not know of."

These words can scarcely apply to the circumstances of the present case, for the amount was not uncertain, the date of payment was defined, and the defendant knew that the contingency, upon which he became liable, had occurred. Their Lordships proceed: "On this principle, too, the discretion given to the jury to consider all the circumstances of each particular case becomes perfectly reasonable. It is quite consistent with this view that, where the debt is payable 'otherwise' than at a certain time, interest is not to be allowed except from and after the time of a written demand of payment. This reasoning leads their Lordships to conclude that the certainty required must exist at the time when the promise is made."

I read the expression "certainly required" as referring to the certainty required by the Statute, *i.e.*, as to amount and date of payment, both of which exist in the present case, but which were absent from the case before the Privy Council, a case which, in my judgment, does not govern the present. For these reasons the plaintiff, in my opinion, is entitled to interest on the principal debt.

Taking this view, it becomes unnecessary to consider the question which was dealt with in the case of *Kamalammal* v. *Peeru Meera Levvai Rowthen* (1), the question as to the application of s. 73 of the Contract Act to the payment of interest in cases not within the Stat. XXXII of 1839.

Lastly, it is said that the Judge in the Court below has not found that the 10 per cent. was the current rate of interest, and that only the current rate of interest can be allowed. There is, however, [962] force in the view urged by the respondent that it has been shown that the plaintiff had to pay 10 per cent. for the money he borrowed to pay the counsel's fees, a rate rather below the not unusual rate of interest of 12 per cent., and that in the absence of any evidence on the other side to show that that was not the current rate, there was sufficient to justify the Court in treating that rate as the current rate. I see no reason to interfere with this conclusion.

On these grounds I think the appeal fails and must be dismissed with costs.

BANERJEE, J.—I am of the same opinion. The two questions raised before us in this appeal are, *first*, whether the plaintiff was entitled to recover the amount claimed when the purpose for which it was promised to be paid had not to be carried out to the end by reason of the suit in relation to which the agreement was made having been compromised after it had proceeded up to a certain stage only; and, *second*, whether having regard to the nature of the agreement and to the provisions of Act XXXII of 1839, the plaintiff was entitled to any interest on the amount promised to be paid.

The contention upon the first point, which was but faintly pressed, was this, that as the money which the defendant promised to pay was agreed to be paid to enable the plaintiff to meet the expenses of engaging counsel in a suit, in which both the plaintiff and defendant were defendants, and as that suit had not to be defended to the end, but was compromised, the plaintiff was not entitled to recover the amount promised to be paid. But it is admitted that counsel was engaged; it is admitted

(1) 20 M. 481.

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also that the plaintiff had to pay counsel more than the sum of Rs. 1,500 being the sum total of the Rs. 900, which the defendant promised to pay, and a sum of Rs. 600, which the plaintiff in his letter to the defendant said he would take from another brother who was also a defendant in that suit. That being so, I do not think that the mere fact of the suit having been compromised at a certain stage can affect the liability of the defendant. Having regard to the terms of the contract, the plaintiff took the risk of having to pay more or less according as events took their course.

Upon the second point it was argued that the requirements of Act XXXII of 1839 were not satisfied, because the debt was not [963] certain and the time of payment was, therefore, also not certain; and in support of this contention, the cases of *Juggomohun Ghose* v. *Manick Chund* (1), and *London Chatham and Dover Railway Co.* v. *South Eastern Railway Co.* (2), were relied upon. But though there was uncertainty in the liability to this extent, that the liability was to arise only in the event of counsel being engaged by the plaintiff, it cannot be said that there was any uncertainty either in the amount of the debt or in the time of payment, supposing the contingency arose upon the happening of which the liability was to accrue. The Act of 1839 speaks of a sum certain payable at a certain time. The language of the Act does not show that a contingency in the liability not affecting the amount of the debt or the time of payment can in any way prevent the provisions of the first part of s. 1 of the Act from applying to the case. There is, in my opinion, a clear distinction between an uncertainty as to the arising of the liability, and an uncertainty as to the amount of the debt or the time of payment. It is true that there are observations in the cases cited, which apparently favour the contention on behalf of the appellant; but after carefully considering those two cases, the facts of which were very peculiar in their nature, I find that the uncertainty that was held as taking them out of the operation of the Statute was an uncertainty as to the amount of the debt and the time of payment. The passage in the judgment of the Judicial Committee, in the case of *Juggomohun Ghose* v. *Manick Chund* which was most strongly relied upon, is this: "This reasoning leads their Lordships to conclude that the certainty required must exist at the time when the promise is made, and, therefore, that the Act does not in this part affect debts contingent in amount and time of becoming due; a construction strictly conformable to the natural meaning of the language used." But the passage shows that the uncertainty which their Lordships were considering was an uncertainty as to the amount and also as to the time. But as I have said above there was no such uncertainty in this case. And it is not denied that the contingency as to the liability was removed by counsel being engaged before the expiry of the ten [964] days within which the defendant promised to pay the money. I am, therefore, of opinion that the case comes within the first part of s. 1 of Act XXXII of 1839.

I should add that if the case had not come within the scope of Act XXXII of 1839, still the plaintiff would, under s. 73 of the Indian Contract Act, be entitled to recover the amount of interest which has been awarded to him as compensation for damage caused to him by the defendant's breach of contract.

The view I take is, no doubt, opposed to that taken by the Madras High Court in the case of *Kamalammal* v. *Peeru Meera Levvai Rowthen* (3).

(1) 7 M. I. A. 263. (2) (1893) L. R. App. Cas. 429. (3) 20 M. 481.

But with all respect for the learned Judges who decided that case, I must say that I am unable to assent to the view expressed by them. It was argued that to give this effect to s. 73 of the Indian Contract Act would be to make the provisions of a general Act to override those of the special Act of 1839. I do not consider this argument correct. The scope of Act XXXII of 1839 is very different from that of s. 73 of the Indian Contract Act. The Act of 1839 provides for the award of interest on debts in certain cases, and provided that the conditions required by the Act are satisfied, interest will be recoverable, quite irrespective of the question whether any actual loss or damage has been caused to the creditor.

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On the other hand s. 73 of the Contract Act provides for the award of compensation to a person to whom loss or damage has been caused by a breach of contract by another person. Compensation under s. 73 of the Contract Act will not therefore be recoverable by a creditor from his debtor on the ground that the payment of money due to him has been withheld by the debtor unless he can show that actual loss or damage has been caused to him. No doubt the law presumes the withholding of payment of money as carrying with it loss to the person to whom such money is due, the compensation for which loss is interest at the market rate. Such damage I may, without any straining of language, call damage in law, as distinguished from damage in fact, or actual damage, which a person from whom payment of money due is withheld may sustain in certain cases as the plaintiff is found to have sustained in this. Thus where **[965]** *A* promises to pay money to *B* in order to enable *B* to meet the expenses of a common purpose, and *A* afterwards withholds payment, and *B* has to borrow money on interest to meet those expenses, then, if *B* claims not only the amount agreed to be paid, but also the interest on it which he had to pay, he would, under s. 73 of the Contract Act, be entitled to recover such interest, provided other conditions are satisfied, such as that the interest is not exorbitant, but is at such a rate as a reasonable man would agree to pay, having regard to the state of the market. Here *B* recovers what is nominally called interest, but is really compensation for damage sustained by him. But if *B* had not actually to borrow any money, and to pay any interest, he would not in such a case be entitled to recover interest, by way of damages under s. 73 of the Contract Act, though if the case came within the provisions of Act XXXII of 1839, he would be entitled to such interest. This is, I think, a rational and sound distinction; and having regard to the finding of the lower appellate Court, that the "plaintiff has charged the amount of interest only, which plaintiff has had to pay on raising a loan for the purpose of paying the counsel's fee," the decree may be supported under s. 73 of the Contract Act, even if the case did not come within the scope of Act XXXII of 1839. This view is not in conflict with the case of *London Chatham and Dover Railway Co.* v. *South Eastern Railway Co.* (1), in which interest, so far as it was claimed as compensation, was claimed not as compensation for any loss or damage sustained in fact, but as compensation for loss or damage presumable in law from non-payment of money due.

S. C. G. *Appeal dismissed.*

(1) (1893) L. R. App. Cas. 429.

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26 C. 966= 4 C.W.N. 317.

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[966] APPELLATE CIVIL.

Before Mr. Justice Ghose and Mr. Justice Stevens.

HAR SHANKAR PRASAD SINGH AND ANOTHER (*Plaintiffs*) *v.* SHEW GOBIND SHAW AND OTHERS (*Defendants*).* [4th August, 1899.]

Lis Pendens—*Involuntary alienation—Execution proceedings—Revenue Sale Law (Act XI of* 1859), *ss.* 13, 54—*Sale for arrears of Government revenue—Mortgage—Sale in execution of mortgage decree—Right of redemption.*

A decree was obtained for the sale of a mortgaged property, being a share of an estate, on the 31st August 1889. In execution of that decree, the property was purchased by the plaintiffs on the 11th December 1891, and the sale was confirmed on the 5th March 1892. Meanwhile, pending the execution proceedings, a larger share of the estate, including the share mortgaged, was purchased by the defendants at a revenue sale on the 30th September 1891, which sale was confirmed on 11th March 1892. In a suit instituted by the plaintiffs for the possession of the property purchased by them the defendants having questioned the validity of the mortgage decree, and contended that they were not bound by it, not being parties thereto, and having in the alternative claimed the right to redeem the mortgaged property,—

Held, that the defendants were bound by the mortgage decree, the principle of *lis pendens* applying to the case.

Held, also, that the defendants, having purchased a share of an estate at a revenue sale, held under the provisions of ss. 13 and 54 of the Sale law, acquried it subject to the mortgage which they were bound in law to discharge before the sale in execution of the mortgage decree had actually taken place, or before, at any rate, that sale had been confirmed on the 5th March 1892; and that having failed to do so, and there being no equities to the contrary, their right of redemption was extinguished.

[F., 2 C.L.J. 288 (300); 5 C.L.J. 45 (N)=11 C.W.N. 495 (497); 9 Ind. Cas. 840; R., 32 C. 891=1 C.L.J. 371=9 C.W.N. 728; 7 C.L.J. 1 (35); 16 O.C. 148 (153)=20 Ind. Cas. 458 (460).]

MEHAL SAHVA, Pergunnah Goa, Zilla Sarun, had separate accounts opened in the Collectorate, of the following shares: 2 annas 8 pie belonging to Har Shankar Prasad Singh, the plaintiff No. 1 in the present suit; 2 annas 8 pie belong in certain specified shares to Nand Kisore Prasad Singh, Sheo Shankar Prasad Singh, and jointly to two brothers Jagdamba Prasad Singh and Ambika Prasad Singh, the whole constituting an **[967]** *ijmali kalam*; and the remaining 10 annas 8 pie belonging to certain other persons.

Jagdamba executed a mortgage deed in favour of Harbans Sahai, mortgaging his entire interest, *kulhuq hakuq*, in Mehal Sahva. The document did not specify the extent of interest mortgaged. On this mortgage, Harbans sued both the brothers Jagdamba and Ambika, and obtained an *ex parte* decree for the sale of the mortgaged property on the 31st August 1889, the decree directing the sale of the shares belonging to both the judgment-debtors specified therein. Ambika made an application to set aside the *ex parte* decree, but that application was rejected on the 21st January 1890. Then, on the 8th September 1891, Harbans applied for execution of the decree, and obtained the sale proclamation to issue on the 29th September 1891. The sale proclamation was served at various places, on the 19th, 20th and 21st October 1891. On the 11th December

* Appeal from Appellate Decree No. 2136 of 1897 against the decree of Alfred F. Steinberg, Esq., District Judge of Sarun, dated the 19th of July 1897, reversing the decree of Babu Behari Lall Mullick, Subordinate Judge of that district, dated the 8th of May 1896.

1891, the property was put up for sale and purchased by Har Shankar Prasad Singh, plaintiff No. 1, Din Dayal Patak, plaintiff No. 2, and Moti Sahu. The sale was confirmed on the 5th March 1892. Subsequently, on the 6th March 1893, Moti Sahu conveyed the share purchased by him to the plaintiff No. 1.

Meanwhile, the *ijmali kalam* of Mehal Sahva, belonging to Jagdamba and others, was sold for arrears of revenue and purchased by Sheo Gobind Sahu and others, the defendants in the present suit, on the 30th September 1891, in the name of one Ahmad Karim. Har Shankar Prasad Singh and others appealed to the Commissioner on the 28th November 1891, questioning the validity of the sale, but the appeal was rejected. The sale was confirmed on the 11th March 1892, and possession was given to the defendants on the 20th May 1892.

In these circumstances, after some proceedings in the Criminal Court and some proceedings for registration of names, the plaintiffs brought the present action for possession of the property purchased by them, mesne profits, &c., alleging that the purchase of the defendants at the revenue sale was subject to the mortgage. They contended that although the defendants had the right to redeem, they having failed to exercise it before **[968]** the date of confirmation of the sale under the mortgage decree, that right was gone. The defendants contended, amongst other things, that they were not bound by the mortgage decree, not being parties to it ; that Ambika's share did not pass by the sale in execution of the decree, as it was not mortgaged; that although they purchased the property at a time when the mortgage decree was being executed, the principle of *lis pendens* did not apply to their case, that principle, according to their contention, not applying to (1) involuntary alienations, nor to (2) alienations after decree and pending execution ; and further that even if they were bound by the decree, they should still be allowed to redeem the property by payment of the mortgage debt.

The Subordinate Judge decreed the suit, holding that the principle of *lis pendens* applied to the case ; that the defendants were bound by the mortgage decree ; and that although they had the right to redeem, as they did not choose to exercise that right before the date of confirmation of the sale under the mortgage decree, having a knowledge of that decree, their right of redemption was completely lost after that date.

On appeal, the District Judge, while agreeing with the lower Court as to the effect of the defendants having purchased *pendente lite*, observed as follows :—

" But I cannot hold with him that the equity of redemption expired with the date of confirmation of sale. The rule laid down in *Prem Chand Pal* v. *Purnima Dasi* (1) does not apply here. The plaintiffs first attempted to ignore the defendants, and then they denied any title in them. Under these circumstances, I know of no law making it incumbent on the defendants to tender the amount of the debt. They could hardly be expected to pay the money into Court and ask for a declaratory decree. It is only now that the right or liability of redemption, denied before, is judicially declared."

The District Judge accordingly set aside the decree of the lower Court and passed a conditional mortgage decree, subject to the defendants' right of redemption. The plaintiffs appealed to the High Court.

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(1) 15 C. 546.

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Dr. *Rash Behary Ghose*, and Dr. *Asutosh Mukerjee*, for the appellants.

[969] Babu *Saroda Charan Mitter*, and Babu *Akhoy Kumar Banerjee*, for the respondents.

The judgment of the High Court (GHOSE and STEVENS, JJ.) was as follows :—

JUDGMENT.

This appeal arises out of a suit to recover possession of certain shares in a 2 anna 8 pie *patti* in Mehal Shava, which formerly belonged to one Jagdamba Prasad Singh and Ambika Prasad Singh. These persons and some other persons, namely, Nand Kisore Prasad Singh and Sheo Shankar Prasad Singh, owned between themselves the said 2 anna 8 pie share, which is described to be a joint *kalam*, there having been a separate account opened with the Collector as regards the shares of the other shareholders in the said Mehal Shava.

It appears that a mortgage deed was executed by Jagdamba Prasad Singh, who was a member of a joint undivided family, with his brother Ambika Prasad Singh in favour of one Harbans Sahai. This individual obtained a decree against both Jagdamba Prasad Singh and Ambika Prasad Singh, on the 31st August 1890, upon the said mortgage. In execution of this decree the interest of Jagdamba and Ambika in Mehal Shava was sold up and purchased by Har Shankar Prasad Singh, the plaintiff No. 1, and one Moti Sahu, which latter individual transferred the interest which he had purchased to the plaintiff No. 2, Din Dyal Patak. This sale seems to have been confirmed on the 5th March 1892. In the meantime, that is to say, on the 28th March 1891, the *ijmali kalam* of a 2 anna 8 pie share of Mehal Shava fell into arrears, and the owners failed to pay the Government revenue, the result being that on the 30th September, the said *ijmali kalam* was sold up, and purchased by a certain person, who subsequently transferred his interest to the present defendants.

There appears to have been some opposition to this sale. There was an application to the Collector by certain individuals, one of them being stated to be Har Shankar Prasad Singh, offering, under s. 24 of the Revenue Sale Law, the amount in arrear, but the Collector refused to receive the money from them, and he rejected the application. Subsequently there was an appeal to the Commissioner on the 28th November 1891, by, as it appears from a certified copy of the petition of appeal produced before us, [970] Har Shankar Prasad Singh and some other individuals, questioning the validity of the sale held by the Collector. This appeal, however, was rejected, and the sale was confirmed on the 11th March 1892.

The question that has been raised in this case is as between the plaintiffs, the purchasers at the sale of the 11th December 1891 under the mortgage decree, and the defendants, the purchasers at the sale for arrears of revenue on the 30th September 1891 and which sale was confirmed on the 11th March 1892. The District Judge has held, having regard to most of the facts to which we have just referred (for it appears that all the facts were not before him at the trial) that the principle of *lis pendens* applies to this case, and that the defendants were bound to satisfy the decree in execution of which the plaintiff made his purchase on the 11th December 1891; but he is at the same time of opinion that, having regard to the fact that "the plaintiff opposed the confirmation of the sale

before the Commissioner, who confirmed the sale on the 11th March 1892," in equity he is not entitled to recover possession of the property claimed in the suit, but that he may sell the property, subject to the right of redemption in the defendants, the purchasers at the revenue sale.

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We need hardly state that the sale of the defendants was under the provisions of ss. 13 and 54 of the Revenue Sale Law, so that he acquired the share 2 annas 8 pie thus sold, subject to the incumbrance which Jagdamba Prasad Singh had created in favour of Harbans Sahai, and subject also to the lien declared under the decree of the 31st August 1889. That being so, it follows that the defendants, after the acquisition of the property by them under the Revenue Sale Law, were bound to discharge the mortgage existing in favour of Harbans Sahai before the sale actually took place, or before, at any rate, that sale was confirmed on the 5th March 1892; but they failed to do so, and we think the learned Judge is perfectly right in holding that the principle of *lis pendens* applies, and that the plaintiff is entitled to relief in this case.

But then the learned District Judge has said, as we have already indicated, that by reason of the opposition that was offered by the plaintiff to the confirmation of the revenue sale, he is debarred [971] from obtaining the precise relief that he has asked for, and all that he is rightfully entitled to is an order for sale subject to the equity of redemption in the defendants. Upon the record as it stood at the time when the case was first heard by us there was nothing to show that the plaintiffs, or either of them, opposed the confirmation of the sale before the Commissioner. We, therefore, thought it right and proper to send for from the Commissioner's Office the original petition or petitions of appeal presented to the Commissioner in that matter. It so happens that the original petition of appeal is not to be found in the Commissioner's Office, and the paper that the Commissioner has sent to us does not afford us any help in finding out who the persons were that appealed to the Commissioner. The learned vakil for the respondents has, however, placed before us attested copies of the petitions presented both to the Collector on the 31st October 1891, and to the Commissioner on the 28th November 1891, and it would appear from the petitions that one Har Shankar Prasad Singh did oppose the confirmation of the sale held by the Collector on the 30th September 1891. But it will be remembered that the plaintiffs did not acquire the interest of Jagdamba and Ambika in the 2 anna 8 pie *ijmali kalam* until the 11th December, that is to say, some time after the presentation of the petitions to the Collector and to the Commissioner of the Division. At the time of the presentation of these petitions we may take it, as disclosed in the plaint, that the plaintiff No. 1 Har Shankar Prasad Singh was a shareholder in the estate, Mehal Shava, but his share was confined to a separate 2 anna 8 pie share, and that he had no interest, so far as one can discover, in the 2 anna 8 pie *ijmali kalam*, which was owned by Jagdamba, Ambika and certain other individuals. It is quite possible that as a shareholder in the mehal itself he was advised to come forward to offer to the Collector the amount for which the revenue sale had taken place, as also to join his other co-sharers in the estate in the appeal to the Commissioner, but there is nothing to show that after he acquired the interest which he purchased, in the 2 anna 8 pie *ijmali kalam*, and which was on the 11th December 1891, he, as such purchaser, offered any opposition to the sale which had taken place on the 30th September 1891, and in respect [972] of which an appeal was pending on the 28th November before the Commissioner at the time of his purchase. That being so, we do not

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see our way to accept the view which has been put forward by the learned District Judge in this case. We do not think that by reason of any conduct on the part of the plaintiff, Har Shankar Prasad Singh, or on the part of the other plaintiff, Din Dayal Patak (for he does not appear to have taken any part in the petitions that were presented to the Collector and the Commissioner) they are in equity barred from obtaining the relief which, according to the view of the learned Judge himself, they are entitled to have, if it were not for the opposition that they are said to have offered to the confirmation of the sale by the Commissioner.

It has been contended on behalf of the respondents that it was the duty of the plaintiffs to have saved the 2 anna 8 pie *ijmali kalam* from being sold by payment of the arrears. That might no doubt have been a wise course to pursue, but having regard to s. 54 of the Revenue Sale Law, it seems to us to be quite clear that the defendants, though they may be taken to have acquired under the sale the 2 anna 8 pie *ijmali kalam*, acquired it subject to the incumbrance that had already been created in favour of Harbans Sahai, and were bound in law to discharge that incumbrance; and the time they had to do so was the period between the 30th September 1891, the date of their purchase, and the 5th March 1862, the date when the sale was confirmed. No doubt the sale to the defendants did not, according to law, become final, until it was confirmed under the orders of the Commissioner on the 11th March 1892, but there was nothing in law to prevent them from paying up the decree in favour of Harbans Sahai, or depositing the money under protest. In that way they might have saved their equity of redemption, but they allowed the sale to take place, the result being that the plaintiffs acquired the property on the 5th March 1892.

In this view of the matter we think that the decree of the learned District Judge cannot be supported. We accordingly set aside the decree of the lower appellate Court and restore that of the first Court, with all costs.

M. N. R. *Appeal allowed.*

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26 C. 973 = 4 C.W.N. 32.

[973] INSOLVENCY JURISDICTION.

Before Mr. Justice Stanley.

IN THE MATTER OF SARAT KUMAR SEN. [2nd August, 1899.]

Insolvent Act (11 *and* 12 *Vict*., *c*. 21), s. 51—*Application for personal discharge—Discharge except as to debts due to a particular creditor—Prospective order under s*. 51.

Application by insolvent for personal discharge. One creditor opposed. It appeared that that creditor lent money to the insolvent on a mortgage on false representation made by the insolvent to him. No decree had been obtained by the creditor on his mortgage. The opposing creditor applied that the insolvent be dealt with under s. 51 of the Insolvent Act. The insolvent contended that an order under s. 51 could only be made when the creditor had obtained a decree, and was in a position to apply at once for the arrest of the insolvent, which was not the case here. *Held*, the insolvent was entitled to his personal discharge, as regards all creditors except the opposing creditor; that the Court had no power under s. 51 to order immediate commitment of the insolvent, inasmuch as the opposing creditor had not placed himself in a position to issue execution against the insolvent, but that the Court could make a prospective order that with regard to the debt due to the opposing creditor the insolvent

should be entitled to his personal discharge as soon as he should have been in custody at the suit of that creditor for the period of six months.

Quære.—If the debt be satisfied out of the proceeds of sale of the mortgaged properties or otherwise, whether the effect of such payment would be to relieve the insolvent from the penalty prescribed by s. 51.

1899 AUG. 2. — INSOLVENCY. JURISDICTION. — 26 C. 973 = 4 C.W.N. 32.

THIS was an application by the insolvent for his personal discharge. His discharge was opposed by one creditor who held a mortgage executed in his favour by the insolvent. It appeared on the evidence before the Court that the opposing creditor had lent the insolvent two sums of money on the security of a mortgage on representations by the insolvent that the property mortgaged was unincumbered, whereas as a matter of fact the property had been previously mortgaged. The opposing creditor had not obtained a decree on his mortgage.

Mr. *R. Mitter*, for the insolvent.

Mr. *Dunne* and Mr. *K. Chowdhry*, for the opposing creditor, the second mortgagee.

[974] *Mr. Avetoom*, for the first mortgagee.

Mr. *Dunne* asks the Court to deal with the insolvent under s. 51 of the Insolvent Act.

STANLEY, J.—The evidence you have adduced is amply sufficient to enable me to deal with him under s. 51. I cannot send him to jail under that section. The case of *In re Mancharji Hirji Readymoney* (1) points out the course to be taken under s. 51.

Mr. *Mitter.*—In that case I will offer no evidence and will leave the matter to the Court. I wish to point out that the opposing creditor has not obtained a decree. An order under s. 51 can only be made when the opposing creditor has obtained a decree. In this case there is no decree, but the creditor must sue and after obtaining his decree then execute. It is clear that the provisions of the section require that the creditor who opposes should be in a position to apply at once for arrest of the insolvent. Here if the discharge of the insolvent should be postponed till he has been imprisoned for say six months or two years the creditor by delaying in bringing his suit and executing his decree may keep the proceedings open indefinitely. *Samarapuri* v. *Parry and Co.* (2).

Mr. *Dunne.*—The debt of the opposing creditor is admitted and I submit that the creditor is in the same position as he would be in if he had obtained a decree.

ORDER.

STANLEY, J.—In this matter it has been clearly established that the insolvent procured two loans amounting together to Rs. 9,000 upon the false representation that the property which formed the security for the loans was free from all incumbrances. The property, or a portion of the property, had been mortgaged the year previously to secure a sum of Rs. 4,000. It is apprehended by the puisne mortgagee that the mortgaged property will not realize sufficient to satisfy the three mortgages, and he opposes the discharge of the insolvent upon the ground of the false and fraudulent representation made to him and on the faith of which he advanced his money. No other creditor is opposing **[975]** the discharge of the insolvent. I regard the conduct of the insolvent as very reprehensible and I cannot overlook it.

Under the circumstances I grant a personal discharge as regard all the creditors save and except creditor No. 2, and as regards creditor No. 2

(1) 5 B.H.C.O.C. 55. (2) 13 M. 150.

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I shall apply the provisions of s. 51 of the Insolvent Act. It appears to me reasonably clear upon the reading of that section of the Act that I have no power to order the immediate commitment of the insolvent inasmuch as the creditor No. 2 has not placed himself in a position to issue execution against the insolvent. In the case of *In the matter of Mancharji Hirji Readymoney* (1) it was held that such an order of adjudication does not in itself operate as an order for the imprisonment of the insolvent, but the detaining creditor if he wishes to arrest the insolvent, for the period prescribed by the Court, must, if he has not already done so, place himself in a position to issue execution against the insolvent. Accordingly, I can only make a prospective order, *viz.*, that as to creditor No. 2 the insolvent shall be entitled to be discharged as soon as he shall have been in custody at the suit of that creditor for the period of six months. The effect of this order may be that if the debt be satisfied out of the proceeds of the sale of the mortgaged properties or otherwise no proceeding may be taken by the creditor No. 2 to enforce this order; but I abstain altogether from saying that the effect of payment will be to relieve the insolvent from the penalty prescribed by this section.

Attorney for the insolvent: Babu *Sashi Sikhar Banerjee.*

Attorney for the opposing creditor: Babu *Ganendra Narayan Dutt.*

(1) 5 Bom. H.C.O.C. 55.

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Ss. 6, 8 and 9—*Negligence—Accident, Loss by—Burden of proof in a suit for damages for non-delivery.*—The plaintiffs sued a company, who were common carriers, for damages for the non-delivery of goods entrusted to them for carriage, destruction of the goods by fire having taken place on board the company's flat when moored off the place of destination. How the fire

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originated was not shown. The company did not prove absence of negligence on their part, nor was there placed before the Original Court a case inconsistent with their negligence. The Judicial Committee dismissed an appeal from the decree of the Appellate High Court, which proceeded on the 9th section of the Carriers' Act (III of 1865), that Court having taken the non-delivery as placing the burden of proving absence of negligence on the carriers. There were facts showing that no adequate means had been provided by the defendants for extinguishing a fire on board, and that the watch was inefficient. The defendants, accordingly, had failed to exonerate themselves. THE RIVERS STEAM NAVIGATION COMPANY v. CHOUTMULL DOOGAR, 26 C. 398 (P.C.)=26 I.A. 1=3 C.W.N. 145 ... 857

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(1) *Settlement of estate—A* talukdhar *settled with on terms imposing a trust on him—Second summary settlement,* 1858*—Effect of the confiscation—Rights of the Government.*—A *sanad*-holding *talukhdar*, whose name has been entered in lists I and II, made in conformity with the Oudh Estates Act, 1869, holds the *talukh* subject to such trusts as have been validly created. At annexation, four descendants of a Muhammadan proprietor were entitled in equal shares to the ancestral estate, which in 1858, at the second summary settlement, was settled with the only one of the four who presented himself to the Settlement Officer. The settlement with him, as *talukhdar*, which was then made was, however, made upon terms providing that the absent co-sharers on their return should obtain their shares. This accorded with his application expressing his willingness. *Held*, that the question whether the *talukhdar* had become a trustee for the plaintiff in respect of his share depended on the terms on which the estate had been granted to the *talukhdar* by the Government at the second summary settlement,it having been at their absolute disposal as a consequence of the confiscation of March 1858. The trust was not affected by the *sanad*. No special provision as to the co-sharer's return, or admission to share had been deemed necessary by the Chief Commissioner, who authorized the settlement with the *talukhdar* in reliance on his assurance. The right of the co-sharer, who returned in 1859, was accordingly established. HASAN JAFAR v. MUHAMMAD ASKARI, 26 C. 879 (P.C.)=26 I.A. 229=4 C.W.N. 65=7 Sar. P.C.J. 550 1163

(2) Talukdari estate under—See WILL, 25 C. 816.

(3) *S.* 33*—Estate of a* sanad*-holding* talukhdar*—Lineal primogeniture by custom—Award of a body of talukhdars within s. 33 of Oudh Estates Act—Withdrawal of a voluntary admission.*—The title to a *talukhdari* estate devolving upon a single heir by a custom of lineal primogeniture was contested. The plaintiff claimed to succeed his deceased brother as *talukhdar*. The defendant, who was his paternal uncle, was in possession. Before the annexation of the province the *kabuliyat* had been taken in the name of the plaintiff's brother as *talukhdar*, who afterwards had been settled with, at both the summary settlements. By primogeniture, whether lineal or by proximity of degree (of which latter kind there was no evidence as to its being the customary one) he was the heir. To him a *sanad* had been granted, and the *talukhdari* had been entered in list II under the Act of 1869. On the other hand it was urged that the above was consistent with the existence of a trust for the benefit of the titular *talukhdar's* uncles of whom the defendant was the survivor, they having assented to the recognition of a nominal title in their nephew. *Held*, that in intention as well as in form, the grant of the *talukhdari* had been made absolutely to the *sanad*-holding *talukhdar*. In regard to the state of things before annexation, it might have been questioned whether or not the property was being hold *benami* at that time. But after the Oudh Estates Act, 1869, had become law, the title shown by the plaintiff must prevail, and he must recover the estate, unless a trust for the defendant should have been established. There had been no consideration given, and there was nothing to create a trust. There had been no transfer, no estoppel, and no bar by time. In 1868 an award had been made by a body of *talukhdars* as arbitrators within s. 33 of the Act, between members of the family other than the present disputants. This as well as *wajib-ul-arz* of one of the village of the *talukh* was admissible as evidence of what was the custom in regard to its devolution. In 1879 the plaintiff

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had, on his brother's death, while admitting "the custom prevailing in my family of *gadinashini*," joined in a petition that the defendant's name should be entered *dakhil kharij* in the revenue records. *Held*, that there might be a withdrawal of any gratuitous admission, unless there should be some obligation not to withdraw it; that there was no such obligation here; and that there had been no proof of any title upon which the admission could rest. MUHAMMAD IMAM ALI KHAN v. HUSAIN KHAN, 26 C. 81 (P.C.) = 25 I.A. 161 = 2 C.W.N. 737 = 7 Sar. P.C.J. 432 ... 656

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(1) Position of executor of Hindu will before passing of—See HINDU LAW (WILL), 25 C. 103.

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(1) S. 12—See LETTERS OF ADMINISTRATION, 26 C. 404.

(2) Ss. 18, 26, 27, 29, 52, 54—See WILL, 25 C. 65.

(3) *S.* 35—*Right of creditors to immediate payment in full if assets sufficient—"Rateable payment," Meaning of—Costs—Meaning of "shall be liable to pay"—Succession Act* (X *of* 1865), *s.* 282—*Probate and Administration Act* (V *of* 1881), *s.* 104.—In a suit by a creditor, if his demand be uncontested or proved and the executor admits assets, the plaintiff is entitled at the hearing to an order for immediate payment without taking the accounts. The admission of assets for the payment of debt is also an admission of assets for the purposes of the suit and extends to costs if the Court thinks fit to give them. There is nothing in s. 35 of the Administrator-General's Act (II of 1874) which qualifies or restricts or otherwise interferes with the right of a creditor to demand immediate payment of his claim in full when the realizable assets in the hands of the Administrator-General are sufficient for the immediate payment of all claims in full. The "rateable payment" referred to in the above section, as well as in s. 282 of the Succession Act (X of 1865), and in s. 104 of the Probate and Administration Act (V of 1881), is rateable payment *out of the assets*; it is nowhere provided that it shall be made out of the nett income of the estate or any other specific part of the assets. The language ("Shall be liable to pay the costs") used in cl. 1 of s. 35 of the Administrator-General's Act (II of 1874) shows that it was intended, not to impose upon a creditor to whom the condition of exemption was inapplicable, an absolute obligation to pay the costs of the suit, but to leave a discretion to the Court to relieve him of the obligation if the circumstances of the case required it. OMIRTA NATH MITTER v. ADMINISTRATOR-GENERAL OF BENGAL, 25 C. 54 .. 37

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Ss. 2 *and* 7 *and* (VIII *of* 1897), *s.* 1, *cls.* 2—3 *and* 8—*Crim. Pro. Code* (*Act* X *of* 1882), *ss.* 3 *and* 399—*Crim. Pro. Code* (*Act* X *of* 1872), *s.* 318—*General Clauses Consolidation Act* (X *of* 1897) —*Effect of the repeal of a repealing statute—Construction of statute.*—The accused was convicted of an offence under s. 457 of the Penal Code by the Deputy Magistrate of Barisal, who found that the accused was a boy of fourteen or fifteen years, decidedly under sixteen, and passed the following order: "I find Ahmad Ali, boy, guilty of house-breaking by night for the purpose of committing theft, and instead of being imprisoned in the jail under s. 457 of the Penal Code, I direct under s. 399 of the Crim. Pro. Code, and s. 7 of Act V of 1876, that Ahmad Ali be confined in the Calcutta Reformatory for two years for training in some branch of useful industry." *Held*, that the order could not be sustained under s. 7 of Act V of 1876, as that Act had been repealed before the date of the order and the commission of the offence, nor under s. 8 of Act VIII of 1897, as the order does not comply with the provisions of the latter Act. *Held*, further that s. 318 of the Crim. Pro. Code (Act X of 1872) having been repealed by s. 2 of Act V of 1876, the corresponding s. 399 of the present Crim. Pro. Code (Act X of 1882) must also be held by virtue of s. 3 of the Code to have been repealed

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in the provinces, including Bengal, to which Act V of 1876 was extended. The repeal of a statute repealing another statute does not revive the repealed statute. The law in India as embodied in s. 7 of the General Clauses Act (X of 1897) is the same as the law in England. DEPUTY LEGAL REMEMBRANCER v. AHMAD ALI, 25 C. 333=2 C.W.N. 11 ... 223

Act XVII of 1876 (Oudh Land Revenue).

(1) *Ss.* 52,53—*Claim to resume grant.*—A proprietor in Oudh claimed to resume a perpetual lease as having been granted by his ancestor at a favourable rent, without the sanction, but otherwise under the circumstances, contemplated by s. 52 of the "Oudh Land Revenue Act," XVII of 1876, so that the grant was resumable. *Held*, that the claim failed. The undefined charges, expenses of management, and other payments incidental to the lease, might have been such as to make the rent paid a reasonable one as between lessor and lessee, and that the favourable nature of the rate of rent had not been established. PERTAB BAHADUR SINGH v. BADLU, 25 C. 479 (P.C.)=7 Sar. P.C.J. 350 ... 317

(2) *Ss.* 121, 123—*Transfer of share of under-proprietors in arrears of rent—Right to interest on rent from transferee—Oudh Rent Act* (XXII *of* 1886), *s.* 141.—Under the Oudh Land Revenue Act, 1876, ss. 121, 123, the shares of defaulting under-proprietors were transferred to three of them who offered to pay. The present suit was brought by the superior proprietor, the *talukhdar*, in whose estate the *mehal* was comprised, against the whole body of under-proprietors for arrears of rent accrued while the term of the above transfer was running. *Held*, that the provision in s. 123 of the Oudh Land Revenue Act, 1876, to the effect that such transfer shall not affect the joint liability of the co-sharers of the *mehal*, had not the effect of charging the co-sharers other than the three transferees with any liability for rent accrued during the term of the transfer. Interest was also claimed, but as to this it was *held* that under-proprietors were not tenants within the meaning of the Oudh Rent Act, 1886, s. 141, providing for payment of interest on rents due from tenants. MUHAMMAD MEHNDI ALI KHAN v. MUHAMMAD YASIN KHAN, 26 C. 523 (P.C.)=26 I.A. 41=3 C.W.N. 218=7 Sar. P.C.J. 468 ... 936

Act I of 1878 (Opium).

Ss. 5 *and* 9—*Licensed vendor, liability of, under s.* 9 *for keeping incorrect accounts.*—S. 5 of the Opium Act (I of 1878) declares that the Local Government with the previous sanction of the Governor-General in Council may make rules consistent with the Act regulating the sale of opium. Under this section rules were issued by the Government of Bengal with the previous sanction of the Governor-General in Council on the 21st February 1898, r. 15 of which declares that a person to whom a license has been granted may sell opium by retail in accordance with the conditions specified in the license. The conditions of the license for retail sale of opium are contained in Form No. 1 made under r. 15. Under art. 13 of this form the holder of the license is to keep a daily correct account showing the quantity of opium received and sold and other details. Art. 18 sets out that on infringement of any of the conditions contained in the form or imposed by the Opium Act the license may be cancelled. The petitioner, a licensed vendor of opium, was convicted of having kept incorrect accounts in contravention of the rules made under s. 5 of the Opium Act, and having thereby committed an offence punishable under s. 9 of that Act. He was sentenced to pay a fine of Rs. 200 and in default of payment to undergo rigorous imprisonment for four months. *Held*, that the conviction and sentence must be set aside, there being nothing in any of the rules made under s. 5 of the Act which would make the preparation of an incorrect account punishable under s. 9. UMESH CHUNDER GHOSE v. QUEEN-EMPRESS, 26 C. 571=3 C.W.N. 365 ... 966

Act XVIII of 1879 (Legal Practitioners).

Ss. 27, 28, 29—*Suit by a pleader to recover fee from his client—Contract Act* (IX *of* 1872), *s.* 70—*Provincial Small Cause Courts Act, s.* 25.—The Legal Practitioners' Act (XVIII of 1879), s. 28, debars a pleader from recovering a fee from his client when no contract in writing is made. SARAT CHANDRA ROY CHOUDHRY v. CHUNDRA KANTA ROY, 25 C. 805 ... 524

Act V of 1881 (Probate and Administration). PAGE

(1) See HINDU LAW—INHERITANCE, 25 C. 254.

(2) Ss. 2, 4—See HINDU LAW (WILL), 25 C. 103.

(3) S. 25—See PROBATE, 26 C. 634.

(4) *Ss.* 40 *and* 90—*Letters of Administration—Effect of transfer of immoveable property by a Hindu widow with the Judge's sanction, on obtaining Letters of Administration—Legal necessity—Fraudulent representation.*—An alienation made with the permission of the District Judge by a Hindu widow who had obtained letters of administration in respect of the estate, is valid as an absolute alienation under s. 90 of the Probate and Administration Act (V of 1881), irrespective of the existence of legal necessity. KAMIKHYA NATH MUKERJEE v. HARI CHARAN SEN, 26 C. 607 ... 990

(5) S. 52—See PROBATE, 25 C. 340.

(6) S. 90—See HINDU LAW (WILL), 25 C. 103.

(7) *S.* 98—*Act* VI *of* 1889, *s.* 15, *Amending Act* V *of* 1881—*Construction of Act—Meaning of the words " an account."*—The provisions of s. 98 of the Probate and Administration Act that an executor shall, within one year from the grant of probate or letters of administration " or within such further time as the Court may from time to time appoint, exhibit an account of the estate," mean that one account is to be exhibited and not a series of accounts from time to time ; the words " from time to time appoint " relating to an extension of the period within which an account is to be exhibited. MOHESH CHANDRA BHUTTACHARJEE v. BISWA NATH BHUTTACHARJEE, 25 C. 250 = 1 C.W.N. 646 ... 168

(8) S. 104—See ACT II OF 1874 (ADMINISTRATOR-GENERAL'S), 25 C. 54.

Act XV of 1881 (Indian Factories).

As amended by Act XI of 1891, *ss.* 15 (*g*) *and proviso* (1) 17—*Bengal Municipal Act* (*Bengal Act* III *of* 1884), *ss.* 320, 321—*Liability for neglecting to keep a factory in a cleanly state—Crim. Pro. Code* (*Act* X *of* 1882), *s.* 537—*Nuisance—Sanction.*—The Inspector of Factories having found the latrines of the Hastings Mill within the Serampore Municipality in a filthy state instituted a prosecution against the manager of the mill, but the prosecution failed. He then prosecuted, as representing the Municipal Commissioners of Serampore, the Chairman of the Municipality, who, on conviction, was fined Rs. 200 for " neglecting to keep the factory free from effluvia arising from a privy" under the provisions of the Factories Act and of the Bengal Municipal Act, s. 320 : *Held*, that the conviction of the Chairman was unsustainable on the finding that the Municipality and the occupier of the factory were jointly responsible. *Held*, further, that it lay upon the occupier of the factory as being primarily liable for breach of any of the provisions of the Factories Act to give the strictest proof of circumstances exonerating himself from the liability in order to fix it on any other person. CHAIRMAN OF THE SERAMPORE MUNICIPALITY v. INSPECTOR OF FACTORIES, HOOGHLY, 25 C. 454 ... 301

Act XV of 1882 (Small Cause Courts Presidency Towns).

S. 26, *sub-ss.* 2, 3, 4, *ss.* 28, 37 *and* 61 *and* 62—*Attachment—Claim by mortgagor in execution proceedings in Small Cause Court—Civ. Pro. Code* (*Act* XIV *of* 1882), *ss.* 278, 279, 280, 281, 282 *and* 293—*Presidency Small Cause Court, Rules of Practice,* 49, 50, 51—*Tiled huts*—" *For the purposes of execution," Meaning of—Question of Title*—Res judicata.—An order made upon a claim to attached property filed in the Small Cause Court of Calcutta in a proceeding under s. 278 of the Civ. Pro. Code is "an order made in a suit," within the meaning of s. 37 of the Presidency Small Cause Courts Act (XV of 1882), and is final, subject only to the right to apply for a new trial. The words of s. 28 (Act XV of 1882) "*for the purposes of execution* " must mean for all purposes of execution, inclusive of the purpose of determining objections made to attachments. Tiled huts for all the purposes of execution are therefore moveable property under the section. The Small Cause Court has full power and authority to determine the question of title under a mortgage over attached property, and that question is, therefore, *res judicata.* DENO NATH BATABYAL v. NUFFER CHUNDER NUNDY, 26 C. 778 = 3 C.W.N. 590 ... 1098

Act VIII of 1885 (Bengal Tenancy). PAGE

(1) See LANDLORD AND TENANT, 25 C. 36.

(2) S. 7—See ENHANCEMENT, 26 C. 832.

(3) *Ss.* 11, 12 *and* 13—*Sale of a tenure in execution of decree not for arrears of rent—Effect of non-payment of landlord's fee or the fee for service of notice of the sale on the landlord before the confirmation of sale.*—Under s. 13 of the Bengal Tenancy Act, when a permanent tenure is sold in execution of a decree other than a decree for arrears of rent due in respect thereof, and the landlord's fee prescribed by s. 12 of the said Act is not paid before the confirmation of the sale, the sale is invalid. BABAR ALI v. KRISHNAMANINI DASSI, 26 C. 603=3 C.W.N. 531 ... 987

(4) S. 22 – See CIV, PRO. CODE (ACT XIV OF 1882), 26 C. 727.

(5) S. 25—See LIMITATION ACT (XV OF 1877), 26 C. 564.

(6) *Ss.* 27 *and* 29—*Landlord and Tenant—Suit for rent—Enhancement of rent—Enhancement of rent by a registered* kabuliat *within* 15 *years from a previous oral agreement to pay enhancement of rent – Effect of.*—By an oral agreement in the year 1885 the tenant defendant agreed to pay an enhancement of rent, and he paid rent at that rate until subsequently he executed in the year 1893 a registered *kabuliat*, by which he agreed to pay a further enhancement of rent which was more than two annas in the rupee. Upon a suit for rent by the landlord based on the registered *kabuliat*: *Held*, that, inasmuch as the enhancement of rent in s. 29 of the Bengal Tenancy Act, refers to enhancement after the promulgation of the Act, if in this case the enhancement which was made in the year 1885 was before the Act came into force, it would not bar an enhancement during the period of fifteen years from the date thereof as contemplated by cl. (3) of s. 29. But if the said enhancement was made after the Actcame into force, it would also not bar a subsequent enhancement within fifteen years from the date thereof, as the previous contract was only an oral one and was not effectual and binding upon the defendants. *Held*, also, that having regard to cl. (*b*) of s. 29, as the enhancement was more than two annas in the rupee, the registered *kabuliat* was bad in law, if the rent then agreed to be paid was an enhanced rent. The *kabuliat* would also be bad in law, if the rent agreed to be paid is partly enhanced and partly increased rent. *Held*, further, that having regard to proviso (1) of s. 29, as also the provisions of s. 27, the plaintiff would at any rate (*i.e.*, failing the *kabuliat*) be entitled to recover rent at the rate paid by the defendant for more than three years. MOTHURA MOHUN LAHIRI v. MATI SARKAR, 25 C. 781 ... 509

(7) *S.* 29—*Enhancement of rent by registered contract—Increase in the amount of rent by reason of increase of area—Applicability of s.* 29 *in such cases.*—S. 29 of the Bengal Tenancy Act applies only to an increase in the rate of rent, and not to an increase in the amount of rent by reason of an increase of the area. SATISH CHUNDRA GIRI v. KABIRADDIN MALLICK, 26 C. 233 ... 753

(8) Ss. 44, 45—See LANDLORD AND TENANT, 25 C. 75.

(9) *S.* 43, cl. (*a*)—*Operation of s.* 48 *on suit instituted before Act came into force*—S. 48, cl. (*a*) of the Bengal Tenancy Act is retrospective. GURU DASS SHUT v. NAND KISHORE PAL, 26 C. 199 ... 732

(10) S. 50—*See* ENHANCEMENT, 26 C. 617.

(11) *S.* 50—*Record of rights—Presumption from twenty years' uniform payment of rent*—Raiyats *holding at fixed rates.*—In a proceeding for record of rights under Chap. X of the Bengal Tenancy Act (VIII of 1885), it having been found that certain *raiyats* were holding their lands at rates which had not been changed during twenty years before the institution of the proceeding, the Settlement Officer recorded them as "*raiyats* holding at fixed rates." In second appeal, *held*, that under s. 50 of the Bengal Tenancy Act, the Settlement Officer was right in giving effect to the presumption that the *raiyats* were holding at fixed rate of rent and in recording them as "*raiyats* holding at fixed rates." DULHIN GOLAB KOER v. BALLA KURMI, 25 C. 744 (F.B.)=2 C.W.N. 580 ... 486

(12) S. 52—See LANDLORD AND TENANT, 26 C. 739.

(13) S. 53—See RES JUDICATA, 25 C. 571.

(14) S. 60—See ACT VII OF 1876 (LAND REGISTRATION, BENGAL), 26 C. 712.

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(15) S. 61—See LANDLORD AND TENANT, 25 C. 289.

(16) S. 65—See CIV. PRO. CODE (ACT XIV OF 1882), 26 C. 727.

(17) S. 65—See LANDLORD AND TENANT, 26 C. 103.

(18) S. 65—See SALE, 26 C. 937.

(19) *S.* 66, *cls.* 2 *and* 3 *and Chap.* XIV—*Landlord and tenant—Suit for arrears of rent—Execution of decree for ejectment for arrears of rent—Extension of time for payment—Per* PRINSEP and BANERJEE, JJ.—The extension of time authorised by s. 66, cl. 3, of the Bengal Tenancy Act can be granted by the Court after the decree, and not only when framing the decree under cl. 2 of that section. *Per* RAMPINI, J.—*contra. Per* PRINSEP and BANERJEE, JJ.—The decree for ejectment passed under s. 66, cl. 2, of the Bengal Tenancy Act need not incorporate the terms as to the ejectment being avoided by payment within fifteen days from the date of the decree. These terms are rather in the nature of a direction to the Court of execution. *Per* PRINSEP, J.—The application for such extension of time may therefore be made by the judgment-debtor on a mere petition, and not in the form of an application for review of judgment. BODH NARAIN v. MAHOMED MOOSA, 26 C. 639=3 C.W.N. 628. 1010

(20) *Ss.* 66, 79—*Suit for arrears of rent brought before expiry of Bengali year—Right to eject tenant—Under-raiyats—Permanent mokurari lease—Ejectment.*—Where a suit is brought before the expiry of the Bengali year in respect of the arrears of rent for that year, the landlord is not entitled to eject the tenant under s. 66 of the Bengal Tenancy Act. GURU DASS SHUT v. NAND KISHORE PAL, 26 C. 199 ... 732

(21) S. 67—See INTEREST, 26 C. 130.

(22) *Ss.* 67, 178—*Suit for arrears of rent and interest at an exorbitant rate—Rule relating to hard and unconscionable bargain—Liability of a purchaser of a tenure at a sale for arrears of rent to pay interest.*—A stipulation for the payment of interest at an unusual and an exorbitant rate cannot be supposed to be an incident of a tenancy which would attach to it even after a sale for arrears of rent. In execution of a decree for rent against a tenant who held under a *kubuliat*, dated March 1880, the plaintiff put up the tenure for sale and the defendant purchased it on the 20th November 1891. Subsequently a suit for rent with interest at 225 per cent. per annum, specified in the *kubuliat* executed by the former tenant, was brought by the plaintiff against the defendant. The defence was that the plaintiff was not entitled to interest at such a high rate. *Held*, that the plaintiff was not entitled to recover interest at the rate claimed, it being an exorbitant one and not an ordinary incident of a tenancy. *Held* also, that in such a case the rule relating to hard and unconscionable bargains should apply, and the plaintiff would be entitled to interest at 12 per cent. per annum, being the ordinary rate of interest for arrears of rent. *Per* RAMPINI, J.—By the sale of an ordinary *raiyati* tenancy for arrears of rent, a new contract is created between the auction-purchaser and the landlord at the date of the sale; therefore in a case where the tenure was sold after the Bengal Tenancy Act came into operation, and a suit was brought by the landlord for rent with interest against the auction-purchaser, the provisions of s. 67, read with s. 178, sub-s. 3, cl. (*h*) of the Bengal Tenancy Act, would apply. KALI NATH SEN v. TRAILOKHYA NATH ROY, 26 C. 315=3 C.W.N. 194 ... 805

(23) Ss. 72, 73—See LANDLORD AND TENANT, 25 C. 445.

(24) S. 73—See CIV. PRO. CODE (ACT XIV OF 1882), 26 C. 727.

(25) *Ss.* 74 and 179—*Stipulation for payment of abwab—Permanent tenure-holder.*—The defendant, a *durpatnidar*, stipulated in the *kabuliat* for the annual payment of Rs. 4 in lieu of certain quantities of jack fruit, bamboos and fish. This stipulation was contained in a clause perfectly distinct from that containing the payment of rent which was payable quarterly. *Held* (i) such a stipulation is a stipulation for the payment of an *abwab*; (ii) A stipulation for the payment of an *abwab*, under a permanent *mokarari* lease is valid, and s. 74 of the Bengal Tenancy Act does not control s.179 of the Act. KRISHNA CHANDRA SEN v. SUSHILA SOONDURY DASSEE, 26 C. 611=3 C.W.N. 608 ... 993

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(26) *S.* 85—*Landlord and tenant—Sub-lease of a raiyati holding, by a registered instrument for a period of more than nine years, whether valid.*—A sub-lease of a holding, by a *raiyat* without the consent of the landlord, though created by a registered instrument, is altogether void under s. 85 of the Bengal Tenancy Act. SRIKANT MONDUL v. SARODA KANT MONDUL, 26 C. 46 ... 633

(27) S. 88—See LANDLORD AND TENANT, 25 C. 531.

(28) *S.* 88—*Transfer of a portion of occupancy holding—Custom—Ejectment—Possession.* The transfer of a portion of an occupancy holding is contrary to the spirit, if not the letter, of s. 88 of the Bengal Tenancy Act VIII of 1885, and the existence of a custom in a particular place by which such a holding is transferable is immaterial, and gives no right to the transferee as against the landlord. KULDIP SINGH v. GILLANDERS ARBUTHNOT & CO, 26 C. 615 = 4 C.W.N. 738 ... 995

(29) S. 89—See LANDLORD AND TENANT, 25 C. 131.

(30) *Ss.* 103, 143, 189—*Rules framed under s.* 189 *of the Bengal Tenancy Act—Whether proceedings under s* 103 *of the Bengal Tenancy Act are suits between landlord and tenant—Code of Civil Procedure* (*Act* XIV *of* 1882)—*Review of judgment.*—Proceedings under s. 103 of the Bengal Tenancy Act are suits between landlord and tenant within the meaning of s. 143 by virtue of the rules framed under s. 189 of that Act; therefore the provisions of the Code of Civil Procedure relating to review of judgment are applicable to such proceedings. ACHHA MIAN CHOWDHRY v. DURGA CHURN LAW, 25 C. 146 = 2 C.W.N. 137 ... 99

(31) S. 104—See APPEAL (SECOND APPEAL), 25 C. 146.

(32) S. 104—See ENHANCEMENT, 26 C. 617.

(33) Ss. 104, 106, 108—See APPEAL (SECOND APPEAL), 25 C. 34.

(34) Ss. 105, 106, 108—See APPEAL (SECOND APPEAL), 26 C. 556.

(35) Ss. 113, 115—See ENHANCEMENT, 26 C. 617.

(36) *S.* 116—Zerait *land*—Raiyat *brought on* zerait *land by lessee, Right of, on expiry of lease—Trespasser—Right of occupancy—Liability to ejectment.*—S. 116 of the Bengal Tenancy Act applies even in a case where a person is brought on the malik's *zerait* land as a *raiyat* by a lessee for a term of years; therefore such a person cannot acquire any right of occupancy or non-occupancy on the said land, and, he, being a trespasser only, on the expiry of the lease of the lessee is liable to ejectment. SHEO NANDAN ROY v. AJODH ROY, 26 C. 546 = 3 C.W.N. 336 ... 950

(37) *Ss.* 121 *and* 140—*Suit for compensation for illegal distraint.*—A suit for compensation for illegal distraint under s. 121 of the Bengal Tenancy Act (VIII of 1885) was brought by one of two persons jointly entitled to the crops distrained: *Held*, that s. 140 of the Bengal Tenancy Act did not exclude a suit of this kind. JAGDEO SINGH v. PADARATH AHIR, 25 C. 285 ... 191

(38) S. 144—See APPEAL (SECOND APPEAL), 26 C. 842.

(39) *S.* 148, *cl.* (*h*)—*Assignee of decree—Trustees applying for execution for benefit of assignor's heir.*—The word "assignee," as used in s. 148, cl. (*h*), of the Bengal Tenancy Act, does not include trustees who execute decrees under an assignment which is not for their own benefit but for the benefit of the heir of the assignor CHHATRAPAT SINGH v. GOPI CHAND BOTHRA, 26 C. 750 = 4 C.W.N. 446 ... 1080

(40) *S.* 148, *cl.* (*h*)—*Rent decree—Decree for arrears of rent—Application for execution by the assignee of such a decree—Code of Civil Procedure* (*Act* XIV *of* 1882), s. 316.—An application for execution by the assignee of a decree which was obtained by a landlord against a defaulting tenant, for arrears of rent which accrued due between the date of the sale of the tenure in execution of a previous decree for arrears of rent, and the date of the confirmation of such sale, is barred by cl. (*h*) of s. 148 of the Bengal Tenancy Act, as being one for the execution of a decree for arrears of rent. KARUNA MOYI BANERJEE v. SURENDRA NATH MOOKERJEE, 26 C. 176 ... 717

(41) S. 153—See LANDLORD AND TENANT, 25 C. 571, note.

(42) S. 153—See RES JUDICATA, 25 C. 571.

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(43) S. 155—See LIMITATION ACT (XV OF 1877), 26 C. 564.

(44) S. 157—See LANDLORD AND TENANT, 25 C. 324.

(45) *S. 167—Effect of service of notice—Annulling of incumbrance—Property in possession of a person other than the purchaser.*—Service of notice under s. 167 of the Bengal Tenancy Act has the effect of annulling an incumbrance. It is not necessary for the purchaser to bring a declaratory suit to have it declared that the incumbrance is annulled. The incumbrance would be annulled even if the property be not at the time of the service of the notice under s. 167 in the possession of the purchaser but of somebody else. PEARI LAL ROY v. MOHESWARI DEBI, 25 C. 551 ... 364

(46) S. 174—See CIV. PRO. CODE (ACT XIV OF 1882), 26 C. 449.

(47) S. 174—See SALE, 25 C. 216.

(48) S. 178—See ACT VIII OF 1885 (BENGAL TENANCY), 26 C. 315.

(49) S. 178—See RIGHT OF OCCUPANCY, 26 C. 184.

(50) S. 178, sub-s. 3, cl. (*h*)—See INTEREST, 26 C. 130.

(51) S. 179—See INTEREST, 26 C. 130.

(52) S. 181—See LANDLORD AND TENANT, 25 C. 131.

(53) S. 183—See RIGHT OF OCCUPANCY, 26 C. 184.

(54) S. 188—See CIV. PRO. CODE (ACT XIV OF 1882), 26 C. 727.

(55) S. 188—See ENHANCEMENT, 26 C. 832.

(56) S. 188—See LANDLORD AND TENANT, 25 C. 324.

(57) S. 188—See SALE, 26 C. 937.

(58) *S. 188—Right of fractional co-sharer to maintain a suit for enhancement of rent—Agreement with fractional co-sharer to pay rent separately, Effect of—Joint landlords.*—A fractional shareholder cannot bring a suit for enhancement of rent. Under the provisions of s. 188 of the Bengal Tenancy Act, where there are several joint-landlords, they must all join in bringing a suit for enhancement of rent ; an agreement in a *kabuliyat* by one tenant to pay an enhanced rent to some of the landlords, if, on measurement, the *jama* of his *jote* is increased, does not create a right to maintain such a suit by those landlords. Such a suit cannot be brought otherwise than under the terms of the Bengal Tenancy Act. An agreement by a tenant with some of several joint-landlords to pay his share of the rent separately does not create a separate tenancy. BAIDYA NATH DE SARKAR v. ILIM, 25 C. 917=2 C.W.N. 44 ... 597

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Act IX of 1887 (Provincial Small Cause Courts).

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Act XII of 1887 (Bengal, Agra and Assam Civil Courts).

(1) S. 13—See EXECUTION OF DECREE, 25 C. 315.

(2) S. 23—See PROBATE, 25 C. 340.

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S. 15—See ACT V OF 1881 (PROBATE AND ADMINISTRATION), 25 C. 250.

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(1) S. 4—See MORTGAGE (REDEMPTION), 26 C. 1.

(2) S. 42—See RECORDER OF RANGOON, 25 C. 488.

Act VIII of 1890 (Guardians and Wards). PAGE

(1) Ss. 2, 30—See GUARDIAN, 25 C. 909.

(2) Ss. 9 and 17—See GUARDIAN, 25 C. 881.

(3) *S.* 14—*Proceedings for appointment of a guardian in more Courts than one—Report by District Court to High Court—Direction by Chief Justice—Powers of High Court—Letters Patent, High Court,* 1865, *cl.* 17—*Jurisdiction—Costs.*—Section 14 of the Guardians and Wards Act (VIII of 1890) does not apply to the High Court in the exercise of its original civil jurisdiction; and the term "report" in cl. (2) of that section refers, not to a judicial reference, but to a ministerial act. Proceedings had been taken for the appointment of a guardian of a minor, under that section, in the High Court, and afterwards in a Mofussil Court. The latter reported the case to the High Court; and the Chief Justice thereupon directed that the proceedings in the Mofussil Court should be stayed, and that a Judge of the original side of the High Court should hear and determine the matter. *Held*, that such direction was in order, and that the Judge who determined the matter had jurisdiction to do so. *Held*, also that although a petitioner had failed in his application on all points except the removal of the guardian, he was entitled to his costs up to and including the order removing the guardian, as he must be taken to have acted, so far, for the benefit of the minor. *In the matter of* FAKARUDDIN MAHOMED CHOWDHRY, HAFIZ AMMINUDIN AHMED v. GARTH, 26 C. 133=3 C.W.N. 91 ... 689

(4) Ss. 27, 29—See LIMITATION ACT (XV OF 1877), 26 C. 51.

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S. 6—*Common gaming-house*—Cowries—*Instruments of gaming.*—*Cowries* may be treated as instruments of gaming where they are used as counters or as a means to carry on gaming. The finding of *cowries* in a house upon search made under a warrant will under s. 6 of the Gambling Act (Bengal Act II of 1867) raise a rebuttable presumption that the house is used as a common aming-house. QUEEN-EMPRESS v. MAKUND RAM, 25 C. 432 ... 286

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(2) S. 2—See SALE, 25 C. 833.

(3) S. 8—See ACT VII OF 1880 (PUBLIC DEMANDS RECOVERY, BENGAL), 26 C. 414.

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(1) See EFFECT OF SALE IN EXECUTION UNDER, 26 C. 285.

(2) Ss. 59, 64—See SALE, 26 C. 937.

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(1) See TITLE, 26 C. 11.

(2) Ss. 59, 62—See DECLARATORY DECREE, 26 C. 845.

(3) *S.* 78—*Registration in regard to a share—Right to receive rent.*—When some out of several proprietors of an estate, who collect the rent jointly, have registered their names under the Land Registration Act, all the proprietors are entitled to join in an action for the whole rent, but a decree will be made only in respect of the rent proportionate to the share registered. Under s. 78 of the Land Registration Act, the penalty of non-registration is the forfeiture, not of the whole rent, but of the rent of the share in regard to which the landlord is unregistered. NILMADUB PATRA v. ISHAN CHUNDRA SINHA, 25 C. 787 ... 512

(4) *S.* 78—*Suit for rent, without registration of name whether maintainable by the legal representatives.*—A suit for rent, accruing due partly during the

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lifetime of a registered proprietor, and partly after his death, was brought by his representatives: the defence was that the suit was not maintainable, inasmuch as the plaintiffs were not registered proprietors, and had no certificate under the Succession Certificate Act. *Held*, that s. 78 of the Land Registration Act is not a bar to the realization of rent accruing due during the lifetime of the registered proprietor, but a suit for rent accruing due after the death of the registered proprietor is not maintainable by his representatives, without having their names registered under the Land Registration Act. NAGENDRA NATH BASU v. SATADAL BASINI BASU, 26 C. 536=3 C.W.N. 294 ... 944

(5) *Ss.* 78 *and* 42—*Suit for rent by unregistered proprietor—Transfer of proprietary right by succession.*—S. 78 of the Land Registration Act, 1876, precludes a person claiming as proprietor from suing a tenant for rent unless his name has been registered as such under the Act. It is immaterial how the transfer of proprietorship is effected, whether it is a case of transfer by purchase or a case of transfer by succession. S. 42 of the Act makes it clear that every person succeeding to the proprietary right in any estate must apply for registration of his name. PUNUK LALL MUNDAR v. THAKUR PROSAD SINGH, 25 C. 717 ... 469

(6) *Ss.* 78, 79—*Bengal Tenancy Act* (VIII *of* 1885), *s.* 60—*Right of suit—Suit for rent—Unregistered proprietor.*—There is nothing in s. 60 of the Bengal Tenancy Act to render a suit for rent by an unregistered proprietor unmaintainable, it being sufficient, if during the pendency of the suit and prior to decree, his name is registered. ABUL KHAIR v. MEHER ALI, 26 C. 712 ... 1055

Act VIII of 1876 (Estates' Partition, Bengal).

(1) S. 54—See EVIDENCE ACT (I OF 1872), 25 C. 90.

(2) Ss. 112, 128—See PARTITION, 26 C. 434.

Act I of 1879 (Chota Nagpur Land-lord and Tenant Procedure).

(1) See JAGIR TENURE, 25 C. 399.

(2) S. 124—See JAGIR TENURE, 25 C. 396.

Act VII of 1880 (Public Demands Recovery, Bengal).

(1) S. 2—See LIMITATION, 25 C. 283.

(2) S. 2—See RIGHT OF SUIT, 25 C. 85.

(3) *S.* 2—*Revenue Court—Sale under certificate—Jurisdiction—Limitation—Appeal to Commissioner for setting aside sale—Suit to set aside sale—Order of Revenue Court setting aside sale—Powers of the Civil Court.*—A sale was held on the 9th September 1893, in execution of a certificate under the Public Demands Recovery Act (Bengal Act VII of 1880). On the 2nd January 1894, an appeal was preferred to the Commissioner under s. 2 of Act VII of 1868 for setting aside the sale after the expiry of the sixty days prescribed for appeal. The Commissioner ordered an inquiry into the question whether the appellants before him were prevented from taking steps in consequence of fraud. The purchaser complained against this order before the Board of Revenue, who, acting under their powers of revision, set aside the certificate, and the Commissioner subsequently set aside the sale without hearing the purchaser. In a suit brought in the Civil Court for the same object during the pendency of the appeal before the Commissioner and decided by the lower Court after the orders of the Board and the Commissioner setting aside the certificate and sale were passed. *Held*, by the High Court on appeal: (1) The plaintiff was entitled to proceed simultaneously in the Civil Court and in the Revenue Court. If the sale be validly set aside by the Revenue Court, a decree must follow in the suit. (2) S. 2 of the Public Demands Recovery Act (Bengal Act VII 1880) applied to a sale under the Certificate Act (Bengal Act VII of 1868), and appeal to the Commissioner was rightly made under that section. (3) As regards the contention that the Commissioner had no jurisdiction to entertain the appeal as it was barred by limitation the question of limitation cannot be held to be one of jurisdiction, and the grounds of the Commissioner's finding on that point cannot be discussed in the High Court. (4) The Civil Court has no authority to reverse the order of a Revenue Court

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which sets aside a sale. (5) The reason for overruling the objection on the ground of limitation applied to the objection that the Commissioner had not heard the purchaser and that objection also could not be entertained. GUNESSAR SING v. GONESH DASS, 25 C. 789 ... 514

(4) *Ss.* 2 *and* 7—*Bengal Act* VII *of* 1868, *s.* 8—*Certificate of sale—Evidence of sufficiency of service of notice—Act* XI *of* 1859, *s.* 28—*Sale for arrears of rent.*—S. 8 of Bengal Act VII of 1868 does not apply to a certificate of title granted to a purchaser at a sale in execution of a certificate issued under s. 7 of Bengal Act VII of 1880, for arrears of rent alleged to be due to an estate under the Court of Wards, but it is limited in its application to the two descriptions of certificates of title therein referred to, namely, certificates granted under s. 28 of Act XI of 1859, and those granted under s. 11 of Bengal Act VII of 1868. BISHAMBUR HALDAR v. BONAMALY HALDAR, 26 C. 414 (F.B.)=3 C.W.N. 233. ... 868

(5) Ss. 8, 9—See CIV. PRO. CODE (ACT XIV OF 1882), 25 C. 239.

(6) *S.* 8, *cl.* (*b*) *and s.* 12—*Suit to set aside certificate and sale—Limitation.*—A certificate was issued under the Public Demands Recovery Act (Bengal Act VII of 1880), and notice under s. 10 of the Act was served on the 12th December, 1895. The debtor objected under s. 12 on the ground that no arrears were due, but the objection was overruled, on his failure to produce evidence, on the 7th August 1895, and the sale took place on the 10th August 1895. In a suit brought on the 8th August 1896 to set aside the certificate and the sale, *held*, that the terms of s. 8, cl. (*b*), providing the limitation of one year from the date of service of notice are peremptory, and in no way controlled by the provisions of s 12, and the suit in respect of the certificate was, therefore, barred by limitation. *Held*, also, that if the certificate cannot be cancelled, that sale held in execution of it also cannot be cancelled. RAJBUNS SAHAI v. KAMESHAR PROSAD, 26 C. 172 ... 714

(7) S. 20—See CIV. PRO. CODE (ACT XIV OF 1882), 25 C. 239.

(8) S. 20—See LIMITATION, 25 C. 283.

Act IX of 1880 (Bengal Cess).

(1) *Ss.* 34 *and* 35—*Preparation and publication of valuation roll—Liability to pay cess.*—In the case of rent-paying lands the publication of the valuation rolls under s. 35 of the Cess Act (Bengal Act IX of 1880) is not a condition precedent to the attaching of liability to pay road cess in accordance with the valuation rolls. BHUGWATI KUWERI CHOWDHRANI v. CHUTTERPUT SINGH, 25 C. 725=2 C.W.N. 407 ... 474

(2) S. 95—See EVIDENCE ACT (I OF 1872), 26 C. 832.

Act III of 1884 (Bengal Municipal).

(1) *S.* 204—*Projection caused by restoring a portion of an old building which has been pulled down with the object of its being rebuilt—Meaning of the words "which may have been so erected or placed"—Metropolis Management Amendment Act*, 1862 (25 *and* 26 *Vict., c.* 102), *s.* 75.—S. 204 of the Bengal Municipal Act (Bengal Act III of 1884) does not apply to the case of a projection forming part of a building which is merely in substitution for an old building which has existed upon the same site before the date on which the District Municipal Improvement Act, 1864, or the District Towns Act, 1868, or the Bengal Municipal Act, 1876, as the case may be, took effect in the Municipality. The words "which may have been so erected or placed" in s. 204 mean erected or placed for the first time. ESHAN CHANDER MITTER v. BANKU BEHARI PAL, 25 C. 160=1 C.W.N. 660 ... 109

(2) S. 224—See JURISDICTION, 26 C. 811.

(3) *Ss.* 237, 238 *and* 273—*Notice of intention to build—Commencing to build before sanction—Refusal of sanction within the period of six weeks—Liability to fine.*—If a person after giving notice in writing of his intention to erect a house under s. 237 of the Bengal Municipal Act (Bengal Act III of 1884) commences to build without waiting for the six weeks mentioned therein [as he is not bound to do under the Act, there being no such provision in it] he does not necessarily contravene the law; yet when he so acts, the reasonable view must be that he does it at his risk, his act being liable to

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be treated as one in contravention of any legal order of the Commissioners issued within the statutory period of six weeks, if such order does not sanction the proposed building; the above appears to be the only reasonable view of s. 238 of the Act. CHUNDRA KUMAR DEY v. GONESH DAS AGARWALLA, 25 C. 419 ... 278

(4) Ss. 245, 246—See JURISDICTION, 26 C. 811.

(5) Ss. 320, 321—See ACT XV OF 1881 (FACTORIES), 25 C. 454.

Act II of 1888 (Calcutta Municipal Consolidation).

(1) *S.* 87 *and sch.* II, *r.* 7, *cl.* (6)—*License tax—Liability to tax of Company carrying on business through Agents in Calcutta and not having a registered place of business.*—A joint-stock company carrying on money lending business through Agents in Calcutta, where it has no registered place of business, is liable to pay license tax under s. 87 and sch. II of the Calcutta Municipal Act of 1888. CORPORATION OF CALCUTTA v. EASTERN MORTGAGE AGENCY CO., 25 C. 483=2 C.W.N. 328 ... 320

(2) *Ss.* 125, 132, *and* 135—"*Valuation,*" *Meaning of—Re-valuation made by the Municipality within six years from the date of the valuation made after hearing objection, Legality of—Provincial Small Cause Courts Act* (IX *of* 1887), *s.* 25—*Code of Civil Procedure* (*Act* XIV *of* 1882), *s.* 622—*Statute* 24 *and* 25 *Vic.*, *c.* 104, *s.* 15—*Superintendence of High Court.*—The word "valuation" in s. 135 of the Calcutta Municipal Consolidation Act (Bengal Act II of 1888) means, not "the amount of the valuation" only, but also the process or act of valuation. A valuation was made by the Calcutta Municipality of a holding, the rate-payer objected to the amount, and the Vice-Chairman of the Municipality, on hearing the objection, fixed the valuation at a certain amount. Within six years from this valuation fixed after objection, a re-valuation was made by the Municipality, and the rate-payer objected to the legality of such valuation on the ground that the Municipality had no power to make a re-valuation within six years from the date of the last valuation. The Vice-Chairman overruled the objection, and the rate-payer appealed under s. 187 of the Act to the Judge of the Court of Small Causes at Sealdah, who allowed the appeal. *Held* that, inasmuch as the objection raised by the rate-payer was an objection to the valuation within the meaning of s. 135 of the Act, the Judge of the Small Cause Court had jurisdiction to deal with it. That being so, it was not open to the High Court to interfere either under s. 25 of the Provincial Small Cause Courts Act, or under s. 622 of the Code of Civil Procedure, or under s. 15 of 24 and 25 Vic., c. 104. CORPORATION OF CALCUTTA v. BHUHPATI ROY CHOWDHURY, 26 C. 74=3 C.W.N. 70 ... 651

(3) *Ss.* 337, 336, 336, *sch.* II. *r.* 6—*Liability for keeping animals without license—Penalty, to whom attached—Owner—Lessee.*—The petitioners, as owners, let out a stable on hire, where *tica gharries* and horses were kept by the lessee without taking out a licence from the Municipal Commissioners. The petitioners were convicted under ss. 307 and 336 of the Calcutta Municipal Act (Bengal Act II of 1888) for having permitted offensive matters, &c., and animals to be kept on the premises in contravention of the provisions of s. 335 of the Act: *Held*, that the convictions were bad, the lessee alone being answerable in such a case for disregarding the provisions of the Act. The penalty, under s. 336 of the Calcutta Municipal Act of 1883, attaches to the owner of any land for permitting any animals to be kept thereon, when he has direct possession of the land, and not when he has leased it out to another. ABHOY CHARAN DASS v. MUNICIPAL WARD INSPECTOR, 25 C 725—2 C.W.N. 289 ... 411

(4) *Ss.* 381, 382—*Burial ground—Certificate for closing a burial ground—Requisites of.*—The Municipal authorities issuing a certificate, under the provisions of s. 381 of the Calcutta Municipal Act (Bengal Act II of 1888), prohibiting the use of a burial ground must definitely specify the point of time from which the period fixed by them under that section is to run. FUTFUR RAHMAN NUSKUR v. MUNICIPAL WARD INSPECTOR. 25 C. 492=2 C.W.N. 145 ... 327

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Administration. PAGE

(1) Letters of—See ACT V OF 1881 (PROBATE AND ADMINISTRATION), 26 C. 607.

(2) Of estate of Shia Mahomedan—See MAHOMEDAN LAW (WILL), 25 C. 9.

(3) Suit for—See HINDU LAW (WILL), 25 C. 112.

(4) Suit for—See JURISDICTION, 26 C. 891.

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(1) Certificate of—See ACT XXXII OF 1839 (INTEREST), 25 C. 54.

(2) Right of, to commission—See WILL, 25 C. 65.

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Adverse Possession.

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(1) Sufficiency of—See PRACTICE, 25 C. 856.

(2) Sufficiency of—See SUMMONS, 26 C. 101.

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Misrepresentation as to—See MINOR, 25 C. 371.

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Agents.

(1) Accounting—See JURISDICTION, 26 C. 715.

(2) Authority of—See PRINCIPAL AND AGENT, 26 C. 701.

(3) Of party to suit—See INSPECTION, 25 C. 294.

Agreement.

(1) As to costs between attorney and client—See PRACTICE, 26 C. 769.

(2) As to shares in partnership—See BURDEN OF PROOF, 26 C. 281.

(3) For satisfaction of decree—See EXECUTION OF DECREE, 25 C. 86.

(4) To pay, as per account—See JURISDICTION, 26 C. 715.

(5) To pay certain sum to defend suit—See COMPROMISE, 26 C. 955.

(6) To pay rent separately, Effect—See ACT VIII OF 1885 (BENGAL TENANCY), 25 C. 917.

Alienation.

Involuntary—See LIS PENDENS, 26 C. 966.

Alimony.

Pendente lite, application for—See PRACTICE, 26 C. 764.

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2.—CRIMINAL.
3.—SECOND APPEAL.
4.—TO PRIVY COUNCIL.

———1.—General.

(1) Adding parties on—See CIV. PRO. CODE (ACT XIV OF 1882), 26 C. 114.

(2) Analogous by same appellants—See PRACTICE, 26 C. 124.

(3) *Appeal from order—Civ. Pro. Code (Act* XIV *of* 1882), *ss.* 57, 582, 588, 589—*Returning plaint to be presented to the proper Court—Order under Civ Pro. Code, s.* 582.—Where an order is made by the lower Court of appeal returning a plaint under s. 57 of the Civ. Pro. Code, by virtue of the powers conferred on it by s. 582, an appeal lies to the High Court under s. 589. S. 588 does not prohibit such appeal. GOOR BUX SAHOO v. BIRJ LAL BENKA, 26 C. 275 = 3 C.W.N. 243 ... 780

(4) *Arbitration—Validity of award—Judgment in accordance with an award—Code of Civil Procedure (Act* XIV *of* 1882), *ss.* 521 *and* 522.—An appeal will lie against a decree given in accordance with an award under s. 522

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of the Code of Civil Procedure, when the award upon which the decree is based is not a valid and legal award. A Court is justified in holding that an award is not valid and binding upon the defendant, when the arbitrator was the retained pleader of plaintiff, and no disclosure of this fact was made, before the arbitrator was appointed, to the defendant who was consequently unaware of it. KALI PROSANNO GHOSE v. RAJANI KANT CHATTERJEE, 25 C. 141 .. 96

(5) Common ground of—See CIV. PRO. CODE (ACT XIV OF 1882), 25 C. 239.

(6) *Companies Act* (VI *of* 1882), *s.* 58—*Appeal in a case where no issue as to title is raised.*—An appeal lies from an order passed under s. 58 of the Indian Companies Act (VI of 1882), although no issue has been directed upon a question of title. AMRITA LALL GHOSE v. SHRISH CHUNDER CHOWDHRY, 26 C. 944 = 4 C.W.N. 101 ... 1204

(7) Dismissal of—See COSTS, 26 C. 361.

(8) Dismissal of—See JUDGMENT, 25 C. 97.

(9) Form of judgment on—See JUDGMENT, 25 C. 97.

(10) Memorandum of, time of presentation of—See PAUPER, 26 C. 925.

(11) Omission to bring—See RIGHT OF SUIT, 25 C. 85.

(12) *Order amending sale-certificate—Order granting application for review of order—Civ. Pro. Code* (*Act* XIV *of* 1882), *s.* 244—*Question relating to execution of decree.*—No appeal lies from an order granting an application for the amendment of a sale-certificate. BUJHA ROY v. RAM KUMAR PERSHAD, 26 C. 529 = 3 C.W.N 374 ... 939

(13) *Order refusing to set aside award—Letters Patent, High Court,* 1865, *cl.* 15 —*Code of Civil Procedure* (*Act* XIV *of* 1882), *ss.* 2, 588.—An order made by a Judge of the High Court in the exercise of original civil jurisdiction refusing to set aside an award is a "judgment" within the meaning of cl. 15 of the Letters Patent of the High Court; and an appeal, therefore, lies from such an order to the High Court in its appellate jurisdiction. Such an appeal is not restricted by s. 588 of the Code of Civil Procedure. TOOLSEE MONEY DASSEE v. SUDEVI DASSEE, 26 C. 361 = 3 C.W.N. 347 834

(14) *Succession Certificate Act* (VII *of* 1889), *ss.* 9 *and* 19—*Order granting certificate, conditional, upon giving security.*—Where, on an application for a certificate of succession under the Succession Certificate Act (VII of 1889), an order was made granting the certificate conditionally upon the applicant's giving security: *Held*, that this was an order "granting, refusing, or revoking a certificate" within the meaning of s. 19 of the Act, and that, therefore, an appeal would lie therefrom. RADHA RANI DASSI v. BRINDABUN CHUNDRA BASACK, 25 C. 320 = 2 C.W.N. 59 ... 214

(15) To Commissioner—See JURISDICTION, 25 C. 876.

(16) Withdrawal of, from District Court—See HIGH COURT, 25 C. 39.

(17) See CIV. PRO. CODE (ACT XIV OF 1882), 25 C. 757.

(18) See CONTRIBUTION, 25 C. 565.

(19) See LETTERS PATENT, 1865 (HIGH COURT), 25 C. 236.

(24) See VOLUNTARY PAYMENT, 26 C. 826.

———**2.—Criminal.**

Crim. Pro. Code (*Act* X *of* 1882), *ss.* 404, 520, 522—*Order as to restoration of immoveable property—Jurisdiction of appellate Court to reverse such an order.*—There is no appeal from an order restoring possession of immoveable property under s. 522 of the Crim. Pro. Code (Act X of 1882), nor can such an order be regarded as an integral part of the judgment appealed from, so as to stand or fall according as the judgment is upheld or reversed. RAM CHANDRA MISTRY v. NOBIN MIRDHA, 25 C. 630 = 2 C.W.N. 225 ... 414

———**3.—Second Appeal.**

(1) Adding parties on—See PARTIES, 26 C. 109.

(2) *Bengal Tenancy Act* (VIII *of* 1885), *ss.* 104, 106, 108—*Special Judge under the Bengal Tenancy Act—Appeal from the decision of the Special Judge.*—Under the terms of s. 108 of the Bengal Tenancy Act (VIII of 1885) a second

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appeal lies from the decision of the Special Judge on questions with regard to the prevailing standard of measurement, area of lands in the possession of tenants, and the liability of the tenants to pay rent on account of any excess lands in their possession. MATHURA MOHUN LAHIRI v. UMA SUNDARI DEBI, 25 C. 34 ... 24

(3) *Bengal Tenancy Act* (VIII *of* 1885), *ss.* 105, 106, 108—*Order of Special Judge as to standard of measurement of lands.*—An order of the Special Judge as to the length of the standard of measurement to be used in measuring certain lands is not a decision in a case under s. 106 of the Bengal Tenancy Act, and therefore no second appeal lies from such an order to the High Court. NABOHARY JANA v. HARI CHARAN PRAMANICK, 26 C. 556 ... 957

(4) *Cases cognizable in Courts of Small Causes—Civ. Pro. Code* (*Act* XIV *of* 1882), *s.* 586—*Landlord and tenant—Bengal Tenancy Act* (VIII *of* 1885), *s.* 144.—A suit between landlord and tenant for the recovery by the tenant of excess payments taken from him by the landlord in respect of the rent of the holding, and not exceeding Rs. 500, is a suit cognisable by the Small Cause Court, and under s. 586 of the Civ. Pro. Code no second appeal lies. There is nothing in s. 144 of the Bengal Tenancy Act to override the provisions of s. 586 of the Civ. Pro. Code, as it determines only the *venue* and has no bearing upon the nature of the suit. RANG ROY *alias* RUNG LAL ROY v. HOLLOWAY, 26 C. 842=4 C.W.N. 957 ... 1140

(5) *Code of Civil Procedure* (*Act* XIV *of* 1882), *ss.* 2, 244, 311 *and* 588—*Decree—Fraud—Question relating to the execution of the decree between parties to the suit—Auction-purchaser a third party.*—An application was made by the judgment-debtor against the decree-holder and the auction-purchaser who was a third party, to have a sale set aside, on the ground of irregularity in publishing or conducting the sale, as also on the ground of fraud. The Court of first instance rejected the application and refused to set aside the sale. On appeal to the Subordinate Judge he reversed the decision of the first Court. On a second appeal to the High Court by the auction-purchaser an objection was taken that no second appeal lay at his instance. *Held*, that inasmuch as the application was under s. 244 of the Civ. Pro. Code a second appeal would lie. The question of a right to a second appeal does not turn upon who may happen to be the appellant, but upon whether or not the case is one within s. 244 of the Code. HIRA LAL GHOSE v. CHUNDRA KANTO GHOSE, 26 C. 539=3 C.W.N. 403 ... 946

(6) *Decision of Settlement Officer—Settlement of rent under Bengal Tenancy Act* (VIII *of* 1885), *s.* 104.—No second appeal lies to the High Court from a decision of a Revenue Officer settling rents under s. 104 of the Bengal Tenancy Act. ACHHA MIAN CHOWDHRY v. DURGA CHURN LAW, 25 C. 146=2 C.W.N. 137 ... 99

(7) *Grounds of second appeal—Civ. Pro. Code* (*Act* XIV *of* 1882), *ss.* 584, 585.—The grounds upon which a second appeal lies to the High Court are those set out in s. 584 of the Civ. Pro. Code, and s. 585 enacts that no second appeal shall lie except on the grounds mentioned in s. 584. The provisions of those sections should be strictly adhered to. KAMESHWAR PERSHAD v. AMANUTULLA, 26 C. 53=2 C.W.N. 649 ... 638

(8) *Order refusing to confirm a sale—Subsisting decree—Code of Civil Procedure* (*Act* XIV *of* 1882), *ss.* 588, 316, 244.—A second appeal lies to the High Court against an order passed by a Judge refusing to confirm a sale, on the ground that there was no subsisting decree at the date when the confirmation of the sale was applied for, the order being not one provided for by s. 588 of the Code of Civil Procedure, and the question raised in the case being a question relating to the execution or satisfaction of the decree within the meaning of s. 244 of the Code. DOYAMOYI DASI v. SARAT CHUNDER MOJUMDAR, 25 C. 175=1 C.W.N. 656 ... 118

(9) *Order under Civ. Pro. Code* (*Act XIV of* 1882), *s.* 293, *on defaulting purchaser to make good deficiency on re-sale—Second appeal—Sale in execution of decree Civ. Pro. Code* (*Act XIV of* 1882), *ss.* 244, 313—*Misdescription of property in proclamation of sale.*—Both an appeal and a second appeal lie from an order under s. 293 of the Civ. Pro. Code, directing a defaulting purchaser at an execution-sale to make good the deficiency of price happening on a re-sale owing to his default. In this case it was held on

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appeal, reversing the decision of the lower Courts, that under the circumstances the purchaser was not liable for the deficiency. KALI KISHORE DEB SANKAR v. GURU PROSAD SUKUL, 25 C. 99 = 2 C.W.N. 408 ... 68

(10) *Suit of nature cognizable in Court of Small Causes—Execution of decree—Transfer of decree for execution—Civ. Pro. Code (Act* XIV *of* 1882), *ss.* 223, 224, 228, 586.—A suit not exceeding Rs. 500 in value was brought in a Court exercising jurisdiction as a Court of Small Causes, and that Court passed a decree and transferred it for execution to the Munsif under ss. 223 and 224 of the Civ. Pro. Code; the Munsif passed an order in execution, and the order was confirmed in appeal. *Held*, that the words "suit of the nature cognizable in Courts of Small Causes" in s. 586 of the Code is equally applicable, whether the suit be brought in a Court of Small Causes or in any other Court, that s. 586 controls s. 228 in a case of this kind and no second appeal would lie from the Munsif's order. LALA KANDHA PERSHAD v. LALA LAL BEHARY LAL, 25 C. 872 ... 569

(11) See CIV. PRO. CODE (ACT XIV OF 1882), 26 C. 250.

(12) See LANDLORD AND TENANT, 25 C. 571 (N).

(13) See RES JUDICATA, 25 C. 571.

(14) See SALE, 26 C 324.

——4.—To Privy Council.

Practice and procedure—Civ. Pro. Code (Act XIV of 1882). *ss.* 603 *and* 610—*Security for costs of respondent—Right of surety to dispute validity of security bond notwithstanding admission of appeal.*—Notwithstanding the admission of an appeal to Her Majesty in Council under s. 603 of the Code of Civil Procedure, a surety is not precluded from questioning the validity of the security bond in execution proceedings, inasmuch as he was not a party to the order of the High Court. GIRINDRA NATH MUKERJEE v. BEJOY GOPAL MUKERJEE, 26 C. 246 = 3 C.W.N. 84 ... 762

Appellate Court.

(1) Decree of—See MORTGAGE (FORECLOSURE), 25 C. 311.

(2) Power of—See PARTIES, 26 C. 109.

(3) Power of, to add parties as respondents—See CONTRIBUTION, 25 C. 565.

(4) To alter charge or finding—See ATTEMPT, 26 C. 863.

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(1) For leave to appeal as a pauper—See PAUPER, 26 C. 925.

(2) To set aside ex parte decree—See PARTIES, 26 C. 267.

(3) To set aside sale—See SALE, 26 C. 324.

Appropriation.

(1) Of payments—See CONTRACT ACT (IX OF 1872), 26 C. 39.

(2) Of payments—See MORTGAGE (REDEMPTION), 26 C. 1.

Arbitration.

(1) *Misconduct of arbitrators—Application to have award set aside—Ground for setting aside award.*—On an application to have an award set aside by reason of misconduct on the part of the arbitrators, their action alleged was *held* not to amount to misconduct, and, therefore, the defendants were not entitled to have the award set aside. TOOLSEE MONEY DASSEE v. SUDEVI DASSEE, 26 C. 361 = 3 C.W.N. 347 ... 834

(2) See APPEAL (GENERAL), 25 C. 141.

(3) See CIV. PRO. CODE (ACT XIV OF 1882), 25 C. 757.

Arbitrators.

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Arrest.

(1) On lands occupied by Hyderabad State Railway—See JURISDICTION, 25 C. 20.

(2) See WARRANT, 26 C. 748.

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(1) Collection of—See WILL, 25 C. 65.

(2) Payment out of—See ACT II OF 1874 (ADMINISTRATOR-GENERAL'S), 25 C. 54.

(3) Realized by sale "or otherwise" in execution—See EXECUTION OF DECREE, 26 C. 772.

Assignee.

(1) Of tenant, liability of—See LANDLORD AND TENANT, 26 C. 338.

(2) See ACT VIII OF 1885 (BENGAL TENANCY), 26 C. 176.

Assignment.

Pendente lite—See LIMITATION ACT (XV OF 1877), 25 C. 409.

Attachment.

(1) *Attachment before judgment, effect of—Alienation during attachment—Civ. Pro. Code* (*Act* XIV *of* 1882), *ss*. 483, 484, 485, 486, 487, 488, 489, 490, 276.—Any private alienation of a property attached before judgment, during the continuance of the attachment, is void as against all claims enforceable under the attachment. The effect of an attachment of a property under the Civ. Pro. Code, whether made before or after decree, is the same provided that in the former case a decree is made for the plaintiff at whose instance the attachment takes place. GANU SINGH *v.* JANGI LAL, 26 C. 531 ... 941

(2) Resistance to—See PENAL CODE (ACT XLV OF 1860), 25 C. 274.

(3) Without sale—See EXECUTION OF DECREE, 25 C. 262.

(4) See ACT XV OF 1882 (SMALL CAUSE COURTS, PRESIDENCY TOWNS), 26 C. 778.

(5) See RECEIVER, 26 C. 127.

(6) See SALE, 25 C. 46.

Attempt.

To commit offence—Power of Appellate Court to alter charge of finding—Prejudice to the accused—Necessity for a re-trial on the altered charge—Crim. Pro. Code (*Act* V *of* 1898), *ss*. 236, 237, 238 *and* 423.—The accused gave his pleader a copy of a document which had been falsified by an interpolation being made in it for the purpose of its being used in the trial of his suit. *Held*, that he was guilty, not of an attempt to commit an offence, under s. 471 of the Penal Code, but of the offence itself. If the prosecution establishes certain acts constituting an offence and the Court misapplies the law by charging and convicting an accused person for an offence other than that for which he should have been properly charged, and if, notwithstanding such error, the accused has by his defence endeavoured to meet the accusation of the commission of these acts then the appellate Court may alter the charge or findings and convict him for an offence which those acts properly constitute, provided the accused be not prejudiced by the alteration in the finding. Such an error is one of form rather than of substance, and the alteration by an appellate Court of the charge or finding would not necessitate a re-trial expressly on a charge of that offence. LALA OJHA *v.* QUEEN-EMPRESS, 26 C. 863=3 C.W.N. 653 ... 1153

Attorney.

(1) Acting for both mortgagor and mortgagee—See MINOR, 26 C. 381.

(2) And Client—See COSTS, 25 C. 887.

(3) And Client, Agreement as to costs between—See PRACTICE, 26 C. 769.

(4) Change of—See PRACTICE, 26 C. 769.

(5) Lien of—See COSTS, 25 C. 887.

(6) Right of, to taxed costs on change of attorney—See PRACTICE, 26 C. 769.

Auction-purchaser.

(1) See APPEAL (SECOND APPEAL), 26 C. 539.

(2) See PARTIES, 26 C. 267.

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(1) Application to set aside—See ARBITRATION, 26 C. 361.

(2) Of Talukhdars—See ACT I OF 1869 (OUDH ESTATES), 26 C. 81.

(3) Order refusing to set aside—See APPEAL (GENERAL), 26 C. 361.

(4) Validity of—See APPEAL (GENERAL), 25 C. 141.

(5) See CIV. PRO. CODE (ACT XIV OF 1882), 25 C. 757.

Benamidar.

(1) Right of, to sue—See BENAMI TRANSACTIONS, 25 C. 874.

(2) Suit to declare defendant a mere—See CIV. PRO. CODE (ACT XIV OF 1882), 25 C. 49.

(3) See DECLARATORY DECREE, 25 C. 49.

(4) See RIGHT OF SUIT, 25 C. 98.

Benami Transactions.

(1) Benami *purchase—Whether property was held* benami *for the claimant or was a gift to the holder—Evidence of ownership—Source of purchase-money.*—The claimant, having supplied the purchase-money on the sale of a village in suit, took the transfer by sale-deed in the name of the first defendant who remained in possession of it, receiving rents. The claim was for proprietary possession by the purchaser, on the ground that the property was held *benami* for him. The first Court decreed the claim. The appellate Court reversed this decision. The first Court had attributed too much to the fact that the plaintiff had supplied the purchase-money—an important fact in most of the cases raising the question of *benami*, or not *benami*, but not the only test of ownership. Here the source of that money was consistent with the claimant's having, as the defence alleged, intended to make a gift of the property to the holder of it: and the right inference from the fact was that it was not held *benami* for the claimant, but belonged to the defendant. RAM NARAIN v. MUHAMMAD HADI, 26 C. 227 (P.C.) = 26 I.A. 38 = 3 C.W.N. 113 = 7 Sar. P.C.J. 425 ... 749

(2) Benami *purchaser—Right of* benamidar *to sue for possession of immoveable property.*—A *benami* purchaser of immoveable property has no right to sue for recovery of possession of the same. BARODA SUNDARI GHOSE v. DINO BANDHU KHAN, 25 C. 874 = 3 C.W.N. 12 ... 570

(3) *Certified purchaser—Civ. Pro. Code (Act* XIV *of* 1882), s. 317—*Sale in execution of a decree—Suit against heirs or mortgagee of the certified purchaser.*—S. 317 of the Civ. Pro. Code is no bar to a suit against any person claiming through or under the certified purchaser, such as his heir or mortgagee. DUKHADA SUNDARI DASI v. SRIMONTA JOARDAR, 26 C. 950 = 3 C.W.N. 657 ... 1208

(4) *Onus of proof—Purchase,* ism farzi, *in the name of a person other than the real purchaser—Proof of the actual transaction.*—In liquidation of a mortgage-debt the mortgagors sold the mortgaged property, and executed a sale-deed with a recital that they had received from the wife of the mortgagee the amount of the mortgage-debt and interest with also a small sum of money. In after years the husband, now plaintiff, and the wife, defendant, contested which of the two was the real purchaser. *Held,* that the burden of proving that the mortgagee gave the consideration for the sale was upon him at the outset, as he claimed contrary to the tenor of the admitted document, which burden had been discharged by his evidence that the substantial consideration for the sale by the mortgagors was the extinction of the mortgage debt due to him. This proof shifted on to the wife the burden of showing that this extinction was effected by her money or of showing that she had continuous possession in accordance with the sale-deed. She did not prove that any money was paid by her, either to the vendors or to the mortgagee; nor was there such an amount of possession proved as affected the question either way. The conclusion was that the wife's name was used *ism farzi* for the husband's as alleged. SULEIMAN KADAR BAHADUR v. MEHNDI BEGUM, 25 C. 473 (P.C.) = 25 I.A. 15 = 2 C.W.N. 186 = 7 Sar. P.C.J. 254 ... 313

(5) See TITLE, 26 C. 11.

Beneficiaries.

Consent of—See PRACTICE, 25 C. 856.

Bigamy. PAGE.

Complaint by the husband—"Person aggrieved"—Crim. Pro. Code (Act V *of* 1898), *s.* 198—*Penal Code (Act* XLV *of* 1860), *s.* 494.—The husband is a "person aggrieved," within the meaning of s. 198 of the Crim. Pro. Code upon whose complaint the Court should take cognizance of an offence under s. 494 of the Penal Code. THE DEPUTY LEGAL REMEMBRANCER v. SARNA KAHMI, 26 C. 336 ... 818

Bill of Lading.

Shipping Company, Liability of.—A Shipping Company is *prima facie* bound to deliver goods in good order and condition, but this obligation is subject expressly to the conditions inserted in the bill of lading. Where a cask of brandy was shipped at Madras in good order and condition, but on arrival at Calcutta was found to be empty: *Held*, that the Company were protected by the special words inserted in the bill of lading "Hogshead brandy covered with gunny, not responsible for condition and contents." CUTLER PALMER & CO. v. THE BRITISH INDIA STEAM NAVIGATION CO., 25 C. 654=2 C.W.N. 423 ... 430

Boat.

Traffic at landing place, Regulation of—See NUISANCE, 25 C. 852.

Bond.

(1) Form of—See LETTERS OF ADMINISTRATION, 26 C. 408.

(2) Unregistered and unattested—See EVIDENCE ACT (I OF 1872), 26 C. 222.

(3) See STAMP ACT (I OF 1879), 26 C. 179.

Books.

Selling, with counterfeit property mark—See PENAL CODE (ACT XLV OF 1860), 26 C. 232.

British Court.

Suit in, on Foreign Judgment—See FOREIGN COURT, 26 C. 931.

British Subject.

See FOREIGN COURT, 26 C. 931.

Building.

Restoration of old—See ACT III of 1884 (MUNICIPAL, BENGAL), 25 C. 160.

Burden of Proof.

(1) *Deeds of gift between joint brothers of part of the family estate—Subsequent partition between them of the residue.*—Two brothers, the only members of a joint Hindu family, executed and registered mutual deeds of gift to one another of their interest in specified portions of their family estate. In after years the younger brother sued the elder for partition of the estate excepting so much of it as had already been the subject of the above gifts. The elder defended on the ground that the deeds of gift had not been intended to operate, not representing any real transaction. To negative their effect the burden of proving that the transaction was not real, but only a pretence. was laid upon the defendant, who failed to adduce that proof. SHAM CHAND PAL v. PROTAB CHANDER PAL, 25 C. 78 (P.C.)= 24 I.A. 186=1 C.W.N. 594=7 Sar. P.C.J. 247 ... 53

(2) *Partnership—Alleged Agreement—Contract Act* (IX *of* 1872), *s.* 253.—In a partnership suit where one party does, but the other party does not, allege a specific agreement that the shares in the said partnership were unequal, the existing presumption as to the equality of the partner's shares casts the burden of proof on those alleging the agreement, who must therefore begin. JADOBRAM DEY v. BULLORAM DEY, 26 C. 281 ... 784

(3) *Suit by reversionary heir—Hindu widow—Burden of proving ownership of the husband through whom title is made.*—It is incumbent on a plaintiff suing as the reversionary heir of a Hindu proprietor, who has died leaving a widow, to show that the property claimed in the suit, and found in her possession, has vested in the husband. There is no presumption of law arising where the late husband possessed considerable property, that property found to be in the possession of the widow after his death must have been included in that which belonged to him unless she shows that

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she obtained the property from another source. DIWAN RAN BIJAI BAHADUR SINGH v. INDARPAL SINGH, 26 C. 871 (P.C.)=26 I.A. 226=4 C W.N. 1=2 Bom. L.R. 1=7 Sar. P.J.C. 578 ... 1158

(4) See ACT III OF 1865 (CARRIERS), 26 C. 398.

(5) See BENAMI TRANSACTIONS, 25 C. 473.

(6) See ENHANCEMENT, 26 C. 832.

(7) See RAILWAY COMPANY, 26 C. 465.

(8) See WILL, 25 C. 824.

Burial Ground.

See ACT II OF 1888 (CALCUTTA MUNICIPAL CONSOLIDATION), 25 C. 492.

Butwara Khasra.

See EVIDENCE ACT (I OF 1872), 25 C. 90.

Carriage.

Explosion in, on Railway—See RAILWAY COMPANY, 26 C. 465.

Cause of Action.

(1) Misjoinder of—See MULTIFARIOUSNESS, 26 C. 891.

(2) See LIMITATION ACT (XV OF 1877), 26 C. 241.

(3) See SLANDER, 26 C. 653.

Certificate.

(1) Of Administrator-General—See ACT XXXII OF 1839 (INTEREST), 25 C. 54.

(2) Of sale—See ACT VII OF 1880 (PUBLIC DEMANDS RECOVERY, BENGAL), 26 C. 414.

(3) Of succession—See SUCCESSION CERTIFICATE ACT (VII OF 1889), 26 C. 536.

(4) Order amending—See APPEAL (GENERAL), 26 C. 529.

(5) Suit to set aside—See ACT VII OF 1880 (PUBLIC DEMANDS RECOVERY, BENGAL), 26 C. 172.

Certified Purchaser.

See BENAMI TRANSACTIONS, 26 C. 950.

Cess.

(2) See ACT IX OF 1880 (BENGAL CESS), 25 C. 725.

Challans.

See SALE, 25 C. 216.

Charge.

(1) Framing new charge—See PENAL CODE (ACT XLV OF 1860), 26 C. 560.

(2) Power of appellate Court to alter—See ATTEMPT, 26 C. 863.

(3) To Jury—See JURY, 25 C. 561.

(4) *To Jury—Misdirection—Crim. Pro. Code* (*Act X of* 1882), *s.* 423—*Setting aside verdict of the jury—Power of appellate Court to deal with the case.*—It is the duty of the Judge to call the attention of the jury to the different elements constituting the offence, and to deal with the evidence by which it is proposed to make the accused liable. Failure to do so amounts to misdirection. Statements by some of the accused persons, which do not amount to a confession, and which do not in any way incriminate them, are not admissible in evidence against any person other than those making them. Omission to direct the jury that in dealing with the evidence against the accused other than those making the statements they are not to take into consideration such statements, also amounts to misdirection. If the verdict of the jury is set aside on any of the grounds mentioned in cl. (*d*) of s. 423 of the Crim. Pro. Code (Act X of 1882), then there is no restriction on the powers of the appellate Court to deal with a case of which it has complete seizin in any of the manners provided in that section. The law nowhere lays down that when the verdict of the jury is set aside the Court must necessarily direct a new trial. TAJU PRAMANIC v. QUEEN-EMPRESS, 25 C. 711=2 C.W.N. 369 ... 465

(5) *To jury—Misdirection—Erroneous verdict owing to misdirection—Failure of justice—Crim. Pro. Code (Act X of 1882), ss.* 418, 423 *(d) and* 537.—On

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a charge of rape the Judge in his charge to the jury said : "You will observe that this sexual intercourse was against the girl's will and without her consent," &c., instead of saying as he ought to have done ; "you will have to determine upon the evidence in this case whether the intercourse was against the girl's will," &c., and the charge went on in the same style of stating to the jury what had been proved instead of leaving it to them to decide what in their opinion was proved. In the concluding sentence of the charge the Judge said : "You have seen the witnesses, and I have no doubt that you will return a just verdict." *Held*, that such a charge amounted to a clear misdirection, and that the verdict was erroneous owing to such misdirection. Even the concluding sentence did not satisfy the requirements of a proper charge. The provisions in s. 423 (*d*) and s. 537 of the Crim. Pro. Code do not require that the Court is to go through the facts and find for itself whether the verdict is actually erroneous upon the facts. ALI FAKIR v. QUEEN-EMPRESS, 25 C. 230. 155

(6) *To Jury—Misdirection—Explaining the law—Evidence Act* (I *of* 1872), *s.* 126 *—Communications to* mukhtears*—Privileged Communications—Admission of inadmissible evidence.*—In charging a jury it is incumbent on the Judge to explain the law to them in order to assist them in applying the law to the facts of the case. Mere reference to sections of the Penal Code defining the offences is not sufficient. The restrictions imposed by s. 126 of the Evidence Act in respect of what are known as privileged communications extend also to communications made to *mukhtears* when acting as pleaders for their clients. In cases tried by jury it is the duty of the Judge to prevent the production of inadmissible evidence, whether it is or is not objected to by the parties. Evidence relating to proposals of compromise ought not, in the exercise of a proper discretion, to be allowed to go in as evidence of guilty knowledge against the accused. ABBAS PEADA v. QUEEN-EMPRESS, 25 C. 736=2 C.W.N. 484 ... 481

Charter Act, High Court (24 and 25 Vict., Cap. 104.)

(1) S. 15—See SANCTION FOR PROSECUTION, 26 C. 852.

(2) S. 15—See SUPERINTENDENCE, 26 C. 188.

Chief Justice.

Direction by, as to trial of case—See ACT VIII OF 1890 (GUARDIANS AND WARDS), 26 C. 133.

Christian Father.

Application by, to be guardian of Hindu son—See GUARDIAN, 25 C. 881.

Civil Court.

(1) Order for possession made by—See CRIM. PRO. CODE (ACT V OF 1898), 26 C. 625.

(2) Powers of—See ACT VII OF 1880 (PUBLIC DEMANDS RECOVERY, BENGAL), 25 C. 789.

Civ. Pro. Code (Act VIII of 1859).

(1) S. 179—See PRACTICE, 26 C. 591.

(2) S. 260—See BENAMI TRANSACTIONS, 26 C. 950.

Civ. Pro. Code (Act XIV of 1882).

(1) See ACT VIII OF 1885 (TENANCY, BENGAL), 25 C. 146.

(2) S. 2—See APPEAL (GENERAL), 26 C. 361.

(2-*a*) S 2—See APPEAL (SECOND APPEAL), 26 C. 539.

(3) S. 2—See CIV. PRO. CODE (ACT XIV OF 1882), 26 C. 250.

(4) S. 2—See SALE, 26 C. 324.

(5) S. 13—See CIV. PRO. CODE (ACT XIV OF 1882), 26 C. 946.

(6) S. 13—See FOREIGN COURT, 26 C. 931.

(7) S. 13—See RES JUDICATA, 25 C. 136, 571 ; 26 C. 285, 428.

(8) *Ss.* 13, 244—*Question for Court executing decree—Execution of decree—Plea taken by defendant in separate suit*—Res judicata.—When an issue arising out of the execution of a decree has not been raised and determined under

Civ. Pro. Code (Act XIV of 1882)—(*Continued*). PAGE

s. 244 of the Civ. Pro. Code, there is nothing in that section to prevent a defendant in a separate suit subsequently brought from raising that issue in that suit. NIL KAMAL MUKERJEE v. JAHNABI CHOWDHURANI, 26 C. 946 ... 1205

(9) S. 15—See SALE, 25 C. 46.

(10) S. 25—See HIGH COURT, 25 C. 39.

(11) Ss. 42, 45—See PLAINT, 25 C. 371.

(12) S. 44, r A—See JURISDICTION, 26 C. 891.

(13) S. 53—See PLAINT, 25 C. 371.

(14) S. 57—See APPEAL (GENERAL), 26 C. 275.

(15) Ss. 74, 76—See SUMMONS, 26 C. 267.

(16) Ss. 79, 80—See SUMMONS, 26 C. 101.

(17) Ss. 102, 103—See REVIEW, 26 C. 598.

(18) S. 108—See PARTIES, 26 C. 267.

(19) *S.* 108—Ex parte *Decree—Effect of a decree set aside at the instance of some only of several defendants against whom the decree passed was* ex-parte—*—Meaning of the words "the decree."*—The words "the decree" in s. 108 of the Code of Civil Procedure mean the whole decree made in the suit. Therefore, in a case where a decree has been passed *ex parte* against some only of several defendants, the effect of its being set aside on their application under s. 108 of the Code of Civil Procedure is that the whole decree made in the suit is set aside, notwithstanding that some of the defendants had entered appearance at the original hearing. MAHOMED HAMIDULLA v. TOHURENNISSA BIBI, 25 C. 155=1 C.W.N. 652 ... 105

(20) S. 108—*Ex parte* decree—Setting aside *ex parte* decree on condition of finding surety See SURETY, 26 C. 222.

(21) S. 109—See PARTIES, 26 C. 267.

(22) S. 205—See LIMITATION ACT (XV OF 1877), 25 C. 109.

(23) S. 206—See LIMITATION ACT (XV OF 1877), 25 C. 258.

(24) S. 209—See CONTRACT ACT (IX OF 1872), 26 C. 39.

(25) S. 209—See LANDLORD AND TENANT, 26 C. 103.

(26) Ss. 223, 224, 228, 586—See APPEAL (SECOND APPEAL), 25 C. 872.

(27) Ss. 223 and 649—See EXECUTION OF DECREE, 25 C. 315.

(28) *S.* 232—*Decree for payment of money—Decree for sale of hypothecated property, which also made the defendant personally liable in case of insufficiency —Mortgage decree.*— A decree, which directs the realization of the decretal amount from the hypothecated property, and if insufficient, makes the defendant remain personally liable, is a mortgage decree, and not a "decree for the payment of money" within the meaning of s. 230 of the Code of Civil Procedure. FAZIL HOWLADAR v. KRISHNA BUNDHOO ROY, 25 C. 580=2 C.W.N. 118 ... 383

(29) S. 232—See CIV. PRO. CODE (ACT XIV OF 1882), 26 C. 250.

(30) S. 235—See LIMITATION ACT (XV OF 1877), 25 C. 109, 594.

(31) S. 244—See APPEAL (GENERAL), 26 C. 529.

(32) S. 244—See APPEAL (SECOND APPEAL), 25 C. 175, 699 ; 26 C. 539.

(33) S. 244—See SALE, 26 C. 324, 326 N.

(34) *S.* 244—*Parties to suit—"Representative" of party—Purchaser of the decree from the decree-holder—Civil Procedure Code (Act* XIV *of* 1882), *ss.* 2, 232 — *Decree-holder — Application by transferee of decree— Civ. Pro. Code, Amendment Act* (VII *of* 1888)—*Second Appeal.*—The word "representative," as used in s. 244 of the Code of Civil Procedure, when used with reference to a decree-holder, includes the purchaser of the decree from the decree-holder by an assignment in writing. The Court executing a decree which has been so transferred can go into the disputed question of the transfer of the decree under the provisions of s. 244 of the Civ. Pro. Code as amended by Act VII of 1888. DWAR BUKSH SIRKAR v. FATIK JALI, 26 C. 250=3 C.W.N. 222 ... 765

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(35) *S. 244—Question in execution of decree Order absolute for sale—Transfer of Property Act* (IV *of* 1882), s. 88 - *Question arising as to the order absolute for sale.*—When an order absolute for sale of mortgaged property has been made, any question that arises as to that order absolute for sale is not a question relating to the execution of the decree within the meaning of s. 244 of the Code of Civil Procedure. AKIKUNISSA BIBEE v. ROOP LAL DAS, 25 C. 133 ... 90

(36) *S. 244—Suit for declaration that the defendant is a mere benamidar for plaintiff—Parties to suit—Question arising in execution of decree.*—A suit brought by *A* to obtain a declaration that a decree originally obtained by *B* against *C* and another which had been purchased in the name of *D* had really been purchased by the plaintiff for his own benefit was held not to be barred by s. 244, cl. (*c*) of the Civ. Pro. Code, as the question raised was not one arising between the parties to the suit in which the decree was passed, or their representatives, but one that arose between two parties, each of whom claimed to be the representatives of one of the parties to the suit, *viz.*, *B*, the party in whose favour the decree was passed. GOUR MOHUN GOULI v. DINONATH KARMOKAR, 25 C. 49=2 C.W.N. 76 34

(37) *Ss.* 244 *and* 258—*Uncertified adjustment—Separate suit—Suit by judgment-debtors to recover back their property which the decree-holder obtained possession of, in execution of his decree, whether maintainable*—One *M* obtained a decree for possession of a *jote* and for mesne profits against the plaintiffs. Subsequently, by a registered *ekrarnamah*, the decree-holder having received from the judgment-debtors (the plaintiff's), the amount due on account of mesne profits, and also a further consideration of Rs. 156, relinquished an eight anna share of the *jote* in favour of them. The remaining eight anna share of the *jote* was also sold by the decree-holder by a registered *kobala* to the judgment debtor. The heirs of the decree-holder on his death applied for execution of the decree, but notwithstanding the judgment-debtor's objection that the decree could not be executed, it having been satisfied by virtue of the aforesaid *ekrarnamah* and *kobala* they obtained possession of the *jote*; and adjustment not having been certified, was not taken into account by the Court executing the decree. On a regular suit by the judgment-debtors for a declaration of title to, as well as for the recovery of possession of the *jote*, the defence mainly was that under s. 244 of the Code of Civil Procedure no separate suit would lie. *Held*, that such a suit was maintainable, and that s. 244 of the Code of Civil Procedure was no bar to it. ISWAR CHANDRA DUTT v. HARIS CHANDRA DUTT, 25 C. 718=2 C.W.N. 247 470

(38) *Ss.* 244, 266 and 318—*Questions for Court executing decree—Sale of an occupancy holding not transferable by custom in execution of a decree for arrears of rent obtained by a co-sharer landlord—Effect of such a sale—Bengal Tenancy Act* (VIII *of* 1885), *ss.* 22, 65, 73 *and* 188.—A decree for rent obtained by some of certain co-sharer landlords and not by the whole body of them, is not a decree under the Bengal Tenancy Act. An occupancy holding which is not transferable by custom, as also the interest of the judgment-debtor in the said holding, are not saleable in execution of such a decree. A judgment-debtor, whose occupancy holding, which was not transferable by custom, had been sold in execution of a decree for rent obtained by some of the co-sharer landlords, objected to the application made by the auction-purchaser after the confirmation of the sale for delivery of possession of the said holding, on the ground that the sale was illegal. *Held*, that the confirmation of the sale was no bar to the application that was made by the judgment-debtor to have it declared that in execution of such a decree the holding could not be sold, the question being one which related to the execution, discharge, and satisfaction of the decree. DURGA CHARAN MANDAL v. KALI PRASANNA SARKAR, 26 C. 727=3 C.W.N. 586 ... 1064

(39) S. 248—See LIMITATION ACT (XV OF 1877), 25 C. 594.

(40) S. 253—See SURETY, 26 C. 222.

(41) Ss. 257A, 258—See EXECUTION OF DECREE, 25 C. 86.

(42) S. 276—See ATTACHMENT, 26 C. 531.

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(43) Ss. 278, 282—See ACT XV OF 1882 (SMALL CAUSE COURTS, PRESIDENCY TOWNS), 26 C. 778.

(44) S. 285—See SALE, 25 C. 46.

(45) S. 293—See ACT XV OF 1882 (SMALL CAUSE COURTS' PRESIDENCY TOWNS), 26 C. 778.

(46) S. 293—See APPEAL (SECOND APPEAL), 25 C. 99.

(47) S. 295—See EXECUTION OF DECREE, 26 C. 772.

(48) *S.* 310-A—*Civ. Pro. Code, Amendment Act* (V *of* 1894)—*Amount payable incorrectly calculated by an officer of the Court.*—The judgment-debtor within thirty days from the date of sale deposited in Court, under s. 310-A of the Code of Civil Procedure, the amount calculated in the office of the Munsif as payable under the section. The Munsif set aside the sale. On appeal to the High Court by the auction-purchaser on the ground that the amount deposited by the judgment-debtor was not in compliance with s. 310-A, and that before the sale could be set aside it was necessary for the judgment-debtor to pay, in addition to what he deposited, a sum equal to five per cent. of the purchase-money : *Held*, that when the amount payable by the judgment-debtor under s. 310-A of the Code of Civil Procedure has been calculated by an officer of the Court, and has been deposited, an order setting aside the sale must be made by the Court as a matter of right ; the Munsif therefore was justified in setting aside the sale. MAKBOOL AHMED CHOWDHRY v. BAZLE SABAN CHOWDHRY, 25 C. 609 ... 400

(49) *S.* 310-A—*Civ. Pro. Code Amendment Act* (V *of* 1894)—*Power of a Court to set aside a sale if the deposit provided for in s. 310-A be not paid within thirty days.*—*Held*, (by the Full Bench) : Where the judgment-debtor has not within thirty days from the date of sale deposited in Court a sum equal to 5 per cent. of the purchase-money and the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered, less any amount which may, since the date of such proclamation of sale, have been received by the decree-holder, but has deposited in Court within the prescribed period a sum calculated by some officer of the Court as the sum to be deposited in respect of such 5 per cent. and of the sum specified in such proclamation of sale, and there is nothing to show that there was any mistake of the Court by which the judgment-debtor was induced to deposit an insufficient amount, the sale ought not to be set aside. CHUNDI CHARAN MANDAL v. BANKE BEHARY LAL MANDAL, 26 C. 449 (F.B.) = 3 C.W.N. 283 ... 890

(50) *S.* 310-*A*—*Sale in execution of mortgage decree*—*Application by mortgagor under s.* 310-*A*, *Civ. Pro. Code*—*Transfer of Property Act* (IV *of* 1882), *s.* 104, *rules framed under Civ. Pro. Code Amendment Act* (V *of* 1894).—*Held*, (by the Full Bench) : S. 310-A of the Civ. Pro. Code (Act XIV of 1882, as amended by Act (V of 1894) does not apply to sales of mortgaged property under the Transfer of Property Act (IV of 1882). The rules framed by the High Court (Circular Order No. 13, dated 27th April 1892) under the provisions of s. 104 of the Transfer of Property Act do not make s. 310-A applicable to such sales. *Quære.*—Whether a rule by the High Court under s. 104 of the Transfer of Property Act making s. 310-A of the Civ. Pro. Code applicable to sales of mortgaged property under the said Act would not be *ultra vires*. KEDAR NATH RAUT v. KALI CHURN RAM, 25 C. 703 (F.B.) = 2 C.W.N 353 ... 460

(51) S. 311—See APPEAL (SECOND APPEAL), 26 C. 539.

(52) S. 311—See SALE, 26 C. 324.

(53) S. 313—See APPEAL (SECOND APPEAL), 25 C. 99.

(54) S. 316—See ACT VIII OF 1885 (BENGAL TENANCY), 26 C. 176.

(55) S. 316—See APPEAL (SECOND APPEAL), 25 C. 175.

(56) S. 317—See BENAMI TRANSACTIONS, 26 C. 950.

(57) Ss. 377, 379—See PRACTICE, 26 C. 766.

(58) Ss. 383, 390, 578—See PARDANASHIN LADY, 25 C. 807.

(59) Ss. 389, 390—See PRACTICE, 26 C. 591.

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(60) *Ss.* 424, 544—*Suit against the Secretary of State for India in Council—Notice —Public Demands Recovery Act* (*Bengal Act* VII *of* 1880), *ss.* 8, 9, 20—*Sale for default in payment of costs of realizing Government revenue—Common ground of appeal.*—S. 424 of the Civ. Pro. Code provides that "No suit shall be instituted against the Secretary of State in Council, or against a public officer in respect of an act purporting to be done by him in his official capacity, until the expiration of two months next after notice in writing has been in the case of the Secretary of State in Council, delivered to, or left at the office of a Secretary to the Local Government or the Collector of the District," &c. The plaintiff had instituted a suit against the Secretary of State for India in Council to set aside a certain sale of the plaintiff's property (possession of which had been given to the purchaser), but had not given him the notice prescribed by s. 424 of the Civ. Pro. Code. The first Court (AMEER ALI, J.) gave the plaintiff a decree. *Held* on appeal (reversing the decision of AMEER ALI, J.) that whether or not the words "in respect of an act purporting to be done by him in his official capacity" relate only to a public officer and not to the Secretary of State, no suit whatever is maintainable against the Secretary of State, unless the notice prescribed by s. 424 of the Code of Civil Procedure has been given; and that therefore the present suit could not be maintained. THE SECRETARY OF STATE FOR INDIA IN COUNCIL *v.* RAJLACKI DEBI, 25 C. 239 ... 161

(61) S. 443—See SUMMONS, 26 C. 267.

(62) Ss. 483, 490—See ATTACHMENT, 26 C. 531.

(63) S. 503—See PRACTICE, 25 C. 642.

(64) Ss. 521, 522—See APPEAL (GENERAL), 25 C. 141.

(65) *Ss.* 525 *and* 526—*Arbitration—Award—Denial of reference to arbitration—Jurisdiction of Court to determine the Factum of reference—Appeal.*—*Held*, by a majority of the Full Bench (MACPHERSON, J., dissenting) that when an application has been made under s. 525 of the Code of Civil Procedure and notice has been given to the parties to the alleged arbitration, the jurisdiction of the Court to order the award to be filed and to allow proceedings to be taken under it, is not taken away by a mere denial of the reference to arbitration on an objection to the validity of that reference. *Held*, also, that an order under s. 525 determining that there has been no valid reference to arbitration and rejecting the application is a "decree" within the meaning of s. 2, and an appeal lies from such order. MAHOMED WAHIDUDDIN *v.* HAKEMAN, 25 C. 757 (F.B.) = 2 C.W.N. 529 494

(66) Ss. 544, 559—See CIV. PRO. CODE (ACT XIV OF 1882), 26 C. 114.

(67) S. 546—See EXECUTION OF DECREE, 25 C. 322.

(68) S 551—See JUDGMENT, 25 C. 97.

(69) S. 559—See CONTRIBUTION, 25 C. 565.

(70) S. 559—See PARTIES, 26 C. 109.

(71) *S.* 561—*Cross objection—Persons interested in the result of the appeal—Whether a respondent can prefer a cross objection against another respondent —Added respondent—Civ. Pro. Code* (1882), *ss.* 544, 559.—In a suit for possession of land the Court of first instance decreed the plaintiff's suit in part against the defendants. Some of the defendants appealed to the High Court without making the other defendants party-respondents. The plaintiffs preferred a cross-objection under s. 561 of the Code of Civil Procedure. The non-appealing defendants were added as respondents by an order of the High Court to the effect that they might be made parties without prejudice to any objection that might be urged on their behalf at the hearing of the appeal. The non-appealing defendants at the hearing of the appeal contended that they were wrongly made parties, and that the plaintiffs could not urge their cross-objection as against them. *Held*, that the non-appealing defendants were persons who were interested in the result of the appeal, within the meaning of s. 559 of the Code of Civil Procedure, and that, therefore, they were rightly made parties. *Held*, also, that as a general rule the right of a respondent to urge cross-objections should be limited to his urging them against the appellant, and it is only by way of exception to this general rule that one respondent may urge a cross-objection against

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another respondent, the exception holding good, among other cases, in those in which the appeal of some of the parties opens out questions which cannot be disposed of completely without matters being allowed to be opened us as between co-respondents; but as there was nothing exceptional in this case, the plaintiffs were not allowed to urge their cross-objections against the non-appealing defendants. BISHUN CHURN ROY CHOWDHRY v. JOGENDRA NATH ROY, 26 C. 114 ... 677

(72) S. 574—See JUDGMENT, 25 C. 97.

(73) S. 582—See APPEAL (GENERAL), 26 C. 275.

(74) S. 582-A—See PAUPER, 26 C. 925.

(75) Ss. 584, 585—See APPEAL (SECOND APPEAL), 26 C. 53.

(76) S. 586—See APPEAL (SECOND APPEAL), 26 C. 842.

(77) S. 588—See APPEAL (GENERAL), 26 C. 275, 361.

(78) S. 588—See APPEAL (SECOND APPEAL), 26 C. 539.

(79) S. 588—See SALE, 26 C. 324.

(80) S. 589—See APPEAL (GENERAL), 26 C. 275.

(81) Ss. 603 and 610—See APPEAL (TO PRIVY COUNCIL), 26 C. 246.

(82) S. 622—See ACT II OF 1888 (CALCUTTA MUNICIPAL CONSOLIDATION, BENGAL), 26 C. 74.

(83) S. 623—See REVIEW, 26 C. 598.

(84) Ss. 623, 624—See LIMITATION ACT (XV OF 1877), 25 C. 258.

(85) S. 640—See PRACTICE, 26 C. 650.

Civ. Pro. Code Amendment Act (VII of 1888).

See CIV. PRO. CODE (ACT XIV OF 1882), 26 C. 250.

Civ. Pro. Code Amendment Act (V of 1894).

See CIV. PRO. CODE (ACT XIV OF 1882), 25 C. 609, 703; 26 C. 449.

Claim.

To attached property by mortgagor in execution proceedings in Small Cause Court—See ACT XV OF 1882 (SMALL CAUSE COURTS, PRESIDENCY TOWNS), 26 C. 778.

Co-contractors.

See PARTIES, 26 C. 409.

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Of assets, meaning of—See WILL, 25 C. 65.

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(1) Effect of partition by—See PARTITION, 26 C. 434.

(2) Surveyor employed by—See PUBLIC SERVANT, 26 C. 158.

(3) Unauthorized sale by—See SALE, 25 C. 833.

Commission.

(1) Application to take evidence on—See PARDANASHIN LADY, 25 C. 807.

(2) Evidence taken on—See PRACTICE, 26 C. 591.

(3) Right of pardanashin lady to be examined on—See PRACTICE, 26 C. 650.

Commitment.

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Common Object.

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S. 58—See APPEAL (GENERAL), 26 C. 944.

Compensation. PAGE

(1) Award of—See LAND ACQUISITION ACT (X OF 1870), 25 C. 194.

(2) For land—See LAND ACQUISITION ACT (I OF 1894), 25 C. 346.

(3) For use and occupation, claim for—See JURISDICTION, 26 C. 204.

(4) On rescission of contract—See MINOR, 26 C. 381.

(5) *Sanction to prosecute and award of compensation—Crim. Pro. Code (Act* V *of* 1898), *s.* 250 *and s.* 476—*Magistrate, discretion of.*—It is an improper exercise of his discretion by a Magistrate to award compensation to the accused under s. 250 of the Crim. Pro. Code and also to direct or sanction the prosecution of the complainant under s. 211 of the Penal Code for bringing a false charge. BACHU LAL v. JAGDAM SAHAI, 26 C. 181 ... 720

(6) See LIMITATION ACT (XV OF 1877), 26 C. 564.

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Presentation of—See MAGISTRATE, 26 C. 786.

Compromise.

(1) *Of suit—Effect of compromise—Interest Act* (XXXII *of* 1839)—*Interest on certain amount payable on the happening of an event and at certain time—Sum agreed to be paid to defend a suit—Effect of compromise of suit on liability to pay.*—*A* brought a suit against *B* and *C*. *B* wrote a letter to *C*, proposing that counsel should be engaged to defend the suit, and that *C* should contribute Rs. 900 only for it. *C* agreed to the proposal and consented to pay the amount within ten days. Counsel was engaged, and Rs. 4,000 were paid to him. After several hearings the case was compromised. *B* then demanded from *C* the amount which he had promised to contribute, and also interest on it. *C* refused to pay and a suit was brought by *B* to recover the said amount with interest. *C* pleaded that he was not liable to pay the amount, inasmuch as the case was compromised, and also pleaded that he was not liable to pay interest on it, as the debt was neither certain in amount nor payable at a certain time. *Held*, that *B* was entitled to recover the amount, as there was a promise by *C* to pay it on the happening of a certain event which had happened. *Held*, also, that *B* was entitled to get interest on the amount inasmuch as the debt was not uncertain, the date of payment was defined, and *C* knew that the contingency upon which he became liable had occurred. SURJA NARAIN MUKHOPADHYA v. PRATAP NARAIN MUKHOPADHYA, 26 C. 955.

(2) Without knowledge of attorney—See COSTS, 25 C. 887.

Concurrent Decree.

Execution of—See SALE, 25 C. 46.

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On facts—See PRIVY COUNCIL, 24 C. 1; 25C. 189.

Condition.

In restraint of lease—See CONTRACT, 25 C. 869.

Conduct.

(1) Evidence of—See EVIDENCE, 26 C. 160.

(2) Of lessor—See LANDLORD AND TENANT, 26 C. 204.

Confession.

Confession to Police Officer—Evidence Act (I *of* 1872), *s.* 25.—The provisions of s. 25 of the Indian Evidence Act (I of 1872), which declare that no confession made to a Police Officer shall be proved as against a person accused of any offence, applies to every Police Officer and is not to be restricted to officers of the regular Police force. QUEEN-EMPRESS v. SALEMUDDIN SHEIK, 26 C. 569=3 C.W.N. 393 ... 965

Confiscation.

Of property, effect of—See ACT I OF 1869 (OUDH ESTATES), 26 C. 879.

Consent Decree.

Effect of partition by—See EASEMENT, 26 C. 516.

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Unlawful, meaning of—See CONTRACT ACT (IX OF 1872), 26 C. 238.

Construction.

(1) Of contract—See LEASE, 26 C. 29.

(2) Of lease—See LEASE, 26 C. 29.

(3) Of mortgage—See MORTGAGE (GENERAL), 26 C. 395.

Contempt.

Of Court, order refusing to commit for—See LETTERS PATENT, 1865 (HIGH COURT), 25 C. 236.

Contract.

(1) Construction of—See LEASE, 26 C. 29.

(2) *Hindu widow—Reversioners — Settlement of dispute*—Ikrarnamah—*Condition in restraint of lease—Transfer of Property Act* (IV *of* 1882), *ss.* 10 *and* 15.—In an *ikrarnamah* executed by a Hindu widow on the one side, and her husband's cousins on the other, in settlement of disputes regarding her husband's estate, one of the conditions agreed upon was that if either of the parties should want to execute a lease jointly or individually, "it would be executed and delivered by mutual consultation of both the parties," and if "the document be not signed and consented to by both the parties, it shall be null and void." In a suit brought on the basis of the *ikrarnamah* to set aside a lease granted by the widow: *Held*, there is nothing in any statute law which renders such a provision inoperative; neither ss. 10 and 15 of the Transfer of Property Act (IV of 1882) nor any principle underlying them is applicable to it; it is not an unreasonable provision; there was no absence of equity in the arrangement, and effect should be given to it. KULDIP SINGH v. KHETRANI KOER, 25 C. 869= 2 C.W.N. 463 ... 567

(3) *Sale of goods—Offer of performance—Tender of railway receipts endorsed in blank—Goods not available—Goods subject to demurrage or freight—Duty of seller.*—*P* agreed to sell and *F* to buy certain goods to be delivered to *F* in April-May 1897. The contract of sale contained (*inter alia*) the following clauses. "(10) The goods to be tendered fully 48 hours before the expiration of the present term of 72 hours granted by the railway company in order to enable buyers to weigh, sample, and inspect the same; and the delivery not to be considered complete until the samples have been refracted and examined, and any dispute about quality, &c., settled. (11) If railway receipt be tendered, such to be handed to buyers 48 hours before the goods are liable to demurrage under the present term of 72 hours granted by the railway company." *P*, not having before the 31st May goods of his own to meet the contract, arranged with *H* for certain goods of *H* to be delivered under it and tendered to *F*. On that day, certain railway receipts, which had been endorsed in blank by *H*, in respect of the said goods, were tendered to *F*. *F* was ready to pay for the goods; but, before tendering the price, he insisted upon an endorsement of the railway receipts by *H* to *P* and by *P* to himself. *P* was unable to point out the goods to be delivered under the contract, nor could he indicate the wagon-numbers. *P* refused to procure the endorsement required by *F*, and thereupon *F* declined to take delivery as proposed though he tendered the price in exchange for the goods. *Held*, that, *F* not having had an opportunity of inspecting the goods as provided by the contract, the tender made as aforesaid by *P* was not such an offer of performance of the contract as *F* was bound to accept. *Held*, also, that *F* was not bound to accept a tender of railway receipts for goods subject (as some of these were) to demurrage, nor for goods on which freight had not been paid (as was the case with some of these goods), nor for goods that were not available on the 31st May, as in the present case. In order to establish a valid tender of the goods, it was for *P* to show that had *F* taken the railway receipts, the railway company would have been bound to deliver the goods upon production of the receipts; and *F* was under no duty to point out to *P* that the tender was defective. *F*'s duty under the contract arose when a sufficient tender was made to him, and not till then. Failure to justify an alleged breach of contract upon one ground only which is found insufficient, does not disentitle the defendant to rely upon other grounds which his rights under the contract entitle him to rely upon. MOTICHAND v. FULCHAND, 26 C. 142=3 C.W.N. 116 ... 695

Contract—(*Concluded*). PAGE

(4) *Sale of unascertained goods—Breach of contract—Power of re-sale—Contract Act* (IX *of* 1872), *s.* 107—*Damages.*—The plaintiffs sold to the defendant under an "indent" contract ten cases of tobacco at an agreed price. On arrival the defendant refused to pay for and take delivery of the goods on the ground that they were not the goods contracted for. After notice to the defendant the plaintiffs resold the goods and sued to recover the expenses of the re-sale, and the difference between the price realized and the contract price with interest. *Held*, that cl. 1 of the "indent" contract gave the plaintiffs a right to re-sell the goods, and sue for the damages mentioned therein. S. 107 of the Contract Act had no bearing on the case. MOLL SCHUTTE & CO. v. LUCHMI CHAND, 25 C. 505 (F.B.)=2 C.W.N. 283 ... 335

(5) To pay interest at high rate—See INTEREST, 26 C. 130.

Contract Act (IX of 1872).

(1) Ss. 11 and 64—See MINOR, 26 C. 381.

(2) *Ss.* 23 *and* 24—*Illegal contract—Compound interest—The Sonthal Parganas Settlement Regulation* (III *of* 1872), *s.* 6—*The Sonthal Parganas Justice Regulation* (V *of* 1893), *s.* 24—"*Unlawful*" *consideration, meaning of.*—There is no law or regulation laying down that an agreement between any two persons living in the Sonthal Parganas to pay compound interest upon the amount borrowed is "unlawful" within the meaning of s. 23 of the Contract Act. All that the law provides is that compound interest will not be *decreed* by any Court. Referring to the Sonthal Regulations, s. 6 of Regulation III of 1872 and s. 24 of Regulation V of 1893, it was *held* in respect of an agreement to pay interest on an amount composed partly of the principal and interest due on a former debt, that such agreement is not void under s. 24 of the Contract Act, and that the obligee may recover such sums of money as he is entitled in law to recover, notwithstanding that part of the consideration is compound interest. SHAMA CHARAN MISSER v. CHUNI LAL MARWARI, 26 C. 238 ... 757

(3) *S.* 60—*Creditor's appropriation of payments to one or other of debts—Transfer of Property Act* (IV *of* 1882), *ss.* 86, 88—*Enforcement of mortgage—Rate of interest from date of suit to date fixed for realization—Civ. Pro. Code* (*Act* XIV *of* 1882), *s.* 209.—One of two mortgages bore interest at 12 per cent. on the mortgage debt payable with costs; and the other carried simple interest. Payments made by the debtor had been appropriated by the creditor to payment of the interest on the bond bearing simple interest, while the compound interest, on the other hand, had been left to accumulate. In a suit, brought against the representative of the debtor after his decease, to enforce the mortgage bearing compound interest, the objection was taken to the appropriation by the creditor. *Held*, that the rule in s. 60 of the Indian Contract Act, 1872, follows the ordinary law in prescribing a rule as to the case in which the creditor may, at his discretion, apply, to one or other of the debts due to him, payments made by the debtor. A reluctance shown by the debtor to agree to pay compound interest, before he executed the mortgage bond at such interest, was not an indication, within that section, that he intended that application of his payments should be made first to that bond. The Transfer of Property Act, 1882, was in force when this suit was instituted, but not when the relation of debtor and creditor between the parties commenced. Assuming that a discretionary power to a Court remained under s. 209, Civ. Pro. Code, to decree interest to run, at less than the contract rate, in a suit commenced before Act IV of 1882 became law, still the best guide to discretion, in this case, was to be found in s. 86 of that Act, which required the Courts to decree mortgage debts with interest at the rate provided by the mortgagee (if to that rate no valid legal objection could be taken) down to the date fixed for realization. RAMESWAR KOER v. MAHOMED MEHDI HOSSEIN KHAN, 26 C. 39 (P.C.)=25 I.A. 179=2 C.W.N. 633=7 Sar. P.C.J. 413 ... 629

(4) S. 69—See VOLUNTARY PAYMENT, 25 C. 305; 26 C. 826.

(5) S. 70—See CONTRIBUTION, 25 C. 565.

(6) S. 73—See COMPROMISE, 26 C. 955.

(7) S. 74—See INTEREST, 26 C. 300.

Contract Act (IX of 1872)—(*Concluded*). PAGE

(8) S. 107—See CONTRACT, 25 C. 505.

(9) Ss. 201 and 218 – See JURISDICTION, 26 C. 715.

(10) S 243—See CONTRIBUTION, 26 C. 262-N.

(11) S. 253—See BURDEN OF PROOF, 26 C. 281.

Contribution.

(1) *Contract Act* (IX *of* 1872), *s.* 70—*Money deposited by the plaintiffs to save the property, of which they were co sharers from being sold for arrears of revenue—Personal liability—Appeal—Power of the Appellate Court to add parties as respondents—Code of Civil Procedure* (*Act* XIV *of* 1882), *s.* 559.—In a suit for contribution by the plaintiffs against the defendants, the Court of first instance gave the plaintiffs a decree against one defendant and exonerated the others. On an appeal by the defendant against whom the decree was passed the appellate Court directed the defendants exonerated by the first Court to be added as respondents, set aside the decree against the appealing defendant, and passed a decree against the defendants who were added as respondents, as representatives of one *S*, and ordered the amount so decreed to be recovered from the estate of her (*S's*) husband. On appeal to the High Court by the defendants, who were thus made liable, on the grounds that they were wrongly made parties and no decrees could be passed against them, and that the liability to contribution being the personal liability of *S*, they, not being heirs to her *stridhan*, were not liable for the plaintiff's claim: *Held*, that there was nothing wrong in the course adopted by the lower appellate Court, and by s. 559 of the Code of Civil Procedure the defendants were rightly made parties. *Held*, also, that inasmuch as a claim for contribution creates only a personal liability against the co-sharers on account of whose share the payment has been made, and does not create a charge on the estate, the persons liable would not be the reversionary heirs to *S's* husband's estates, but those who would inherit her *stridhan*. UPENDRA LAL MUKERJEE v. GIRINDRA NATH MUKERJEE, 25 C. 565 = 2 C.W.N. 425 .. 373

(2) Suit for—See LIMITATION ACT (XV OF 1877), 25 C. 844; 26 C. 241.

(3) *Suit for—Partnership business—Money borrowed by agreement by one partner and paid into partnership business—Decree against one partner—Suit for contribution by him against other partners—Adjustment of account whether necessary.*—In a partnership business entered into between the plaintiff and the defendants, it was agreed that each member, together with the *gomastas* of the business, should be at liberty to borrow money upon his individual credit and to pay into the firm the money so borrowed to carry on the business. The plaintiff conjointly with defendants 4 and 6, in accordance with that agreement, borrowed several sums of money upon promissory notes, and paid the amounts so borrowed into the business. After the loan the partnership business came to an end, but no account was settled. Afterwards decrees were obtained upon those promissory notes, and the plaintiff was obliged to pay up the decretal amounts. To a suit for contribution by the plaintiff, for money so paid, against the members of the firm, the defence, *inter alia* was that the suit was not maintainable, in the absence of adjustment of the accounts relating to the firm. *Held*, that the suit was maintainable, inasmuch as the money secured by the promissory notes did not become an item of the partnership account. DURGA PROSONNO BOSE v. RAGHU NATH DASS, 26 C. 254 = 3 C.W.N. 299 ... 767

(4) *Suit for—Partnership business—Whether a suit for contribution by a partner against a co-partner would lie and in what cases—Adjustment of account whether necessary.*—A suit for contribution by a partner against some of his co-partners, on account of money paid by him for the satisfaction of a debt contracted by him jointly with the said co-partners, is maintainable in cases where the liability satisfied by the plaintiff is not a joint liability of the entire partnership, or where the said partners were some only of several persons comprising the partnership, and the bond was executed not in the usual course of business of the partnership; it is also maintainable in a case where the co-partners expressly promised to contribute their share of debt after a decree had been passed upon the bond. GUDA KULITA v. JOYRAM DAS, 26 C. 262, Note ... 772

Conveyance Act of 1881 (Statute 44 and 45 Vict., Cap. 41). PAGE

S. 7—See VENDOR AND PURCHASER, 25 C. 298.

Co-sharer.

(1) Incumbrance created by—See PARTITION, 26 C. 434.

(2) *Joint possession, suit for—Effect of purchase of a right of occupancy, not transferable by custom, by a co-sharer landlord without the consent of the other co-sharers—Abandonment—Right to partition.*—In a suit to recover joint possession of an occupancy holding in respect of his share by a co-sharer landlord, on the ground that the defendant acquired no title by the purchase of the said holding, as it was not transferable by custom, and that there was an abandonment of the holding by the former tenant, the defence (*inter alia*) was that the plaintiff was not entitled to joint possession, and that he could not get any relief except by bringing a suit for partition, inasmuch as they (the plaintiff and the defendants) were joint proprietors. *Held*, that the plaintiff was entitled to the relief claimed, and that the claim for joint possession without partition was maintainable. DILBAR SARDAR v. HOSEIN ALI BEPARI, 26 C. 553 ... 955

(3) Landlords, decree obtained only by some of several—See CIV. PRO. CODE (ACT XIV OF 1882), 26 C. 727.

(4) Right of, to sue—See ACT VIII OF 1885 (BENGAL TENANCY), 25 C. 917.

Costs.

(1) Agreement as to, between attorney and client—See PRACTICE, 26 C. 769.

(2) *Application for stay of execution—Practice.*—Where the defendants in an original suit applied to the appellate Court for stay of execution of the decree pending the appeal: *Held* (BANERJEE, J., *dissenting*) that the applicant who asked for the indulgence must pay the costs of the application. CHUNI LAL v. ANANTRAM, 25 C. 893 ... 582

(3) *Attorney's lien for costs—General jurisdiction of High Court over all suitors—Compromise by parties without knowledge of attorney—Lien, notice of—Attorney and client.*—The decree obtained by the plaintiff in a suit was satisfied by defendant behind the back of the plaintiff's attorney, although he had notice of the lien for costs of the plaintiff's attorney. The plaintiff's attorney thereupon applied for an order upon the plaintiff and the defendant, or either of them, to pay his costs: *Held*, the High Court has general jurisdiction over its suitors; that although a defendant has the right to compromise with a plaintiff without the knowledge of the plaintiff's attorney, such compromise must be made with the honest intention of ending the litigation, and not with any design to deprive the attorney of his costs, and he cannot make a payment to the plaintiff under that compromise, if he has notice of the lien for the costs of the plaintiff's attorney. KHETTER KRISTO MITTER v. KALLY PROSUNNO GHOSE, 25 C. 887=2 C.W.N. 508 ... 578

(4) Decree for—See EXECUTION OF DECREE, 25 C. 283.

(5) *Dismissal of appeal—Time occupied in hearing of preliminary objection to appeal.*—An appeal was dismissed with costs notwithstanding that almost the whole time occupied in the hearing of the case on appeal was taken up by the argument on a preliminary objection that no appeal lay which was taken by the respondents and was unsuccessful. TOOLSEE MONEY DASSEE v. SUDEVI DASSEE, 26 C. 361=3 C.W.N. 347 ... 834

(6) Liability to pay—See ACT II OF 1874 (ADMINISTRATOR GENERAL'S), 25 C. 54.

(7) Of petitioner—See PRACTICE, 25 C. 222.

(8) See ACT VIII OF 1890 (GUARDIANS AND WARDS), 26 C. 133.

(9) See APPEAL (TO PRIVY COUNCIL), 26 C. 246.

(10) See PRIVY COUNCIL, 25 C. 187.

(11) See RAILWAY COMPANY, 26 C. 465.

Court Fee.

Payment of, after period of limitation—See PAUPER, 26 C. 925.

Court Fees Act (VII of 1870). PAGE

(1) Ss. 3 and 19-H—See LETTERS OF ADMINISTRATION, 26 C. 407.

(2) Sch. I, art. 11—See LETTERS OF ADMINISTRATION, 26 C. 407.

Court Fees Amendment Act (XI of 1899).

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Covenant.

(1) For title, implied—See VENDOR AND PURCHASER, 25 C. 298.

(2) In ekrarnama for money paid—See LIMITATION ACT (XV OF 1877), 26 C. 241.

Co-widows.

Alienation by one of two—See PRIVY COUNCIL, 25 C. 189.

Cowries.

See ACT II OF 1867 (GAMBLING ACT), 25 C. 432.

Creditors.

(1) Right of, to immediate payment—See ACT II OF 1874 (ADMINISTRATOR-GENERAL'S), 25 C. 54.

(2) See CONTRACT ACT (IX OF 1872), 26 C. 39.

Cremation.

See NUISANCE, 25 C. 425.

Criminal Breach of Trust.

By public servant—See PENAL CODE (ACT XLV OF 1860), 26 C. 560.

Crim. Pro. Code (Act XXV of 1861).

S. 434—See COMPENSATION, 26 C. 181.

Crim. Pro. Code (Act X of 1882).

(1) S. 3—See ACT XIII OF 1859 (WORKMAN'S BREACH OF CONTRACT), 25 C. 637.

(2) S. 3—See ACT V OF 1876 (REFORMATORY SCHOOLS), 25 C. 333.

(3) *S.* 35—*Sentence—Concurrent sentences of imprisonment—Penal Code (Act* XLV *of* 1860), *s* 409.—Sentences of imprisonment passed for distinct offences to run concurrently are not warranted by law. DAITARI DAS v. QUEEN-EMPRESS, 25 C. 557 ... 368

(4) S. 106—See RECOGNIZANCE TO KEEP PEACE, 25 C. 628.

(5) *Ss.* 107 *and* 118—*Wrongful act likely to occasion a breach of the peace—Practice—Rule issued upon the Magistrate—Right to appear of a party interested in the result.*—The granting of leases to tenants of land not in one's possession does not constitute a wrongful act such as s. 107 of the Crim. Pro. Code (Act X of 1882) contemplates. Where the notice directs a person to show cause why he should not be bound down to keep the peace, it is improper to make an order directing him to execute bonds for his good behaviour. When a rule is issued upon the Magistrate to show cause and the order sought to be set aside is one that is only intended to secure the peace of the District by binding down the petitioner, the Magistrate is the only party entitled to be heard. Any other party interested in the result of the order cannot appear. DRIVER v. QUEEN-EMPRESS, 25 C. 798 ... 520

(6) *Ss.* 107, 145—*Dispute concerning land—Procedure—Recognizance.*—Where a dispute likely to cause a breach of the peace exists concerning possession of land, proceedings under s. 145, and not under s. 107, of the Crim. Pro. Code should be instituted. DOLEGOBIND CHOWDHURY v. DHANU KHAN, 25 C. 559 ... 369

(7) S. 133—See NUISANCE, 25 C. 278, 425.

(8) S. 137—See NUISANCE, 25 C. 278.

(9) S. 140—See NUISANCE, 25 C. 278.

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(10) S. 144—See NUISANCE, 25 C. 852.

(11) *S. 145—Possession, Order of Criminal Court as to—Parties to proceedings—Manager in possession.*—A person who is in possession of land merely as manager for the actual proprietor should not be made a party to proceedings under s. 145 of the Crim. Pro. Code. BROWN v. PRITHIRAJ MANDAL, 25 C. 423 ... 280

(12) S. 182—See JURISDICTION, 25 C. 858.

(13) S. 195—See SANCTION FOR PROSECUTION, 26 C. 359.

(14) S. 297—See JURY, 25 C. 561.

(15) Ss. 306, 307, 536—See JURY, 25 C. 555.

(16) S. 318—See ACT V OF 1876 (REFORMATORY SCHOOLS), 25 C. 333.

(17) S. 342—See EVIDENCE, 26 C. 49.

(18) Ss. 350 (*a*), 537—See WITNESS, 25 C. 863.

(19) S. 399—See ACT V OF 1876 (REFORMATORY SCHOOLS), 25 C. 333.

(20) Ss. 404, 520, 522—See APPEAL (CRIMINAL), 25 C. 630.

(21) S. 418 (*d*)—See CHARGE, 25 C. 230.

(22) S. 423—See CHARGE, 25 C. 230, 711.

(23) S. 423—See COMPLAINT, 25 C. 711.

(24) S. 488—See MAINTENANCE, 25 C. 291.

(25) S. 514—See RECOGNISANCE TO KEEP PEACE, 25 C. 440.

(26) *S. 522—Restoration of possession of immoveable property—Dispossession by use of criminal force.*—The words "an offence attended by criminal force" in s. 522 of the Crim. Pro. Code (Act X of 1882) mean an offence of which criminal force forms an ingredient. Section 522 is not applicable to cases where there has been no conviction for criminal force, either separately or as an ingredient of the offence of which there is a conviction, and where there is no finding that any person has been dispossessed of any immoveable property by criminal force. RAM CHANDRA BORAL v. JITYANDRA, 25 C. 434 = 2 C.W.N. 305 ... 288

(27) S. 526, cl. (*e*)—See TRANSFER, 25 C. 727.

(28) S. 537—See ACT XV OF 1881 (FACTORIES), 25 C. 454.

(29) S. 537—See CHARGE, 25 C. 230.

Crim. Pro. Code (Act V of 1898).

(1) S. 80—See WARRANT, 26 C. 748.

(2) S. 106—See RECOGNIZANCE TO KEEP PEACE, 26 C. 576.

(3) S. 133—See NUISANCE, 26 C. 869.

(4) S. 138—See JURY, 26 C. 869.

(5) S. 145—See SUPERINTENDENCE, 26 C. 188.

(6) *S. 145—Possession, Order of Criminal Court as to—Jurisdiction of Magistrate—Order made by a Civil Court—Power of revision by the High Court.*—It is the duty of the Magistrate when the right to possession has been declared within a time not remote from his taking proceedings under s.145 of the Crim. Pro. Code to maintain any order which has been passed by any competent Court ; and therefore to take proceedings which necessarily must have the effect of modifying or even cancelling such orders, is to assume a jurisdiction which the law does not contemplate. The power of revision to be exercised by the High Court is limited to matters of jurisdiction, that is to say, to cases in which it is found that the Magistrate by taking proceedings under s. 145 has acted without jurisdiction. DOULAT KOER v. RAMESWARI KOERI *alias* DULIN SAHEBA, 26 C. 625 = 3 C.W.N. 461 ... 1002

(7) *S. 145—Right of ferry—Dispute concerning ferry including land, and water over which it plies—Possession, Order of Criminal Court as to.*—The right to a ferry, *i.e.*, the right to carry passengers to and fro, cannot be treated apart from the possession of the lands used on either side of the stream for the purpose of landing them. It is a proper case to be dealt with under s. 145 of the Crim. Pro. Code (Act V of 1898) where the subject-matter of

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dispute is a ferry including the land and water upon which the right of ferry is exercised. HURBUL LUBH NARAIN SINGH v. LUCHMESWAR PROSAD SINGH, 26 C. 188=3 C.W.N. 49 ... 725

(8) Ss. 190 and 191—See MAGISTRATE, 26 C. 786.
(9) S. 197—See SANCTION FOR PROSECUTION, 26 C. 852.
(10) S. 198—See BIGAMY, 26 C. 336.
(11) Ss. 222 (2) and 234—See PENAL CODE (ACT XLV OF 1860), 26 C. 560.
(12) Ss. 236, 237, 238—See ATTEMPT, 26 C. 863.
(13) S. 230—See COMPENSATION, 26 C. 181.
(14) S. 423—See ATTEMPT, 26 C. 863.
(15) S. 423—See REVISION, 26 C. 746.
(16) S. 435—See REVISION, 26 C. 746.
(17) S. 435—See SUPERINTENDENCE, 26 C. 188.
(18) S. 439—See REVISION, 26 C. 746.
(19) S. 439—See SANCTION FOR PROSECUTION, 26 C. 852.
(20) S. 476—See COMPENSATION, 26 C. 181.

Criminal Proceedings.

Commencement of—See WITNESS, 25 C. 863.

Crops.

Increase of rent for rise in price of—See ENHANCEMENT, 26 C. 617.

Cross-objection.

See CIV. PRO. CODE (ACT XIV OF 1882), 26 C. 114.

Custom.

(1) Evidence of—See RIGHT OF OCCUPANCY, 26 C. 184.
(2) See ACT VIII OF 1885 (BENGAL TENANCY), 26 C. 615.

Damages.

(1) For illegal distraint, suit for—See LIMITATION ACT (XV OF 1877), 25 C. 285.
(2) For insult, loss of reputation, and mental pain—See SLANDER, 26 C. 653.
(3) Measure of—See RAILWAY COMPANY, 26 C. 465.
(4) Suit for, for non-delivery—See ACT III OF 1865 (CARRIERS), 26 C. 398.
(5) See CONTRACT, 25 C. 505.
(6) See WRONGFUL DISTRAINT, 25 C. 285.

Death.

Of party to execution proceeding—See SUCCESSION CERTIFICATE ACT (VII OF 1889), 26 C. 839.

Debt.

(1) Acknowledgment of—See JURISDICTION, 26 C. 715.
(2) Acknowledgment of—See LIMITATION ACT (XV OF 1877), 26 C. 204.
(3) Contracted by one only of several partners—See CONTRIBUTION, 26 C. 254, 262-N.
(4) Interest paid on—See LIMITATION ACT (XV OF 1877), 25 C. 844.

Debtor and Creditor.

See INSOLVENT ACT (11 AND 12 VICT., C. 21), 26 C. 973.

Declaratory Decree,

(1) Suit for—See TITLE, 26 C. 11.
(2) *Suit for—Specific Relief Act (I of 1877) s. 42—Suit for declaration that the defendant is a mere benamidar for plaintiff.*—In a suit by *A* to obtain a declaration that a decree originally obtained by *B* against *C* and another, which had been purchased in the name of *D*, had really been purchased by the plaintiff for his own benefit: *Held*, that inasmuch as it was not necessary to ask for an injunction, the suit was not barred by the proviso to s. 42 of the Specific Relief Act. GOUR MOHUN GOULI v. DINONATH KARMOKAR, 25 C. 49=2 C.W.N. 76 ... 34

Declaratory Decree—(*Concluded*). PAGE

(3) *Suit for declaration of title--Land not properly described--Land Registration Act* (*Bengal Act VII of* 1876), *ss.* 59, 62—*Specific Relief Act* (*I of* 1877), *s.* 42—*Subsequent suit for possession—Practice—Amendment of plaint.*—A person is not debarred from bringing a suit for declaration of title on the ground that the land in question is not properly described; but if an order under s. 59 of the Land Registration Act is made against him, he is precluded by s. 42 of the Specific Relief Act from bringing a suit merely for declaration of his title without seeking to recover possession, although he may be in physical possession, the effect of such an order being to "settle the actual possession." The appellate Court will not grant in a case of this nature an opportunity to amend the plaint if the plaintiffs had already such an opportunity and did not avail themselves of it. RAJ NARAIN DAS v. SHAMA NANDO DAS CHOWDHRY, 26 C. 845=4 C.W.N. 162 ... 1141

Decree.

(1) Absolute, for foreclosure—See MORTGAGE (FORECLOSURE), 25 C. 311.

(2) Adjustment or satisfaction of—See EXECUTION OF DECREE, 25 C. 86.

(3) Against one of several partners—See CONTRIBUTION, 26 C. 254, 262-N.

(4) Amendment of—See LIMITATION ACT (XV OF 1877), 25 C. 258.

(5) Application for execution of, by transferee—See CIV. PRO. CODE (ACT XIV OF 1882), 26 C. 250.

(6) Application to set aside—See PARTIES, 26 C. 267.

(7) Assignment of—See ACT VIII OF 1885 (BENGAL TENANCY), 26 C. 176.

(8) Consent, setting aside—See PRACTICE, 25 C. 649.

(9) Execution of, not materially defective, application for—See LIMITATION ACT (XV OF 1877), 25 C. 594.

(10) Ex-parte—See CIV. PRO. CODE (ACT XIV OF 1882), 25 C. 155.

(11) Ex-parte—See SURETY, 26 C. 222.

(12) Form of—See MORTGAGE (GENERAL), 26 C. 78.

(13) *Form of decree—Decree for maintenance—Receiver, Appointment of, in case of default—Transfer of Property Act* (*IV of* 1882), *ss.* 67, 99, 100.—To avoid any difficulty in executing a decree for maintenance out of property charged with payment of the allowance and make a fresh suit unnecessary in case of default in payment of the instalments, a Receiver should be appointed under the decree itself with directions, in case of default in payment of the maintenance, to take possession of the estate and sell the same, and out of the sale proceeds to pay the allowance for maintenance. HEMANGINI DASSEE v. KUMODE CHANDER DASS, 26 C. 441=3 C.W.N. 139 ... 884

(14) *Form of decree—Mortgage decree—Transfer of Property Act* (IV *of* 1882), *decree regarded as mortgage decree under—Sale of mortgaged property in execution of decree.*—In a suit for recovery of mortgage money by sale, brought after the Transfer of Property Act (IV of 1882) had come into force, the decree of the Court was: "That a decree be passed in favour of the plaintiffs in respect of Rs. 5,387-10-13, together with costs and interest at the rate of 6 per cent. per annum up to the date of realization, and that the mortgaged properties be made liable (*pae band kea jae*) for realization of the decretal money." *Held*, that the decree was to be regarded as a mortgage decree governed by the Transfer of Property Act, though not made in the form prescribed by that Act; and it followed that it was not open to the decree-holder to proceed against properties other than the mortgaged properties before exhausting the latter, and without obtaining an order under s. 90 of the said Act. LAL BEHARY SINGH v. HABIBUR RAHMAN, 26 C. 166=3 C.W.N. 8 ... 711

(15) For money—See EXECUTION OF DECREE, 25 C. 322.

(16) For payment of money—See CIV. PRO. CODE (ACT XIV OF 1882), 25 C. 580.

(17) For possession and mesne profits—See LIMITATION, 25 C. 203.

(18) For sale of hypothecated property—See CIV. PRO. CODE (ACT XIV OF 1882), 25 C. 580.

(19) Not subsisting at time of sale—See APPEAL (SECOND APPEAL), 25 C. 175.

Decree—(*Concluded*). PAGE

(20) Obtained by fraud, power of Court to treat it as nullity—See FRAUD, 26 C. 891.

(21) Of foreign Court as evidence in Court in British India—See FOREIGN COURT, 26 C. 931.

(22) *Possessory decree—Specific Relief Act* (I *of* 1877), *s.* 9.—Where a decree was passed under s. 9 of the Specific Relief Act (I of 1877) giving the plaintiff possession, and also directing that the costs of removing huts and filling up excavations should be paid by the defendant under this decree: *Held*, that the latter portion of the decree was beyond the scope of a possessory decree under s. 9 of the Specific Relief Act and must be set aside. TILAK CHANDRA DAS *v.* FATIK CHANDRA DAS, 25 C. 803 ... 523

(23) Set aside at instance of some only of defendants—See CIV. PRO. CODE (ACT XIV OF 1882), 25 C. 155.

(24) Transfer of, for execution—See APPEAL (SECOND APPEAL), 25 C. 872.

(25) See APPEAL (SECOND APPEAL), 26 C. 539.

Decree-holder.

See CIV. PRO. CODE (ACT XIV OF 1882), 26 C. 250.

Deed.

(1) Acknowledgment of, by Registrar—See MORTGAGE (GENERAL), 26 C. 78.

(2) Attestation of—See MORTGAGE (GENERAL), 26 C. 78.

(3) Construction of—See MORTGAGE (GENERAL), 26 C. 395.

(4) Of gift between joint brothers of part of family estate—See BURDEN OF PROOF, 25 C. 78.

Defendant.

Payment into Court by—See PRACTICE, 26 C. 766.

Demurrage.

Or freight, goods liable to—See CONTRACT, 26 C. 142.

Denial.

(1) Of execution—See REGISTRATION ACT (III OF 1877), 25 C. 93.

(2) Of means by respondent—See PRACTICE, 26 C. 764.

Deposit.

(1) By defendant, of money in Court in satisfaction of claim—See PRACTICE, 26 C. 766.

(2) By judgment-debtor—See CIV. PRO. CODE (ACT XIV OF 1882), 26 C. 449.

(3) Of decretal amount incorrectly calculated by Officer of Court—See SALE, 25 C. 216.

Discharge.

Except as to debts due to a particular creditor—See INSOLVENT ACT (11 AND 12 VICT., C. 21), 26 C. 973.

Discretion.

(1) Of Court—See JURY, 26 C. 869.

(2) Of Court—See PRACTICE, 26 C. 766.

Dismissal.

(1) Of appeal—See JUDGMENT, 25 C. 97.

(2) Of suit for default—See REVIEW, 26 C. 598.

Dispossession.

(1) Of putnidar and dar-putnidar—See LIMITATION ACT (XV OF 1877), 26 C. 460.

(2) See POSSESSION, 26 C. 579.

Distraint.

Suit for compensation for illegal—See ACT VIII OF 1885 (TENANCY, BENGAL), 25 C. 285.

Distribution. PAGE

Of proceeds of execution—See EXECUTION OF DECREE, 26 C. 772.

District Court.

Report by, to High Court—See ACT VIII OF 1890 (GUARDIANS AND WARDS), 26 C. 133.

District Judge.

(1) Jurisdiction of—See HIGH COURT, 25 C. 39.

(2) Withdrawal of appeal from—See HIGH COURT, 25 C. 39.

(3) See PROBATE, 25 C. 340.

Division Court.

See FULL BENCH, 25 C. 896.

Divorce.

(1) See MAHOMEDAN LAW (MARRIAGE), 25 C. 537.

(2) See SANCTION FOR PROSECUTION, 26 C. 359.

Divorce Act (IV of 1869).

(1) Ss. 7, 35 and 45—See PRACTICE, 25 C. 222.

(2) S. 36—See PRACTICE, 26 C. 764.

Document.

(1) Execution of—See PARDANASHIN LADY, 25 C. 807.

(2) Execution of, denial of—See REGISTRATION ACT (III OF 1877), 25 C. 93.

(3) Signed by several persons, some of whom only are dead—See EVIDENCE ACT (I OF 1872), 26 C. 236.

(4) Unregistered—See EVIDENCE, 26 C. 334.

(5) Unregistered—See FORGERY, 25 C. 207.

(6) See INSPECTION, 25 C. 294.

Domicile.

See FOREIGN COURT, 26 C. 931.

Durputnidar.

Dispossession of—See LIMITATION ACT (XV OF 1877), 26 C. 460.

Easement.

(1) *Implied grant—Easement upon the severance of a heritage by its owner into two or more parts—Continuous and apparent easement—Right of way—Limitation Act* (XV *of* 1877), *s.* 26.—Implication of a grant of easement upon the severance of a tenement may extend to a "way," but that is so only where there has been some permanence in the adaptation of the tenement from which continuity could be inferred. RAM NARAIN SHAHA v. KAMALA KANTA SHAHA, 26 C. 311 ... 803

(2) *Light and air—Partition of a joint-family house—Effect of partition by a consent decree where the decree does not reserve any right to the use of light and air—Implied grant of easement upon severance of tenement.*—On partition of a family dwelling house by a consent decree the plaintiff claimed a right to the passage of light and air necessary for the enjoyment of his share of the building in the way in which it was enjoyed at the time of the partition, though no such right was expressly reserved in the decree. The defence was that the principle of an implied grant of easement upon severance of the tenement should not be applied to the case, but that the rights of the parties should be determined solely with reference to the decree made in the partition suit. *Held*, that the principles of justice, equity and good conscience should be applied to the case, and that the plaintiff was entitled to the right claimed, even in the absence of any express provision in the decree reserving such right. *Quære* : Whether the principle of an implied grant of easement in severance of tenements would apply in a case where the partition was effected by a decree of the Court in a contested suit and not by a consent of parties. KADAMBINI DEBI v. KALI KUMAR HALDAR, 26 C. 516=3 C.W.N. 409 ... 932

(3) See RIGHT OF WAY, 26 C. 593.

Ejectment. PAGE

(1) Execution of decree for, for arrears of rent—See ACT VIII OF 1885 (BENGAL TENANCY), 26 C. 639.

(2) Liability to—See ACT VIII OF 1885 (BENGAL TENANCY), 26 C. 615.

(3) Right of—See ACT VIII OF 1885 (BENGAL TENANCY), 26 C. 199.

(4) Suit for—See LANDLORD AND TENANT, 25 C. 36, 75, 131.

(5) Suit for—See RIGHT OF SUIT, 25 C. 98.

(6) See ACT VIII OF 1885 (BENGAL TENANCY), 26 C. 546.

(7) See LANDLORD AND TENANT, 26 C. 761.

Ekrarnama.

Liability created by—See LIMITATION ACT (XV OF 1877), 26 C. 241.

Encroachment.

(1) See LANDLORD AND TENANT, 25 C. 302.

(2) See LIMITATION ACT (XV OF 1877), 25 C. 167.

Enhancement.

(1) Of rent—See ACT VIII OF 1885 (BENGAL TENANCY), 26 C. 233.

(2) *Of rent—Bengal Tenancy Act* (VIII *of* 1885), *ss.* 50 (*sub-s.* 2), 115, 104 (*sub-ss.* 2 *and* 3), 113—*Record of rights—Presumption as to fixity of rent—Settlement of fair and equitable rent—Enhancement for excess land—Enhancement for rise in price of crops.*—The provision contained in s. 115 of the Bengal Tenancy Act against the presumption as to fixed rent under s. 50 (2) of the Act arising in certain cases, has no application in a suit brought by a tenant for the purpose of contesting the correctness of the decision of a Revenue Officer in regard to the entry as to the status of a *raiyat* in a record-of-rights prepared under Ch. X of the Act. In such a suit the tenant is entitled to the benefit of the presumption. Given the circumstance of an increase or decrease in the area of the land for which a tenant is paying rent, it is competent to the Revenue Officer under s. 104 (2) of the Bengal Tenancy Act to settle a fair and equitable rent in respect of the whole of the land of the tenant, including the excess area, and the Revenue Officer can in such a case enhance the rent under the provisions of the Tenancy Act, *e.g.*, on the ground of the rise in the price of the food crops, and so forth. THE SECRETARY OF STATE FOR INDIA IN COUNCIL *v.* KAJIMUDDI, 26 C. 617 ... 997

(3) *Of rent—Partition of estate—Bengal Tenancy Act* (VIII *of* 1885), *ss.* 7 *and* 188—*Customary rate of rent—Fair and equitable rent—Joint landlords—Onus of proof.*—In a suit for enhancement of rent of a tenure under s. 7 of the Bengal Tenancy Act, it is for the plaintiff to start his case by proving that the existing rate was below the customary rate payable by persons holding similar tenures in the vicinity, or that it was not fair and equitable, before the *onus* can be shifted to the defendant to prove that the existing rent was fair and equitable. A tenure was held under a zemindari, which originally formed one entire estate. The estate was subsequently partitioned by the revenue authorities into four several estates. The rent of the tenure was thereupon allotted proportionately to each of the four estates thus formed, although the land forming the tenure remained undivided. In a suit for enhancement of the rent of the tenure brought by the proprietor of some of the estates, *held*, that the effect of the partition of the parent estate was to create separate and distinct tenures out of the original single tenure under the proprietors of each of the estates; that the proprietors of the several estates were not *joint* landlords of the tenure within the meaning of s. 188 of the Bengal Tenancy Act, and that, therefore, a suit for enhancement of rent would lie by a proprietor of one of the estates in respect of the rent allotted to his estate. HEM CHANDRA CHOWDHRY *v.* KALI PRASANNA BHADURI, 26 C. 832 ... 1133

(4) Of rent, suit for—See ACT VIII OF 1885 (BENGAL TENANCY), 25 C. 917.

Enjoyment.

As of right, continuance of—See RIGHT OF WAY, 26 C. 593.

Entry.

Made in measurement papers—See EVIDENCE ACT (I OF 1872), 25 C. 90.

Equitable Execution. PAGE

See EXECUTION OF DECREE, 26 C. 772.

Equitable Relief.

See INTEREST, 26 C. 300.

Estoppel.

See MINOR, 26 C. 381.

Evidence.

(1) As to jurisdiction at hearing—See JURISDICTION, 26 C. 715.

(2) *Evidence in criminal case—Crim. Pro. Code* (*Act* X *of* 1882), *s.* 342—*Statement of accused under that section—Misdirection* —A gap in the evidence for the prosecution cannot be filled up by any statement made by the accused in his examination under s. 342 of the Crim. Pro. Code. It is a misdirection to ask the jury to consider a document, purporting to be proved by such a statement, as evidence against the accused. BASANTA KUMAR GHATTAK v. QUEEN-EMPRESS, 26 C. 49 ... 635

(3) Of title—See TITLE, 26 C. 11.

(4) *Parol evidence—Evidence Act* (I *of* 1872), *s.* 92—*Evidence of conduct—Return of a lease—Intention of parties.*—Evidence of conduct, as for instance return of a lease, is admissible in evidence under s. 92 of the Evidence Act to prove that such return was due to an intention to make the lease inoperative. SHYAMA CHARAN MANDAL v. HERAS MOLLAH, 26 C. 160 ... 707

(5) *Production and admissibility in evidence of income-tax papers—Income Tax Act* (II *of* 1886), *s.* 38—*R.* 16 *of rules made by Local Government under Income Tax Act.*—R. 16 of the rules made by the Local Government under s. 38 of the Income Tax Act (II of 1886) does not apply to the production of income-tax papers in a Court of Law in a suit between two partners, *Lee* v. *Birrell*, 3 Camp., 337, and Mayne's Commentary on the Criminal Law, pp. 86, 87, cited. JADOBRAM DEY v. BULLORAM DEY, 26 C. 281 ... 784

(6) *Registration Act* (III *of* 1877), *s.* 49—*Collateral purpose—Mortgage, unregistered—Limitation Act* (XV *of* 1877).—An unregistered document, the registration of which is compulsory, may be admissible in evidence for a collateral purpose, *i.e.*, to prove admission of liability on part of the executant sufficient to prevent a claim from being barred by the Limitation Act. MUGNIRAM v. GURMUKH ROY, 26 C. 334 ... 817

(7) *Secondary evidence—Evidence Act* (I *of* 1872), *ss.* 65, 66.—(*Per* BANERJEE and RAMPINI, JJ.)—Where oral evidence was given to prove the contents of a letter, which was neither produced nor called for, but no objection was raised to the giving of the evidence. *Held*, that this was secondary evidence of the contents of a document, and could not be given without satisfying the conditions of s. 65 of the Evidence Act. S. 66 rendered it legally inadmissible, although no objection was raised to the giving of it. KAMESWAR PERSHAD v. AMANUTULLA, 26 C. 53=2 C.W.N, 649 ... 63

(8) Taken on commission—See PRACTICE, 26 C. 591.

(9) See CHARGE, 25 C. 736.

(10) See SETTLEMENT, 26 C. 792.

(11) See WILL, 25 C. 824.

Evidence Act (I of 1872).

(1) *Ss.* 11 *and* 13—*Judgment not* inter partes—*Admissibility in evidence of judgment in former case—The subject matter of the former suit not being indentical with that of the latter suit, judgment irrelevant.*—The rule laid down in the cases of 6 C. 171 and 13 C. 352 has been materially qualified by the decisions of the Privy Council, in the cases of 22 C. 533=22 I. A. 60 and 19 A. 277=24 I. A. 10. Under certain circumstances, in certain cases, the judgment in a previous suit to which one of the parties in the subsequent suit was not a party, may be admissible in evidence for certain purposes and with certain objects in the subsequent suit. In a case where the previous suit was to recover a two-thirds share of the property in question, and the subsequent suit was by a different plaintiff to recover the remaining one-third share of the same property: *Held*, in the subsequent suit the

Evidence Act (I of 1872)—(*Continued*). PAGE

judgment in the previous suit was not admissible in evidence, the subject matter in the two suits not being identical. TEPU KHAN v. RAJANI MOHON DAS, 25 C. 522 (F.B.) = 2 C.W.N. 501 ... 347

(2) *Ss.* 11, *cl,* 2, *and* 21, *cl.* 3—*Admissibility of petition and written statement filed in a previous proceeding.*—Where the plaintiff and some of the defendants were co-owners of certain properties, the question at issue being whether there was a partition between them, and whether under that partition the defendants came to be in possession of a specific property in lieu of their shares in all the properties, a petition and a written statement filed by the defendants in certain previous suits admitting the partition and the exclusive acquisition of the specific property were put in, but objected to as inadmissible in evidence: *Held,* that the documents were admissible against those defendants under ss. 11, cl. (2), and 21, cl. (3), of the Evidence Act. GYANNESSA v. MOBARAKANNESSA, 25 C. 210 = 2 C.W.N. 91. 142

(3) S. 25—See CONFESSION, 26 C. 569.

(4) *S.* 27—*Information received from the accused—Statement leading to the discovery of a fact—Admissibility of such statement.*—If the statement of an accused person in the custody of the police is a necessary preliminary of the fact thereby discovered, it is admissible under s. 27 of the Evidence Act; it is immaterial whether the statement is sufficient to enable the police to make the discovery by themselves, or is only of such a nature as to require further assistance of the accused to enable them to discover the fact. LEGAL REMEMBRANCER v. CHEMA NASHYA, 25 C. 413 = 2 C.W.N. 257 ... 274

(5) *S.* 32—*Statements made by deceased tenants—Road-cess returns—Bengal Cess Act (Bengal Act* IX *of* 1880), *s.* 95.—*Semble*: The statements made by deceased tenants in road-cess returns filed by them regarding assets of the tenancy are not admissible in evidence under s. 32 of the Evidence Act. HEM CHANDRA CHOWDHRY v. KALI PRASANNA BHADURI, 26 C. 832 1133

(6) *S.* 32, *cl.* (5)—*Statement relating to the existence of any relationship contained in a document signed by several persons, some only of whom are dead.*—A statement relating to the existence of any relationship contained in a document signed by several persons, some only of whom are dead, is admissible in evidence under cl. 5 of s. 32 of the Evidence Act. CHANDRA NATH ROY v. NILMADHAB BHUTTACHARJEE, 26 C. 236 = 3 C.W.N. 88 755

(7) *S.* 35—"*Butwara Khasra*"—*Estates Partition Act (Bengal Act* VIII *of* 1876), *s.* 54—*Measurement papers, Entry made in*—"*Record.*"—A *butwara khasra* or measurement paper prepared under s. 54 of the Estates Partition Act (Bengal Act VIII of 1876) is not a "record" within the meaning of s. 35 of the Evidence Act I of 1872. An entry made therein of the name of a tenant in possession is not admissible in evidence under that section. PERMA ROY v. KISHEN ROY, 25 C. 90 ... 61

(8) *S.* 38—*Statement as to French Law—Unauthorized translation of Code Napoleon.*—A statement contained in an unauthorised translation of the Code Napoleon as to what the French law is on a particular matter, is not relevant under s. 38 of the Evidence Act. CHRISTIEN v. DELANNEY, 26 C. 931 = 3 C.W.N. 614 ... 1195

(9) S. 48—See RIGHT OF OCCUPANCY, 26 C. 184.

(10) Ss. 65, 66—See EVIDENCE, 26 C. 53.

(11) *S.* 68—*Surety bond purporting to hypothecate immoveable property—Bond not properly attested—Transfer of Property Act* (IV *of* 1882), *s.* 59.—Where a surety bond purported to hypothecate immoveable property, though it was not registered and attested by two witnesses, a personal decree could be passed on it against the surety inasmuch as the document was evidence of a money debt. SONATUN SHAHA v. DINONATH SHAHA, 26 C 222 = 3 C.W.N. 228 ... 746

(12) S. 85—See PRACTICE, 25 C. 856.

(13) S. 92—See EVIDENCE, 26 C. 160.

(14) *S.* 92, *Mortgage—Sale—Conduct of parties—Oral evidence when admissible to prove that an apparent sale is a mortgage—Admissibility of parol evidence to vary a written contract.*—Oral evidence of the acts and conduct of parties, such as oral evidence that possession remained with the vendor

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notwithstanding the execution of a deed of out-and-out sale, is admissible to prove that the deed was intended to operate only as a mortgage. PREO-NATH SHAHA v. MADHU SUDAN BHUIYA, 25 C. 603 (F.B.)=2 C.W.N. 562 ... 397

(15) *S*. 92, *proviso* 3—*Parol evidence qualifying an engagement in a written document—Admissibility of such evidence—Reservation of question as to the admissibility of evidence.*—The proper meaning of proviso 3 to s. 92 of the Evidence Act (I of 1872) is that a contemporaneous oral agreement, to the effect that a written contract was to be of no force or effect, and that it was to impose no obligation at all until the happening of a certain event, may be proved. An oral agreement purporting to provide that the promise to pay on demand in a promissory note though absolute in its terms, was not to be enforceable by suit until the happening of a particular event, *i.e.*, that the legal obligation to perform the promise was to be postponed, is not such an agreement as falls within the proviso 3 to s. 92 of the Evidence Act. Qustions as to the admissibility of evidence should be decided as they arise, and should not be reserved until judgment in the case is given. RAMJIBUN SEROWGY v. OGHORE NATH CHATTERJEE, 25 C. 401=2 C.W.N. 188 ... 266

(16) S. 115—See MINOR, 25 C. 616 ; 26 C. 381.

(17) S. 126—See PRIVILEGED COMMUNICATION, 25 C. 736.

(18) *S*. 127—*Privileged communication—Communication to clerk of pleader.*—(*Per* BANERJEE, J.)—S. 127 of the Evidence Act (I of 1872) extends to a communication made to the pleader's clerk the same confidential character that attaches to a communication to the pleader direct, under s. 126. KAMESHWAR PERSHAD v. AMANUTULLA, 26 C. 53=2 C.W.N. 649 ... 638

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(1) Rate of—See EXECUTION OF DECREE, 25 C. 283.

(2) See TRANSFER OF PROPERTY ACT (IV OF 1882), 25 C. 210.

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(1) *Adjustment or satisfaction of decree—Civ. Pro. Code (Act* XIV *of* 1882), *ss.* 257-A, 258—*Sanction of Court to agreements for satisfaction of decree—Payments by judgment-debtor under void agreement—Effect of uncertified payments to decree-holder.*—A sum paid under an agreement void under s. 257A of the Civ. Pro. Code cannot be acknowledged or recognised in execution of a decree under s. 258 of the Code, unless it has been certified within the proper time. Agreements for the satisfaction of a judgment-debt not sanctioned under s. 257A of the Civ. Pro. Code, are void ; but, if sanctioned, they may be carried out in execution. DURGA PRASAD BANERJEE v. LALIT MOHUN SINGH ROY, 25 C. 86 ... 59

(2) Against female heir—See SALE, 26 C. 285.

(3) Application for—See LIMITATION ACT (XV OF 1877), 25 C. 258 ; 26 C. 888.

(4) Application for stay of—See COSTS, 25 C. 893.

(5) By assignee—See ACT VIII OF 1885 (BENGAL TENANCY), 26 C. 176.

(6) By trustees under assignment—See ACT VIII OF 1885 (BENGAL TENANCY), 26 C. 750.

(7) *Charge—Attachment without sale—Transfer of Property Act (*IV *of* 1882), *ss*. 67, 99, 100—Res judicata.—The plaintiff, a judgment-creditor, had in the High Court obtained a decree against the defendant, whereby it was ordered that the defendant should pay to the plaintiff a sum of Rs. 1,68,123, and that the said sum should be a charge on certain immovable properties situated in the mofussil and specified in a schedule to the decree. In August 1894 the plaintiff obtained an order for transfer of the decree to a mofussil Court and sent a copy of the decree for execution there. He obtained in that Court an order for attachment and sale of the property, but that order was reversed on appeal in May 1895, the High Court holding that the properties could not be sold in execution of the decree, but that a separate suit must be brought under s. 67 of the Transfer of Property Act. The plaintiff then applied to the Court that passed the decree for an order for transmission of the decree to the

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mofussil Court with a view to execution. That application was refused by SALE, J., who held that the decision of May 1895 was conclusive as to the plaintiff's right to attach the property as distinct from a sale or to sell it except after a suit under s. 67 of the Transfer of Property Act: *Held* on appeal (reversing the decision of SALE, J.) that the application was not *res judicata*. *Held*, also, that an order for attachment only as distinct from a sale could be made. GOURI SUNKER PANDAY v. ABHOYESWARI DABEE, 25 C. 262 ... 176

(8) *Code of Civil Procedure* (*Act* XIV *of* 1882), *ss.* 223 *and* 649—*Bengal, North-Western Provinces and Assam Civil Courts Act* (XII *of* 1887), s. 13—*Re-distribution of local areas, Effect of—Jurisdiction of Munsif.*—*A* obtained a decree against *B* in the Court of the first Munsif of Howrah. After the decree, the local area. within which the cause of action arose, and the judgment-debtor resided, was transferred from the first to the second Munsif. On an application by *A* for the execution of his decree in the Court of the second Munsif which allowed execution: *Held*, that the second Munsif had no jurisdiction to entertain the application and allow execution, and that the application ought to have been made in the Court of the first Munsif which passed the decree. KALIPADO MUKERJEE v. DINO NATH MUKERJEE, 25 C. 315 ... 211

(9) *Distribution of proceeds of execution—Assets realized by sale or otherwise in execution—Monies realized by Receiver appointed by decree-holder—Equitable execution—Code of Civil Procedure* (*Act* XIV *of* 1882), s. 295.—Rents of property under attachment which have been realized by a receiver appointed at the instance of one decree-holder are "assets realized by sale or otherwise in execution of a decree" within the meaning of s. 295 of the Code of Civil Procedure. The appointment of a Receiver by the Court at the instance of a judgment-creditor is a "process of execution." FINK v. MAHARAJ BHADOOR SING, 26 C. 772=4 C.W.N. 27 ... 1094

(10) Effect of striking off application for—See LIMITATION, 25 C. 203.

(11) Effect on sale of reversal of—See SALE, 26 C. 734.

(12) For arrears of rent against registered tenant alone—See SALE, 26 C. 677.

(13) For ejectment for arrears of rent—See ACT VIII OF 1885 (BENGAL TENANCY). 26 C. 639.

(14) *Order of Privy Council—Decree for costs—Rate of Exchange.*—In converting into Indian currency the amount of costs expressed in sterling in an order of Her Majesty in Council the rate of exchange is the rate which prevailed at the time when the order was made. MAHOMED ABDUL HYE v. GAJRAJ SAHAI, 25 C. 283=2 C.W.N. 89 ... 190

(15) Proceedings and orders in—See LIMITATION, 25 C. 203.

(16) Question arising in—See CIV. PRO. CODE (ACT XIV OF 1882), 25 C. 49, 133.

(17) Question for Court in—See CIV. PRO. CODE (ACT XIV OF 1882), 26 C. 946.

(18) Question sin—See CIV. PRO. CODE (ACT XIV OF 1882), 26 C. 727.

(19) Question relating to—See APPEAL (GENERAL), 26 C. 529.

(20) *Stay of execution—Decree for arrears of rent—Decree for money—Code of Civil Procedure* (*Act* XIV *of* 1882), s. 546.—A decree for arrears of rent is a "decree for money" within the meaning of s. 546 of the Civil Procedure. BANKU BEHARY SANYAL v. SYAMA CHURN BHUTTACHARJEE, 25 C. 322 216

(21) See ACT VIII OF 1885 (BENGAL TENANCY), 26 C. 603.

(22) See APPEAL (SECOND APPEAL), 25 C. 872; 26 C. 539.

(23) See BENAMI TRANSACTIONS, 26 C. 950.

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(26) See LIMITATION ACT (XV OF 1877), 25 C. 109.

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(28) See RECEIVER, 26 C. 127.

(29) See SALE, 26 C. 937.

(30) See SUCCESSION CERTIFICATE ACT (VII OF 1889), 26 C. 839.

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Jurisdiction of—Private International Law—Suit in British Court on foreign judgment—Territorial jurisdiction—British subject—Domicile—Nationality—Decree of Foreign Court as evidence in Court in British India—Civ. Pro. Code (XIV *of* 1882), *s.* 13.—A foreign Court has no jurisdiction over a person who is a British subject domiciled and residing in British India, who was not within the territorial jurisdiction of that Court either at the time when a suit was brought against him or previously, and who never subjected himself by an act of his, such as by appearing and defending the suit, to the jurisdiction of that Court. A decree passed by a foreign Court against such a person cannot be given effect to in a Court in British India. Even if there be in such a case any special territorial legislation giving jurisdiction to the foreign Court, such legislation cannot be recognised by a Court in British India. Nationality is determined by birth on the soil and not by citizenship by descent. There is a distinction between a case in which a defendant puts forward a foreign judgment as a bar to a suit under s. 13 of the Code of Civil Procedure, and a case in which a plaintiff seeks to enforce a foreign judgment. In the former, it may fairly be supposed that the parties submitted to the jurisdiction of the foreign Court. CHRISTIEN v. DELANNEY, 26 C. 931=3 C.W.N. 614 ... 1195

Forgery.

(1) *Abetment of forgery by writing out the deed—Unregistered document purporting to be a valuable security—Penal Code* (*Act* XLV *of* 1860), *ss.* 109, 114, *and* 467.—The accused was not only the writer but also took an active part in the preparation of a document, the alleged executant of which was dead before the date of the document, and the person who really had an interest under the document was convicted under s. 82 of the Registration Act (III of 1877). But evidence was wanting to show that the accused took any part in the forgery of the name of the alleged executant: *Held*, that the accused could not be convicted of the offence of forgery under s. 467

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of the Penal Code. There being nothing on the record to show that the accused was a party to or took any part in the actual forgery of the document, or that he was present on the occasion when it was forged, the proper section to convict him under would be s. 457/109, that is of abetment of forgery, and not s. 467/114. An unregistered document, though it may not be a valuable security until the registration is completed, "still" purports to be a valuable security within the meaning of s. 467 of the Penal Code. KASHI NATH NAEK v. QUEEN-EMPRESS, 25 C. 207 = 1 C.W.N. 681 ... 140

(2) *Using a forged document—Penal Code (Act* XLV *of* 1860), *ss.* 463, 471—"*Fraudulently,*" *meaning of.*—Deprivation of property, actual or intended, is not an essential element in the offence of fraudulently using as genuine a document which the accused knew or had reason to believe to be false. QUEEN-EMPRESS v. ABBAS ALI, 25 C. 512 (F.B.) = 1 C.W.N. 255 ... 340

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(1) Application to set aside sale on ground of—See APPEAL (SECOND APPEAL), 26 C. 539.

(2) Fraudulent representation as to age—See MINOR, 25 C. 371.

(3) *Pleading fraud—Power of Court at instance of innocent party to treat decree of another Court obtained by fraud as a nullity.*—An innocent party may be allowed to prove in one Court that a decree obtained against him in a different proceeding in another Court of concurrent jurisdiction was obtained by fraud, and if the Court be of opinion that such decree so obtained in the other Court cannot stand it has jurisdiction to treat that decree as a nullity and render its effect nugatory. NISTARINI DASSI v. NUNDO LALL BOSE, 26 C. 891 = 3 C.W.N. 670 ... 1171

(4) Suit for relief on ground of—See LIMITATION ACT (XV OF 1877), 25 C. 49.

(5) See SALE, 26 C. 324, 326-N.

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(1) Sold, not available for delivery—See CONTRACT, 26 C. 142.

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(1) Power of—See SETTLEMENT, 26 C. 792.

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(1) Acknowledgment of debt by—See LIMITATION ACT (XV OF 1877), 26 C. 51.

(2) Appointment of—See ACT VIII OF 1890 (GUARDIANS AND WARDS), 26 C. 133.

(3) *Appointment of guardian—Guardians and Wards Act* (VIII *of* 1890), *ss.* 9 *and* 17—*Application by a Christian father to be appointed guardian of his Hindu minor son—Matters to be considered by the Court in appointing guardian.*—A, who was originally a Hindu, but afterwards became a Christian and abandoned his family residence, applied to be the guardian of the person of his minor son. On the objections of the paternal and maternal uncles of the boy that, under the circumstances of the case, the father was not a fit and proper person to be appointed the guardian of the minor. *Held*, although the father is *prima facie* entitled to the custody of his infant child, he can be deprived of such parental right if the circumstances justify it; therefore in a case where a child who was brought up as a Hindu, and who expressed a desire to remain a Hindu, and was living with his Hindu relation, who was maintaining him and was looking after his education properly, it would not be to the welfare of the child that he should be handed over to the father and brought up in the Christian faith, and that the Court below, under the circumstances of the case, was right in dismissing the application. MOKOOND LALL SINGH v. NOBODIP CHUNDER SINGH, 25 C. 881=2 C.W.N. 379... 574

(4) Powers of—See LIMITATION ACT (XV OF 1877), 26 C. 51.

(5) *Power of guardian to mortgage minor's property—Act* XL *of* 1858, *s.* 18—*Guardians and Wards Act* (VIII *of* 1890), *s.* 30, *read with s.* 2, *Retrospective effect of—Mortgage without sanction of Court.*—A mortgage of a minor's property, made by his guardian holding a certificate under Act XL of 1858, without obtaining sanction of the Court as required by s. 18 of the Act, is absolutely null and void. Section 2 of the Guardians and Wards Act (VIII 1890) does not give retrospective effect to s. 30, which, therefore, does not apply to a mortgage executed before the Act came into operation, so as to destroy its void character and render it merely voidable. LALA HURRO PROSAD v. BASARUTH ALI, 25 C. 909 ... 592

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(4) *Jurisdiction of—District Judge, jurisdiction of—Appeal—Appeal withdrawn from the District Court—Civ. Pro. Code* (*Act* XIV *of* 1882), *s.* 25.—An appeal, the subject-matter of which was over Rs. 5,000 in value, was wrongly presented and filed in the District Judge's Court, and was subsequently upon application by the appellant withdrawn by the High Court under s. 25 of the Civ. Pro. Code and registered as an appeal to that Court. The order of withdrawal left it open to the respondent to raise objection on the score of want of jurisdiction of the District Court at the time of hearing of the appeal. *Held*, that when an appeal is transferred under s. 25 of the Civ. Pro. Code, it must be heard subject to all the objections which could be taken before the Court from which it has been transferred. The High Court, therefore, had no jurisdiction to hear the appeal. RAM NARAIN JOSHY v. PARMESWAR NARAIN MAHTA, 25 C. 39 ... 27

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(9) Power of interference of—See REVISION, 25 C. 233.

(10) See SANCTION FOR PROSECUTION, 26 . 852.

(11) See SUPERINTENDENCE, 26 C. 188.

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———1.—**Adoption.**

(1) Suit based on allegation of validity of—See LIMITATION ACT (XV OF 1877), 25 C. 354.

(2) *Widow—Direction to accumulate—Second adoption.*—Where a power to adopt was given by a testator to his widow, who was also the executrix of his will and to two other executors conjointly: *Held*, that such power was bad. Under Hindu law power to adopt can be given to a widow only, and she has no capacity to adopt save under the express permission of her husband given in his lifetime. *Per* TREVELYAN, J.—A Hindu testator cannot direct the accumulation of the income of his estate for an indefinite period, if there is no beneficial interest created in the property in order to render the gift whether under the will or *inter vivos* valid. By second adoption a widow divests herself of the mother's estate in the same way that she divests herself of her widow's estate on the first adoption. AMRITO LALL DUTT v. SURNOMONI DASI, 25 C. 662=2 C. W.N. 389 ... 435

———2.—**Alienation.**

(1) By widow—See PRIVY COUNCIL, 25 C. 189.

(2) *By widow—Mortgage taken from Hindu widow—Unpaid interest claimed on her deceased husband's mortgage—Will, construction of.*—A *purdanashin* widow executed a mortgage of part of the family estate to secure payment of the balance of interest alleged to be due on three previous mortgages which had been executed by her husband in his lifetime. Justifying necessity for her to encumber was not shown, nor enquiry by the mortgagee as to her authority. Even if the transaction had been properly explained to her, as a Hindu widow, she would have exceeded her powers. By his will her husband had declared that his widow should have full powers, but that, during the life of his minor son she should not have power to transfer without legal necessity; and that she should have power to mortgage to pay revenue and other debts: *Held*, that the will conferred on her no greater power of alienating the family estate than she had under the Hindu law; and that, under the circumstances, the mortgage executed by her was invalid. Notes promising to pay interest, additional to that contracted for in the mortgages, had been signed by the husband, which it was held could not affect the right to redeem, being unregistered. TIKA RAM v. THE DEPUTY COMMISSIONER OF BARA BANKI, 26 C. 707 (P.C.)=26 I.A. 97=3 C.W.N. 573=1 Bom. L.R. 692=7 Sar. P.C.J. 520. 1052

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(4) *Manager—Sale by a* de facto *manager of minor's property for legal necessity and for his benefit whether valid.*—A *de facto* manager of an infant's estate has, in case of necessity or for the benefit of the minor, power to sell his property. MOHANUND MONDUL v. NAFUR MONDUL, 26 C. 820=3 C.W.N. 770 ... 1125

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(1) *Bengal School—Father's brother's daughter's son whether preferential heir to mother's brother's son.*—Under the Bengal School of Hindu Law, the father's brother's daughter's son as heir is preferential to the mother's brother's son. BRAJA LAL SEN v. JIBAN KRISHNA ROY, 26 C. 285 ... 787

(2) *Letters of administration—Probate and Administration Act* (V *of* 1881)—*Prostitute—Succession to property of degraded woman.*—In the absence of any local custom or usage to the contrary, a woman of the town is no heir to her deceased sister, who was also a woman of the town. A woman of the town, who is a Hindu by birth does not cease to be a Hindu by reason of her degradation, and succession to her property is governed by Hindu law. SARNA MOYEE BEWA v. SECRETARY OF STATE FOR INDIA IN COUNCIL, 25 C. 254=2 C.W.N. 97 ... 171

(3) Suit to determine right of—See LETTERS OF ADMINISTRATION, 25 C. 354.

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(1) House, Partition of—See EASEMENTS, 26 C. 516.

(2) *Partnership—Infant sons—Mitakshara law—Promissory note, Suit on—Non-joinder of parties—Plea in bar of suit.*—In a suit on a promissory note executed by defendant in favour of a firm whose original partners were two brothers, one of whom had previously died leaving an infant son surviving, while the other, who also had infant sons, was, at the date of the execution of the note, sole surviving partner of the firm. *Held*, that a Hindu infant, who by birth or inheritance becomes entitled to an interest in a joint family business, does not necessarily become a member of the trading partnership carrying on the business. There must be some consentient act to that effect on the part of the infant and his partners. Even, therefore, where parties are governed by the Mitakshara law, an infant need not be joined as a co-plaintiff in a suit by the father to recover a trade debt. Decrees obtained in such suits by or against the managers of the business are presumed to have been obtained by or against them in their representative capacity and will be binding on the whole joint family. LUTCHMANEN CHETTY v. SIVA PROKASA MODELIAR, 26 C. 349=3 C. W.N. 190 ... 826

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the heir of a woman to her *stridhana* property is the nearest kinsman of her husband and not of her father. The Virmitrodaya cannot be referred to where the Mitaksbara is clear. JAGANNATH PRASAD GUPTA v. RUNJIT SINGH, 25 C. 354 ... 237

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———**15.—Will.**

(1) Construction of—See HINDU LAW (ALIENATION), 26 C. 707.

(2) *Construction of will—Administration suit—Chancery practice—"Living," meaning of—Trust for religious purposes—Idol, gift to—Rule against perpetuities.*—A testator by his will devised certain house property, first for the celebration of *pujahs*, and the worship of an idol, and then that his children with their families should be allowed to *live* there. One of the sons used the premises for the purpose of his business as a *kabiraj* which was objected to by the other sons as being contrary to the terms of the will. One of the defendants also contended that before the Court could construe the terms of the will to ascertain the meaning of the testator it was necessary to bring a proper administration suit. *Held*, that considering the character of the consequential relief sought the Court could construe the will without an administration suit: that questions between trustees and beneficiaries and between trustees and strangers requiring the construction of provisions in a trust deed have been determined without the Court being asked to undertake the entire administration of the trust. To ascertain the meaning intended to be applied to a particular phrase, it is necessary first to consider the words of the will and next the surrounding circumstances which may affect the testator's meaning. If there is a valid dedication of premises for religious purposes this is not invalid merely because it transgresses against the rule forbidding the creation of perpetuities. Under Hindu law an idol as symbolical of religious purposes is capable of being endowed with property, but no express words of gift to such idol in the shape of a trust or otherwise are required to create a valid dedication. BHUGGOBUTTY PROSONNO SEN v. GOOROO PROSONNO SEN, 25 C. 112 ... 76

(3) *Construction of will—Executory bequest—Gift to an idol not in existence at the testator's death—Existence of idol—Dedication.*—No valid gift or dedication of property can be made by will to an idol not in existence at the time of the testator's death. The power conferred by will to make a gift must be a power to convey property to a person in existence, either actually or in contemplation of law at the death of the testator. UPENDRA LAL BORAL v. HEM CHUNDRA BORAL, 25 C. 405 = 2 C.W.N. 295 ... 269

(4) *Execution of Will – Testamentary capacity—Evidence. Burden of proof.*—As to the testamentary capacity of a person who was alleged to have executed his will while suffering from paralysis and in his last illness, the Courts below had differed. The proponent's case was that the will had been signed for the testator in his presence by another person authorized by him, and that he was of sound and disposing mind at the time, though unable to write his name. Against this, there was affirmative, oral, evidence tending to show that he was not then capable of making a will. Other circumstances supported the latter view. On the weight of the evidence the Judicial Committee decided that the proponent had not discharged the burden of proving him to have been capable. The present

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case did not resemble one where a testator, near death, might with the requisite degree of knowledge have executed a disposition of his property for which previously and while his mind was still in vigour he might have given instructions. RASH MOHINI DASI v. UMESH CHUNDER BISWAS, 25 C. 824 (P.C.) = 25 I.A. 109 = 2 C.W.N. 321 = 7 Sar. P.C.J. 298 ... 537

(5) *Executor—Position of an executor under a Hindu will before the Hindu Wills Act* (XXI *of* 1870) *came into force—Difference in position between an executor under a Hindu will and an executor under an English will—Probate and Administration Act* (V *of* 1881), *ss.* 2, 4 *and* 90.—An executor under a Hindu will, before the Hindu Wills Act came into force, is not in the same position as an English executor under an English will, and the property does not vest in him, he holds it only as manager. SARAT CHANDRA BANERJEE v. BHUPENDRA NATH BOSU, 25 C. 103 ... 70

(6) *Hindu Wills Act* (XXI *of* 1870)—*Indian Succession Act* (X *of* 1865), *s.* 50—*Execution of a will, by impression of the facsimile of the name, whether valid in law.*—A testator, who, for a number of years, was, as he was unable to write, in the habit of using a name stamp, which used to be attached by a servant to any document or paper he wanted to sign, executed a will, and under his direction a servant affixed the impression of his name stamp on the said document: *Held*, that the execution of the will in this case was proper and came strictly within the meaning of the words used in s. 50 of the Indian Succession Act. NIRMAL CHUNDER BANDOPADHYA v. SARATMONI DEBYA, 25 C. 911 = 2 C.W.N. 642 ... 594

Holding over.

Effect of—See LANDLORD AND TENANT, 26 C. 338.

Hurt.

Causing hurt in furtherance of common object—See RIOTING, 26 C. 574.

Husband.

Complaint by—See BIGAMY, 26 C. 336.

Idol.

(1) Gift to—See HINDU LAW (WILL), 25 C. 405.

(2) See HINDU LAW (WILL), 25 C. 112.

Ikrarnamah.

See CONTRACT, 25 C. 869.

Illegal Contract.

See CONTRACT ACT (IX OF 1872), 26 C. 238.

Immoveable Property.

(1) Outside jurisdiction, Acts of mal-administration regarding—See JURISDICTION, 26 C. 891.

(2) Transfer of, by Hindu widow—See ACT V OF 1881 (PROBATE AND ADMINISTRATION), 26 C. 607.

Imprisonment.

In default of payment—See MAINTENANCE, 25 C. 291.

Improvements.

Expenditure on—See MORTGAGE (REDEMPTION), 26 C. 1.

Income Tax.

Papers, production and admissibility in evidence of—See EVIDENCE, 26 C. 281.

Incumbrance.

(1) Created by co-sharer—See PARTITION, 26 C. 434.

(2) See LIMITATION ACT (XV OF 1877), 25 C. 167.

Infant.

Sons—See HINDU LAW (JOINT FAMILY), 26 C. 349.

Information.

From accused—See EVIDENCE ACT (I OF 1872), 25 C. 413.

Insolvent Act (11 and 12 Vic., C. 21). PAGE

S. 51—Application for personal discharge—Discharge except as to debts due to a particular creditor—Prospective order under s. 51.—Application by insolvent for personal discharge. One creditor opposed. It appeared that that creditor lent money to the insolvent on a mortgage on false representations made by the insolvent to him. No decree had been obtained by the creditor on his mortgage. The opposing creditor applied that the insolvent be dealt with under s. 51 of the Insolvent Act. The insolvent contended that an order under s. 51 could only be made when the creditor had obtained a decree, and was in a position to apply at once for the arrest of the insolvent, which was not the case here. *Held*, the insolvent was entitled to his personal discharge, as regards all creditors except the opposing creditor; that the Court had no power under s. 51 to order immediate commitment of the insolvent, inasmuch as the opposing creditor had not placed himself in a position to issue execution against the insolvent, but that the Court could make a prospective order that with regard to the debt due to the opposing creditor the insolvent should be entitled to his personal discharge as soon as he should have been in custody at the suit of that creditor for the period of six months. *Quære.*—If the debt be satisfied out of the proceeds of sale of the mortgaged properties or otherwise whether the effect of such payment would be to relieve the insolvent from the penalty prescribed by s. 51. *In the matter of* SARAT KUMAR SEN, 26 C. 973=4 C.W.N. 32 ... 1222

Inspection.

Of documents—Practice—Inspection by agent of a party —When under an order giving liberty to a party to a suit, his attorneys and agents, to inspect and peruse the documents produced by the opposite party, inspection by an agent is contemplated, the order should be read in such a way as would give the Court some control over the persons to be appointed to inspect the documents. Such an order contemplates that the agent will be a person standing in the position of the party for the purposes of ths suit. *Held*, therefore that the Court ought not to permit a person formerly in the service of the defendant to inspect as the plaintiff's agent the defendant's books, which had been in his charge. ENAMUL HUQ v. EKRAMUL HUQ, 25 C. 294 ... 197

Intention.

Of parties—See EVIDENCE, 26 C. 160.

Interest.

(1) At exorbitant rate—See ACT VIII OF 1885 (BENGAL TENANCY), 26 C. 315.

(2) Compound interest—See CONTRACT ACT (IX OF 1872), 26 C. 238.

(3) Liability of purchaser at sale for arrears of rent to pay—See ACT VIII OF 1885 (BENGAL TENANCY), 26 C. 315.

(4) *Mortgage—Construction of mortgage*—Post diem *interest where none is stipulated for in the deed.*—Where a mortgage deed contained a covenant for payment of principal and interest at a fixed rate in two years and further covenants not to transfer the mortgaged property until payment of principal and interest, and also on failure of payment of interest for one year to treat the amount after the lapse of that year as principal: *Held*, upon the construction of the mortgage-deed, that the parties intended that if the principal were not paid by the stipulated date interest should continue to run at the rate mentioned in the deed, and that the mortgagee was entitled to recover the principal with interest at the stipulated rate to the date of the decree of the first Court and at the rate of 6 per cent. thereafter. SARALA DASI v. JOGENDRA NARAIN BASU, 25 C. 246 ... 165

(5) On arrears of rent—See ACT XVII OF 1876 (OUDH LAND REVENUE), 26 C. 523.

(6) *On arrears of rent—Bengal Tenancy Act* (VIII *of* 1885), *ss.* 67, 178, *sub-ss.* 3, *cl.* (*h*) *and* 179—*Contract to pay interest at higher rate than allowed by s.* 67 *of the Act.*—A contract by a tenant holding under a permanent *mokarari* lease to pay interest on the arrears of rent at a higher rate than 12 per cent. per annum is not enforceable in law. BASANT KUMAR ROY CHOWDHRY v. PROMOTHA NATH BHUTTACHARJEE, 26 C. 130=3 C.W.N. 36 ... 687

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(7) *On arrears of rent—Waiver—Omission to claim rent for some years at the stipulated rate, whether it amounts to a waiver.*—The mere omission to claim interest for some years from a tenant at the rate stipulated in the lease does not amount to a waiver of the landlord's right to claim interest at such rate. SHYAMA CHARAN MANDAL v. HERAS MOLLAH, 26 C. 160 ... 707

(8) On certain amount payable on happening of certain event and at certain time.—See COMPROMISE, 26 C. 955.

(9) On mortgage—See HINDU LAW (ALIENATION), 26 C. 707.

(10) Paid on debt—See LIMITATION ACT, (XV OF 1877), 25 C. 844.

(11) *Penalty—Enhanced rate of interest—Interest Act* (XXVIII *of* 1855), *s.* 2—*Contract Act* (IX *of* 1872), *s.* 74—*Equitable relief.*—In a mortgage bond the interest payable was 2 per cent. per mensem, and there was a stipulation that on default of payment on the due date, interest should run "from the date of default of promise" at 6 per cent. per mensem. In a suit upon the bond interest was claimed at the higher rate from date of default to the date of realization. *Held*, that it is open to the Court to decide notwithstanding the provisions of s. 2, Act XXVIII of 1855, whether the stipulation as to the enchanced interest was agreed upon as interest properly so called, or as a penalty, and whether in the circumstances of the case the debtor was entitled to equitable relief. *Per Ghose, J.*—The cases of 9 C. 689, and 19 C. 392, do not lay down any rule of law precluding the Court from affording relief to a debtor, independently of s. 74 of the Contract Act (IX of 1872), even when the bond provides for increased rate of interest prospectively, and not retrospectively, where a proper ground for such equitable relief is made out. *Per Rampini, J.*—The stipulation for increased rate of interest *may* be a penalty, but is not necessarily so merely because the increased rate is an exorbitant one; whether it is a penalty or not is rather a question of fact than one of law, and the Court must consider whether in the circumstances of the case the defendants had made out their claim to equitable relief. PARDHAN BHUKHAN LAL v. NARSING DYAL, 26 C. 300=3 C.W.N. 175 ... 796

(12) Rate of—See CONTRACT ACT (IX OF 1872), 26 C. 39.

(13) See MORTGAGE (REDEMPTION), 26 C. 1.

(14) See STAMP ACT (I OF 1879), 26 C. 179,

Interlocutory Order.

See WITNESS, 25 C. 863.

Irregularity.

(1) In criminal case—See WITNESS, 25 C. 863.

(2) Not affecting merits of case—See PARDANASHIN LADY, 25 C. 807.

Issue.

Whether land is *mal* or *lakhiraj*—See RES JUDICATA, 25 C. 136.

Jagir Tenure.

(1) *Chota Nagpore Landlord and Tenant Procedure Act* (*Bengal Act* I *of* 1879), *s.* 124—*Incidents of Jagir and under-tenures—Decree for arrears of rent.*—No decree for arrears of rent can be made against any person other than the actual tenant, or some one who may be security for him, and consequently there can be no decree for rent against persons holding subordinate interests in a *jagir tenure* which have been created by *jagirdar*. PERTAB UDAI NATH SAHI DEV v. PARDHAN MOKAND SINGH, 25 C. 399=2 C.W.N. 96 ... 265

(2) *Chota Nagpore Landlord and Tenant Procedure Act* (*Bengal Act* I *of* 1879), *s.* 124—*Incidents of Jagir tenure—Sale in execution of a decree for rent—Right, title and interest of registered "ilakadar"—Joint holders.*—Where a suit was brought for the recovery of arrears of rent due in respect of a *jagir* tenure, the joint property of four brothers governed by the Mitakshara law, the arrears having accrued during the life time of their father, and a decree was obtained against the eldest brother, who was the sole registered *ilakadar*, or person held responsible in the zemindar's book, it was *held* that the decree related to the arrears due in respect of the whole tenure and not merely of the judgment-debtor's individual interest, and that a

Jagir Tenure–(*Concluded*). PAGE

sale of his right, title and interest under s. 124 of Bengal Act I of 1879 would, under the circumstances of the case and by the incidents attaching to such tenure, include the right, title and interest of any person claiming jointly with him, and whose interest was inseparably united with his. MODHUSUDAN NATH TEWARI v. HIRU RAM PANDEY, 25 C. 396=2 C. W.N. 94 ... 263

Joint Debtors.

See LIMITATION ACT (XV of 1877), 25 C. 844.

Joint Holders.

(1) See JAGIR TENURE, 25 C. 396.

(2) See LANDLORD AND TENANT, 26 C. 103.

Joint Landlords.

(1) Sale by one of several—See SALE, 26 C. 937.

(2) See ACT VIII OF 1885 (BENGAL TENANCY), 25 C. 917.

(3) See ENHANCEMENT, 26 C. 832.

(4) See LANDLORD AND TENANT, 25 C. 324.

Joint Possession.

Suit for—See CO-SHARERS, 26 C. 553.

Judge.

(1) Of High Court, sitting alone, Powers of—See FULL BENCH, 25 C. 896.

(2) Sanction to prosecute—See SANCTION FOR PROSECUTION, 26 C. 852.

Judgment.

(1) *Form of judgment on appeal—Judgment not in conformity with law—Dismissal of appeal—Civ. Pro. Code* (*Act* XIV *of* 1882), *ss.* 551, 574.—The lower appellate Court, in disposing of an appeal from a decree of the Munsif, recorded the following judgment: "Suit laid at Rs. 480, value of buffaloes. Appeal rejected under s. 551 of the Civ. Pro. Code." *Held*, that this was not a judgment in conformity with law. The dismissal of an appeal under s. 551 of the Civ. Pro. Code by a Court whose decision may be the subject of an appeal does not relieve the Court from the necessity of writing a judgment which, according to the provisions of s. 574 of the Code, should shew the points raised, the decision upon those points, and the reasons for deciding them. RAMI DEKA v. BROJO NATH SAIKIA, 25 C. 97=1 C.W.N. 692 ... 66

(2) In accordance with award—See APPEAL (GENERAL), 25 C. 141.

(3) See LETTERS PATENT 1865 (HIGH COURT), 25 C. 236.

Judgment-debtor.

(1) Deposit by—See CIV. PRO. CODE (ACT XIV OF 1882), 26 C. 449.

(2) Want of saleable interest in—See SALE, 26 C. 937.

Jurisdiction.

(1) *Crim. Pro. Code* (*Act* X *of* 1882), *s.* 182—*Local area—Uncertainty as to the situation of the scene of offence.*—When there is an uncertainty as to whether a particular spot, where an offence has been committed, is situated within one district or another the case is governed by s. 182 of the Crim. Pro. Code (Act X of 1882), and the offence is triable in the Court of either district. The expression "local area" includes, and was intended to include, a "district." PUNARDEO NARAIN SINGH v. RAM SARUP ROY, 25 C. 858=2 C.W.N. 577 ... 559

(2) *Evidence as to jurisdiction at hearing—Letters Patent, High Court, cl.* 12—*Agreement to pay as per account—Acknowledgment of debt—Limitation Act* (XV *of* 1877), *s.* 19—*Agency, Termination of—Accounting Agents—Limitation Act* (XV *of* 1877), *sch.* II, *art.* 89—*Contract Act* (IX *of* 1872), *ss.* 201 *and* 218.—The plaintiff as Receiver to the estate of *S* instituted a suit on the 11th July 1898 against the defendants to recover the sum of Rs. 2,808-13-2, a portion of the said sum being the rent of a house occupied by the defendants at Mandalay since January 1894 till the 11th July 1898, the remaining portion being the price of goods sold by the defendants as agents of *S*. The plaintiff at the institution of the suit obtained leave

Jurisdiction—(*Continued*). PAGE

under cl. 12 of the Charter. The defendant contended that the Court had no jurisdiction, inasmuch as the plaint on its face did not shew that the cause of action or any part of it arose in Calcutta; that the cause, title alone represented the defendants as carrying on business in Calcutta, and that portion of the plaint was not verified; nor could the plaintiff give evidence to prove that his cause of action arose in Calcutta, as it would be varying the cause of action, and that fresh leave would have to be granted, which could not be done in this suit. *Held*, that the Court had jurisdiction, and the plaintiff was entitled to give evidence at the hearing to show that his cause of action arose in Calcutta. To admit evidence of that fact, and if necessary amend the plaint by adding a statement that part of the cause of action did arise in Calcutta, does not cause a variance in the original cause of action. It is sufficient to show that the cause of action or part of it arises in Calcutta when the suit comes on for hearing. It was also contended by the defendants that the plaintiff's claim to rent prior to July 1894 was barred, and that as the sale of the piecegoods was completed by the defendants in June 1894, that claim was also barred. The plaintiff submitted that the letters written by the defendants to the plaintiff within three years of the institution of the suit agreeing to pay as per account enclosed by them to the plaintiff was a sufficient acknowledgment to save the claim for rent from being barred. Further, that although the sale of the goods was completed in June 1894, the defendants did not cease to be the plaintiff's agents until they had accounted to him for the price of the goods which had not yet been done. *Held*, that the plaintiff's claim for the portion of rent claimed beyond three years was not barred; the defendant's letters were of a sufficient acknowledgment to save limitation; there being an admission that there was an open account between the parties, and that there was a right to have it taken, implied a promise to pay. *Held*, also, that the defendants were liable to the plaintiff as agents until they had accounted to him, and therefore his claim as to the piecegoods was not barred. FINK v. BULDEO DASS, 26 C. 715 = 3 C.W.N. 524 ... 1057

(3) In probate cases—See PROBATE, 25 C. 340.

(4) Of Civil Court—See SALE, 25 C. 833.

(5) *Of Civil Court—Bengal Municipal Act (Bengal Act* III *of* 1884), *ss.* 224, 245 *and* 246—*Acts done in accordance with ss.* 245 *and* 246, *whether subject to the jurisdiction of a Civil Court—Notice under s.* 246 *whether sufficient for the purpose of the removal of huts in a basti as well as* pucca *privy.*—Where a Municipality, having proceeded in accordance with ss. 245 and 246 of the Bengal Municipal Act, decide that certain works are necessary, that conclusion in the absence of *mala fides* or fraud or considerations of that nature cannot be questioned in a Civil Court. The action of the Municipality, so far as a privy was concerned, was held not to be *ultra vires*, although in the notice issued in accordance with s. 246 of the Bengal Municipal Act, they directed the plaintiff to remove not only certain huts but also a *pucca* privy, inasmuch as the Municipality had a right to require him to remove the privy under s. 224 of the Act. DUKE v. RAMESWAR MALIA, 26 C. 811 = 3 C.W.N. 508 ... 1120

(6) *Of Civil Court—Sale for arrears of Revenue—Revenue Sale Act* (XI *of* 1859), *s.* 33—*Sale for arrears not due—Suit to set aside sale—Appeal to Commissioner.*—A suit may be brought in the Civil Court to set aside a sale held under Act XI of 1859, on the ground that no arrears were due, although such ground was not declared and specified in an appeal to the Commissioner as provided for in s. 33 of Act XI of 1859. HARKHOO SINGH v. BUNSIDHUR SINGH, 25 C. 876 = 2 C.W.N. 360 ... 572

(7) *Of Criminal Court—Criminal jurisdiction along the Railway through Indian Independent State—Locality of crime—Illegal arrest on lands occupied by the Hyderabad State Railway.*—The authority for the exercise of criminal Jurisdiction by the Government of India upon lands within the limits of the Hyderabad State Railway is derived from a grant to that Government in 1887 by His Highness the Nizam as ruler of the territory. The Railway lands remain part of his dominions. The grant of Civil and Criminal jurisdiction contained in the correspondence of that year between the Nizam's Minister and the Resident at Hyderabad is expressed to be "along the line of Railway as is the case on other lines running through Independent States." This jurisdiction, notwithstanding any words in the

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Notification of the Government of India of the 22nd March 1888 (which could not of itself give any authority, or add to that granted by the Nizam), does not justify the arrest on the lands of the Hyderabad State Railway of a subject of the Nizam under the warrant of the Magistrate of a District in British India, on a charge of a criminal offence committed in British India, and unconnected with the Hyderabad Railway administration. The mere presence of the accused on the Railway lands over which criminal jurisdiction had been granted as above, was no legal ground for his arrest under the warrant of the Court in British India, his offence, if committed at all, not having been committed on those lands and not having been connected with the Railway. MUHAMMAD YUSF-UD-DIN v. QUEEN-EMPRESS, 25 C. 20 (**P.C.**)=24 I.A. 137=2 C.W.N. 1=6 P.R. 1897 Cr.=7 Sar. P.C.J. 239 ... 14

(8) *Of Criminal Court—Jurisdiction to try offence under Penal Code*, s. 486—*Goods with counterfeit trade-mark not intended to be sold within jurisdiction*—A Magistrate has jurisdiction to try an offence under s. 486 of the Penal Code if the accused be shown to be in possession of goods with a counterfeit trade-mark for sale or any purpose of trade or manufacture, though the sale or the trade or the manufacture for the purpose of which the accused has the goods in his possession be not intended to take place within the jurisdiction of the Court in which the complaint is lodged. YUSUF MAHOMED ABARUTH v. BANSIDHUR SIRAOGI, 25 C. 639=2 C.W.N. 450 ... 420

(9) *Suit for land—Administration suit—Acts of maladministration regarding immoveable property outside jurisdiction—Power of Court to set aside leases of immoveable property outside its jurisdiction—Letters Patent, High Court, cl.* 12—*Lease to sue—Civ. Pro. Code* (*Act* XIV *of* 1882), *s.* 44, *r.* A.—In an administration action the fact that amongst other things leases of immoveable property granted by the executors to themselves are sought to be set aside on the ground that such leases are acts of maladministration does not make the action one for the recovery of immoveable property, and leave under s. 44 of the Civ. Pro. Code, r. A, is not necessary. If the High Court has jurisdiction to entertain such an administration action the fact that the property comprised in the leases complained of is wholly outside the limits of its ordinary original civil jurisdiction does not preclude it from setting aside such leases, and leave for that purpose under cl. 12 of the Charter is not necessary. The Court assumes jurisdiction in regard to immoveable properties situate outside the jurisdiction in cases where it can act *in personam*, either to compel the owner to give effect to legal obligations into which he has entered or to a trust reposed in him. NISTARINI DASSI v. NUNDO LALL BOSE, 26 C. 891=3 C.W.N. 670 ... 1171

(10) *Suit for land—Suit for rent of land, with alternative claim for compensation for use and occupation—Land situated outside jurisdiction of High Court.*—A suit by landlord against a tenant for rent at a rate agreed upon for one period, and for rent on the basis of use and occupation for a subsequent period is not a suit for land; and therefore the High Court may have jurisdiction to try such a suit even when the land is situate outside the local limits of its jurisdiction. RUNGO LALL LOHEA v. WILSON, 26 C. 204=2 C.W.N. 718 ... 735

(11) See ACT VIII OF 1860 (GUARDIANS AND WARDS), 26 C. 133.

(12) See CRIM. PRO. CODE (ACT V OF 1898), 26 C. 625.

(13) See FRAUD, 26 C. 891.

(14) See RECORDER OF RANGOON, 25 C. 488.

(15) See SALE, 25 C. 46.

Jury.

(1) *Irregularity in trial by Jury—Trial by Jury of an offence triable with Assessors—Crim. Pro. Code* (*Act* X *of* 1882), ss. 306, 307. 536—*Penal Code* (*Act* XLV *of* 1860), *ss.* 240, 241—*Government Notification of* 1862.—The accused was tried by a jury for an offence triable with the aid of assessors, and the jury by a majority found him "not guilty." The Sessions Judge, who disagreed with the verdict, convicted the accused, treating the verdict of the jury as the opinion of assessors: *Held*, that the conviction was

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bad, inasmuch as the case was validly "tried by a jury" within the meaning of s. 536 of the Crim. Pro. Code (Act X of 1882), and the trial was complete when the jury had returned their verdict; and that the Judge was bound, under the circumstances, either to give judgment in accordance with the verdict, or, if he disagreed with it, to submit the case for the orders of the High Court as provided by ss. 306 and 307 of the Code. A reference under s. 307 of the Crim. Pro. Code, should be made when the Judge is "clearly of opinion" that he should do so for the ends of justice. SURJA KURMI v. QUEEN-EMPRESS, 25 C. 555 ... 367

(2) *Verdict of—Charge to Jury—Misdirection—Crim. Pro. Code (Act X of 1882), ss 297, 423 (d)—Effect of omission to explain the law to Jury—Penal Code (Act XLV of 1860), ss. 143, 147, 380, 395—Practice.*—In a trial by jury, the accused were charged with offences under the Penal Code. The Judge while charging the jury omitted to explain the law by which they were to be guided. The Jury returned a verdict of *guilty* on all counts except one, and the Judge agreeing with the verdict convicted the accused. *Held*, that the omission to explain the law to the jury amounted to a misdirection vitiating the verdict within the meaning of s. 423 (*d*), Crim. Pro. Code. Some statement should appear in the record of a trial by jury to show that the law bearing upon the charges has been explained to the jury. BIRU MANDAL v. QUEEN-EMPRESS, 25 C. 561 ... 371

(3) *Verdict on inspection of locality without taking evidence—Crim. Pro. Code (Act V of 1898), s. 138—Use of discretion in nomination of jurors by Magistrate.*—A jury cannot decide a matter referred to them merely on inspection of the locality without taking any evidence. In nominating the foreman and one half of the remaining members of the jury as required by s. 138 of the Crim. Pro. Code the Magistrate must exercise his own independent discretion and not appoint the nominees of the parties. KAILASH CHUNDER SEN v. RAM LALL MITTRA, 26 C. 869 ... 1156

Kabuliat.

Effect of—See SETTLEMENT, 26 C. 792.

Katkina Lease.

Mortgagee, purchase by—See TRANSFER OF PROPERTY ACT (IV OF 1882), 26 C. 164.

Korfa Raiyats.

In Manbhum—See LANDLORD AND TENANT, 26 C. 761.

Land.

(1) Not properly described—See DECLARATORY DECREE, 26 C. 845.

(2) Suit for—See JURISDICTION, 26 C. 204, 891.

Land Acquisition Act (X of 1870).

Ss. 13, 24 and 25—Valuation of land acquired for public purposes—Time of acquisition—Award of compensation.—When land has been acquired under the provisions of the Land Acquisition Act, 1870, changes in its condition, between the time of such acquirement and that of the actual conclusion of the award of compensation, are not to increase, or lessen, the valuation. The provision in s. 25 points to ascertaining the value at the time when the land is acquired, the right to compensation being simultaneous with the right to the land attaching to the Government. At the time when, according to the claim, the right to certain plots of land attached to the Government, the sub-soil had no market value, because the surface was in use for public roads, having been so for about half a century: *Held*, that, even if the claimants had proved a title in themselves to the sub soil or the plots underneath the roads, still no market value had been shown to belong to that sub-soil within the meaning of ss. 13 and 24 of the Land Acquisition Act, 1870, at the time of the right therein attaching to the Government for a public purpose: therefore, compensation has been rightly disallowed. MANMATH NATH MITTER v. SECRETARY OF STATE FOR INDIA IN COUNCIL, 25 C. 194 (P.C.)=24 I.A. 177=1 C.W.N. 698=7 Sar. P.C.J. 226 ... 131

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Ss. 6, 18, 23, cls. 4, 24, 48—Compensation—Acquisition of land "injuriously affecting other property"—Right to compensation for loss of a ferry by reason of acquisition of adjacent land—Land Clauses Consolidation Act (8 Vict., c. 18), s. 63.—The word "acquisition," as used in s. 23 of the Land Acquisition Act, includes the "purpose" for which the land is taken as well as the actual taking; and the words "at the time" in cl. 4 of the same section must be taken to mean the time when the damage takes place and the right to compensation arises. The District Board of Dinagepore erected a bridge over the river Tulai, in consequence of the erection of which a ferry, which was within 100 cubits of the bridge and owned by the Maharajah of Dinagepore, who was also the owner of the land taken for the construction of the bridge, ceased to exist: *Held*, that the owner of the ferry was entitled under the Land Acquisition Act to compensation for the loss of the ferry. COLLECTOR OF DINAGEPORE v. GIRJA NATH ROY, 25 C. 346 ... 231

Land Clauses Consolidation Act (8 Vict., C. 18).

S. 63—See LAND ACQUISITION ACT (I OF 1894), 25 C. 346.

Landlord and Tenant.

(1) Acceptance of kabuliat by—See SETTLEMENT, 26 C. 792.

(2) *Accretion to parent estate, assessment of rent in respect of—Reg. XI of 1825, s. 4, cl. (1)—Act XI of 1855, s. 1—Reg. VII of 1822—Act IX of 1847—Act XXXI of 1858—Bengal Tenancy Act (VIII of 1885), s. 52.*—In a suit brought by the *talukdar* of a certain *mouzah* against the *durtalukdar* for a declaration that he was entitled to get rent at a certain rate annually, also for arrears of rent at that rate, and in the alternative for compensation for use and occupation of the disputed land which was an accretion to the said *mouzah*, and in respect of which a settlement was made with him by Government treating it as a separate estate, the defence (*inter alia*) was that the suit was not maintainable unless a rental was assessed in the first instance, and that no arrears of rent could be claimed as there was no relationship of landlord and tenant between the parties. *Held*, the landlord could not treat it as a separate tenure altogether; that the increment was to be regarded as part of the parent estate, and treating it as part and parcel of the parent estate he was entitled to get assessment of rent on the disputed land; but he was not entitled in the suit to back rent or compensation for use and occupation. ASSANULLAH BAHADUR v. MOHINI MOHAN DAS, 26 C. 739 ... 1072

(3) *Assignment by tenant of goodwill, stock in trade, fixtures, furniture and chattels—Notice by landlord to lessee and to assignee to deliver up possession on expiration of lease or to pay rent—Holding over—Use and occupation—Liability of assignee for compensation for use and occupation.*—*L* assigned to *D* the stock in-trade, goodwill, fixtures, chattels and premises in connection with a certain business carried on by him at the said premises which he held on lease from the plaintiff. The deed of assignment contained (*inter alia*) a provision empowering the assignee, in the event of any breach by *L* of the covenants contained in the said deed, to let the premises for any term or terms of years for such rent and under such covenants and conditions as *D* might think fit; and there was a further provision that *L* should not remove any of the stock in-trade, chattels, &c., without the permission of *D*. Shortly before the expiration of the lease, the plaintiff served a notice on *L* to deliver up possession of the premises on the expiry of the lease or to pay an enhanced rent therefor, and a notice on *D* requiring *D* to deliver up possession and stating that in default he would hold *D* jointly liable with *L* for the enhanced rent. *D* had durwans and a clerk on the premises to see that nothing was removed therefrom without his permission. *L* and *D* continued to keep the stock-in-trade on the premises after the determination of the lease and the business was carried on as before. The plaintiff subsequently brought an action against *D* and *L* for compensation for use and occupation of the premises for four months. *Held* (reversing the decision of AMEER ALI, J.) that the lease did not pass under the terms of the assignment to *D*, and that *D* was not liable to the plaintiff for compensation for the use and occupation of the premises. MADHUBMONEY DASSEE v. NUNDO LALL GUPTA, 26 C. 338 ... 819

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(4) *Encroachment by a tenant—Effect of such encroachment—Position of such tenant—Trespasser*—When a tenant encroaches upon the land of his landlord he does not by such encroachment become the tenant in respect of the land encroached upon against the will of the landlord. PROHLAD TEOR v. KEDARNATH BOSE, 25 C. 302 ... 202

(5) Korfa raiyats *in Manbhum—Ejectment—Sufficiency of notice to quit—Act* X *of* 1859.—There is no authority for the proposition that notice to quit to a *korfa raiyat* in Manbhum must be a six months' notice. Such a *raiyat* is only entitled to a "reasonable notice." What is a reasonable notice is a question of fact, which must be decided in each case according to the particular circumstances and local customs as to reaping crops and letting land. DIGAMBAR MAHTO v. JHARI MAHTO, 26 C. 761 ... 1087

(6) *Liability for rent—Regulation* VIII *of* 1819. *s* 6—*Liability of the transferee of a fractional share of putni to pay rent—Personal liability of putnidar for rent, notwithstanding a stipulation in the putni lease that arrears of rent should be realized by auction sale of the putni—Bengal Tenancy Act* (VIII *of* 1885), *s* 65.—Although the transferee of a fractional share of a *putni* cannot enforce registration of his name on payment of the necessary fee and tender of the requisite security, yet the transfer is not altogether void, and he is liable for rent severally and jointly with the registered tenant, if the landlord chooses to recognize him as one of the joint holders of the *putni*, and he is also liable for the entire rent of the *putni* estate. Notwithstanding a stipulation in the *putni* lease that on default of any instalment of rent, the landlord shall be entitled to realize the same by auction sale of the *putni mehal*. the *putnidar* is also personally liable for the rent of the said *mehal*. SOURENDRA MOHAN TAGORE v. SURNOMOYI, 26 C. 103=3 C.W.N. 38 ... 670

(7) *Nature of tenancy—Lease for construction of permanent works—Permanent tenure—Conduct of lessor.*—The defendants and their predecessors in title held of the plaintiffs and their predecessors certain land under a *pottah*, which, though not expressly stated to grant a permanent lease, was granted for the purpose of constructing "a brick built dock, building, &c., and workshops." The works were constructed; and during a period of 42 years the interests of the lessees were from time to time transferred, without any conduct on the part of the lessors or their successors indicating that they regarded the interests of the lessees as not permanent. Some years after the construction of the dock it ceased to be used as such. *Held*, that the tenure created by the *pottah* was of a permanent nature. RANGO LALL LOHEA v. WILSON. 26 C. 201=2 C.W.N. 718 ... 735

(8) *Notice to quit. Bengal Tenancy Act* (VIII *of* 1885)—*Suit for ejectment—Notice including some land of which the defendants found to be not in possession.*—A notice to quit is not bad in law simply because of a small error in the statement in such notice of the area of the land in consequence of which it included some land which the defendant was found not to hold under the plaintiff SHAMA CHURN MITTER v. WOOMA CHURN HALDAR, 25 C. 36=2 C.W.N. 106 ... 26

(9) *Notice to quit—Non-occupancy raiyat—Bengal Tenancy Act* (VIII *of* 1885), *ss.* 44 *and* 45—*Suit for ejectment by a lessor against another holding over after expiry of his lease*—Certain land was let by the zemindar to the defendants on lease for a term of eight years. After the expiry of the lease the plaintiffs obtained a lease of the land, and, giving a month's notice to quit to the defendants, who had continued in possession after their lease expired, brought a suit to eject them. *Held*, that the defendants could not be considered as trespassers, but that s. 45 of the Bengal Tenancy Act applied to the case, and that the plaintiffs not having complied with its provisions, the suit was rightly dismissed for want of proper notice to quit. GOBURDHONE SAHA v. KARUNA BEWA, 25 C. 75 51

(10) *Recognition of an under tenure by the Zemindar—Result of his receiving rent in respect of it—Deposit of rent by tenure-holder under Bengal Tenancy Act* VIII *of* 1885, *s.* 61, *and acceptance by Zemindar—Hindu widow, lease granted by, while in possession of widow's estate.*—A widow in possession of her widow's estate in a zemindari made a grant of a *putni* tenure under it to a lessee at a rent. In this suit brought by the reversionary heir, on her death, with the object of having the grant set aside as invalid as against him, the *putni* lease was not proved to have been

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made with authority or from necessity justifying the alienation by the widow. *Held*, that the *putni* was, on the death of the widow, only voidable, and not of itself void ; so that the plaintiff the next inheritor of the zemindari, might then elect to treat it as valid. The plaintiff had done so. He had accepted rent in respect of the tenure, as that tenure was specified in a petition which accompanied the *putnidar's* deposit of the rent in a Court, under the Bengal Tenancy Act (VIII of 1885), s. 61. This was *prima facie* an admission that the *putni* was still subsisting. In the absence of evidence to put a different construction upon the plaintiff's act, and to negative its effect, there was a sufficient *prima facie* case of an election to affirm the validity of the *putni*. MODHU SUDAN SINGH v. ROOKE, 25 C. 1 (P.C.) = 24 I.A. 164 = 1 C.W.N. 433 = 7 M.L.J. 127 = 7 Sar P.C.J. 194 ... 1

(11) *Suit for ejectment—Service tenure—Bengal Tenancy Act* (VIII *of* 1885), *ss.* 89 *and* 181.—Service tenures are excepted from the operation of s. 89 of the Bengal Tenancy Act. MOKBUL HOSSAIN v. AMEER SHEIKH, 25 C. 131 ... 89

(12) *Suit for rent—Bengal Tenancy Act* (VIII *of* 1885), *ss.* 72 *and* 73—*R.* 3, *chap.* 1 *of the Rules made by the Local Government under cl.* (2) *of s.* 189 *of the Bengal Tenancy Act—Liability for rent on change of landlord—Notice of transfer—Transfer of putni right over a specific area, whether valid—Regulation* VIII *of* 1889, *ss.* 3 *and* 6—*Transfer of Property Act* (IV *of* 1882), *s.* 6.—*Putni* right over a specific area lying within a *putni* taluk is transferable. Sub-s. 1 of s. 72 of the Bengal Tenancy Act does not require that the notice therein contemplated should be given in any particular manner. MADHUB RAM v. DOYAL CHAND GHOSE, 25 C. 445 = 2 C.W.N. 108 ... 295

(13) *Suit for rent—Deposit of rent by a tenant through the transferee of the holding from him, whether valid—Bengal Tenancy Act* (VIII *of* 1885), *s.* 61.—A deposit of rent, though not made by a tenant himself, but made on his behalf by a transferee of the holding from him, is a valid deposit within the meaning of s. 61 of the Bengal Tenancy Act. BEHARY LAL MOOKERJEE v. BASARAT MANDAL, 25 C. 289 ... 194

(14) *Suit for rent—Sub-division of tenancy—Rent receipt signed by the agent—Bengal Tenancy Act* (VIII *of* 1885), *s.* 88.—A receipt for rent granted by a landlord or his agent containing a recital that a tenant's name is registered in the landlord's *sherishta* as a tenant of a portion of the original holding at a rent which is a portion of the original rent, does amount to a consent in writing by the landlord to a sub-division of the holding and a distribution of the rent payable in respect thereof, within the meaning of s. 88 of the Bengal Tenancy Act. PYARI MOHUN MUKHOPADHYA v. GOPAL PAIK, 25 C. 531 (F.B.) = 2 C.W.N. 375 ... 352

(15) *Suit for rent—Tenant settled on the land by a trespasser, position of—Joint landlords—Payment of rent by a tenant to some of the landlords, whether sufficient discharge from liability to other landlords—Bengal Tenancy Act* (VIII *of* 1885), *ss.* 157 *and* 188.—A suit was brought by the plaintiffs against a tenant for the entire rent, making the co-sharer landlords also defendants to the suit. The defence of the tenant, defendant No. 1, was denial of relationship of landlord and tenant, and payment to the co-sharer landlords. The co-sharer landlords *inter alia* pleaded that, as the tenant defendant was settled on the land by them at a time when they were claiming to be entitled exclusively to the possession thereof, under a title derived from their auction-purchase, they must be taken to have been trespassers on the land, so far as the plaintiffs' share was concerned, and that consequently defendant No. 1, who was settled on the land by them, must also be treated as a trespasser as against the plaintiffs: *Held*, that the defendant No. 1, could not be treated as a trespasser as against the plaintiffs, and that the plaintiffs were entitled to claim rent for use and occupation from the defendant No 1. *Held*, also, that the payment to the co sharer landlords, defendants Nos. 2 and 3, was not sufficient to discharge the defendant No. 1 from liability to the plaintiffs. AZIM SIRDAR v. RAMLALL SHAHA, 25 C. 324 ... 216

(16) *Suit for rent—Whether interest on rent is rent within the meaning of s* 3, *cl.* (5) *of the Bengal Tenancy Act* (VIII *of* 1885)—*Second appeal—Bengal Tenancy Act* (VIII *of* 1885), *s.* 153.—Interest on rent is not rent

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within the meaning of s. 3, cl. (5), of the Bengal Tenancy Act. Therefore no second appeal would lie in a case where the question is only relating to rate of interest, and the value of the subject-matter of the suit is less than Rs. 100. KOYLASH CHANDRA DE v. TARAK NATH MANDAL, 25 C. 571 (note) = 1 C.W.N. lxiii ... 377

(17) See ACT VIII OF 1885 (TENANCY, BENGAL), 25 C. 146, 781; 26 C. 46, 639.

(18) See APPEAL (SECOND APPEAL), 26 C. 842.

(19) See INTEREST, 26 C. 160.

(20) See LEASE, 26 C. 29.

(21) See LIMITATION ACT (XV OF 1877), 26 C. 204.

(22) See RES JUDICATA, 25 C. 136.

(23) See SALE, 26 C. 937.

Law.

Ignorance or knowledge of, as a defence—See RAILWAY COMPANY, 26 C. 465.

Lawful Authority.

Resistance to—See PENAL CODE (ACT XLV OF 1860), 25 C. 274.

Lease.

(1) Condition in restraint of—See CONTRACT, 25 C. 869.

(2) *Construction of lease—Construction of a contract in a* potta *allowing relinquishment of the land leased, in whole or in part—Landlord and Tenant.*—A *potta* granted a permanent *mokurari* lease for mining purposes, and gave to the tenant the privilege of surrendering either the whole or part of the land included in the lease, with a deduction to be made in the rent for the extent of land that might be found on measurement to have been surrendered. *Held*, that this privilege could only be exercised by the tenant upon a strict observance of the condition expressly declared, or plainly implied, in the lease itself. The lease was of 1,974 *bighas*. The tenant executed a deed of relinquishment of 1,409 *bighas*, 8 *cottahs*, 8 *gundas*, whereof possession was surrendered with the exception of two plots, one of 24, and the other of 9 *bighas*. *Held*, that according to the true construction of the contract, there was error in the judgment of the High Court which decided that the retention of the plots did not altogether deprive the relinquishment of its effect. This retention did more than lessen the area actually surrendered. It was a mistake to suppose that an increased rent to be paid by the relinquishing tenant in proportion to the areas retained and surrendered, respectively, would adjust the point disputed as a matter of law. The contract was that in case the tenant surrendered a part the future rent was to be ascertained by the measurement of the area relinquished. To have made a new surrender would have been within the competency of the tenant. But for the tenant to continue to hold possession of part of the area which he had purported to relinquish was not open to him, or consistent with the validity of the surrender, the contract not admitting of approximate equivalents in regard to the possession of the total area professed to be surrendered but not surrendered. Therefore the surrender upon which rested the defence to a suit by the lessor for the full rent was invalid in law. RAMCHURN SINGH v. RANIGANJ COAL ASSOCIATION, 26 C. 29 (P.C.) = 25 I.A. 210 = 2 C.W.N. 697 = 7 Sar. P.C.J. 399 ... 622

(3) For construction of permanent works—See LANDLORD AND TENANT, 26 C. 204.

(4) Granted by Hindu widow, whilst possession of estate—See LANDLORD AND TENANT, 25 C. 1.

(5) Of immoveable property outside jurisdiction—Power of Court to set aside—See JURISDICTION, 26 C. 891

(6) Return of—See EVIDENCE, 26 C. 160.

(7) See ACT VIII OF 1885 (BENGAL TENANCY), 26 C. 546.

Leave to sue.

See JURISDICTION, 26 C. 891.

Legacy.

See MAHOMEDAN LAW (WILL), 25 C. 9.

Legalised Nuisance. PAGE

See NUISANCE, 25 C. 425.

Legal Necessity.

(1) See ACT V OF 1881 (PROBATE AND ADMINISTRATION), 26 C. 607.

(2) See HINDU LAW (ALIENATION), 26 C. 820.

Legal Representative.

Suit for rent by—See ACT VII OF 1876 (LAND REGISTRATION, BENGAL), 26 C. 536.

Legislature.

(1) Power of local—See SUPERINTENDENCE, 26 C. 188.

(2) See INTEREST, 26 C. 130.

Lessee.

See ACT II OF 1888 (CALCUTTA MUNICIPAL CONSOLIDATION), 25 C. 625.

Lessor.

Conduct of—See LANDLORD AND TENANT, 26 C. 204.

Letters of Administration.

(1) *Administrator General's Act* (II *of* 1874), *s.* 12—*Verification of petition—Court Fees Amendment Act* XI *of* 1899.—The Administrator General as a public officer is exempted from verifying otherwise than by his signature any petition presented by him under the provisions of the Act (II of 1874). The form of affidavit prescribed by Act XI of 1899 indicates that it does not apply to an application by the Administrator-General. *In the goods of* AYDALL, 26 C. 401=3 C.W.N. 298 ... 861

(2) *Bond, form of—Succession Act* (X *of* 1865), *s.* 256—*Practice.*—The Indian Succession Act, s. 256, requires that an administration bond should be taken in every case. It may, however, be varied, by special order of the Court, in the case of a limited or special administration and follow the English form. *In the goods of* GUBBOY, 26 C. 408=3 C.W.N. 364 ... 863

(3) *Court Fees Act* (VII *of* 1870), *s.* 3, *sch.* I, *art.* II, *s.* 19-*H.*—*Court Fees Amendment Act* (*XI of* 1899)—*Practice—Payment of* ad valorem *fee on Probate or Letters of Administration.*—In an application for probate or letters of administration the *ad val rem* fee prescribed by Statute should be prepaid to the satisfaction of the Court. Such payment must be made to the Registrar and certified by him or by the Taxing Officer where an exemption is claimed and allowed. This certificate should be produced to the Court with the application and affidavit of valuation. *In the goods of* OMDA BIBEE, 26 C. 407=3 C.W.N. 392 ... 863

(4) *Court of Wards*—"*Person.*"—The Court of Wards is not a "person" and letters of administration cannot under the law be granted to it. GANJESSAR KOER v. COLLECTOR OF PATNA, 25 C. 795=2 C.W.N. 349 ... 518

(5) *Suit by unsuccessful claimant to letters of administration—Right of suit—Suit to determine right of inheritance or to be appointed shebait of temple.*—Where letters of administration were granted to the defendant, in preference to the plaintiff, the order granting the letters of administration is not a bar to the plaintiff bringing a suit for the purpose of determining any question of inheritance or of the right to be appointed as *shebait*, the decree in which will supersede the grant. JAGANNATH PRASAD GUPTA v. RUNJIT SINGH, 25 C. 354 ... 237

(6) See ACT V OF 1881 (PROBATE AND ADMINISTRATION), 26 C. 607.

(7) See HINDU LAW (INHERITANCE), 25 C. 254.

Letters Patent, 1865 (High Court).

(1) Cl. 12—See JURISDICTION, 26 C. 715, 891.

(2) Cl. 15—See APPEAL (GENERAL), 26 C. 371.

(3) *Cl.* 15—*Order refusing application to commit for contempt—Appeal—Judgment.*—An appeal lies from an order refusing an application to commit for contempt of Court. MOHENDRA LALL MITTER v. ANUNDO COOMAR MITTER, 25 C. 236 ... 159

(4) Cl. 17—See ACT VII OF 1890 (GUARDIANS AND WARDS), 26 C. 133.

(5) Cl. 28—See REVISION, 26 C. 746.

Libel. PAGE

Suit for—See SLANDER, 26 C. 653.

Licensed Vendor.

Liability of—See ACT I OF 1878 (OPIUM), 26 C. 571.

License Tax.

See ACT II OF 1888 (CALCUTTA MUNICIPAL CONSOLIDATION), 25 C. 483.

Lien.

Notice of—See COSTS, 25 C. 887.

Light and Air.

Right to passage of—See EASEMENT, 26 C. 516.

Limitation.

(1) *Application for ascertainment of mesne profits—Decree for possession and mesne profits—Effect of striking off application for execution—What are proceedings and orders in "execution of decree."*—An application for delivery of possession of land decreed and for ascertainment of mesne profits was made in 1892, more than three years after a previous application for the same purpose, and was "struck off" for non-service of notice. On a fresh application for ascertainment of mesne profits in 1895. *Held*, that that portion of the proceeding or order of 1892 which related to mesne profits was not one "in execution of decree;" that under the circumstances the present application was not barred by that proceeding or order; and that the application was not barred by limitation, although the claim to possession was barred. PRYAG SINGH v. RAJU SINGH, 25 C. 203 ... 137

(2) Possession for period short of—See POSSESSION, 26 C. 579.

(3) *Public Demands Recovery Act* (*Bengal Act* VII *of* 1880), *ss.* 2 *and* 20—*Act* XI *of* 1859, *s.* 34.—S. 2 of the Public Demands Recovery Act (Bengal Act VII 1880) does not make the provision of limitation in s. 34 of Act XI of 1859 applicable to the execution of a decree annulling a sale under s. 20 of Bengal Act VII of 1880. MAHOMED ABDUL HYE v. GAJRAJ SAHAI, 25 C. 283 = 2 C.W.N. 89 ... 190

(4) See ACT VII OF 1880 (BENGAL PUBLIC DEMANDS RECOVERY), 25 C. 789; 26 C. 172.

Limitation Act (IX of 1871).

See LIMITATION ACT (XV OF 1877), 26 C. 285.

Limitation Act (XV of 1877).

(1) See EVIDENCE, 26 C. 334.

(2) S. 2—See LIMITATION ACT (XV OF 1877), 26 C 285.

(3) S. 5—See PAUPER, 26 C. 925.

(4) S. 10—See PRACTICE, 25 C. 642.

(5) *S.* 13—*Absence of defendant from British India—Defendant carrying on business in British India through an authorised agent.*—S. 13 of the Limitation Act, which excludes the time during which a defendant has been absent from British India in computing the period of limitation for any suit, applies even where to the knowledge of the plaintiffs, the defendants, partners in a firm, are during the period of their absence carrying on business in British India through an authorised agent. PURNA CHUNDER GHOLE v. SASSON, 25 C. 496 (F.B.) = 2 C.W.N. 269... 329

(6) S. 19—See JURISDICTION, 26 C 715.

(7) *S.* 19—*Acknowledgment by guardian of minor—Guardians and Wards Act* (VIII *of* 1890), *ss.* 27 *and* 29—*Act* XL *of* 1858—*Guardian, powers of.*—An acknowledgment of a debt by the guardian of a minor appointed under the Guardians and Wards Act does not bind the minor and is not such an acknowledgment under s. 19 of the Limitation Act as would give a new period of limitation against the minor. CHHATO RAM v. BILTO ALI, 26 C. 51 = 3 C.W.N. 313 ... 637

(8) *S.* 19—*Acknowledgment of debt—Suit for arrears of rent—Limitation Act, sch.* II, *art.* 110.—The plaintiffs sued the defendants for arrears of rent from the 4th December 1889 to the 31st July 1894, relying upon the following letter as an acknowledgment sufficient to take their demand out of the Limitation Act: "As we have informed your client, we are quite willing to pay him the rent due under our *mourasi pottah* if he can show

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a title to give us a good receipt for it that will satisfy our lawyers. If he is in the same position that his father was up to the time of his death, unable to produce a perfect title, we are still willing to pay him the rent on his giving us a substantial indemnity similar to that which we had from his father." *Held*, that this was a sufficient acknowledgment within s. 19 of the Limitation Act. RUNGO LOL LOHEA v. WILSON, 26 C. 204 = 2 C.W.N. 718 ... 735

(9) *Ss.* 19 *and* 20 *and sch.* II, *art.* 61—*Acknowledgment of liability—Interest paid on debt—Contribution—Joint debtors.*—By a payment into Court under an order on account of decrees for rent and revenue in arrear, due to the landlord zemindar from the joint owners of an under-tenure, their estate was saved from sale. In respect of a proportionate share of liability for money raised for this purpose one of the joint owners became liable to be sued by another of them for contribution; and a question arose as to the application of art. 61 of sch. II of the Limitation Act, 1877. More than there years before this suit all the joint owners had filed in Court a petition for the appointment of a manager of their estate who should, out of its profits, pay debts and interest to creditors from whom had been borrowed the money for the payment into Court. *Held*, that this was an acknowledgment of the joint debt by the co-owner who had not contributed, within s. 19 of the Limitation Act; whence had followed the legal consequences, one of which was her liability to be sued within due time for contribution. Whilst the three years from the date of that acknowledgment were running, and at a date less than three years before this suit, interest on part of the money borrowed had been paid by the manager whom the appellant, jointly with the other co-owners of the estate, had authorized, as her agent, to pay it. *Held*, that this interest, being clearly a payment in exoneration, *pro tanto*, of the plaintiff's liability, was such a payment as was contemplated by s. 20, and gave a new departure for the period of limitation. SUKHAMONI CHOWDHRANI v. ISHAN CHUNDER ROY, 25 C. 844 (P.C.) = 25 I.A. 95 = 2 C.W.N. 402 = 7 Sar. P.C.J. 294 ... 550

(10) *S.* 22—*Assignment* pendente lite—*Substitution of assignees as plaintiff.*—In a suit instituted within the period prescribed by the Law of Limitation the plaintiff assigned over his interest, and the assignees were substituted on the record in place of the original plaintiffs after the said period had expired. *Held*, that under s. 22 of the Limitation Act (XV of 1877) the suit was barred by limitation. HARAK CHAND v. DEONATH SAHAY, 25 C. 409 ... 271

(11) *S.* 22—*Suit for damages for illegal distraint—Joinder of parties—Party plaintiff joined beyond period of limitation.*—A suit for compensation for illegal distraint of crops was brought by one of two persons jointly entitled to the crops distrained. Objection being taken by the defendant at a late stage of the case on the ground of non-joinder of a party that party was on his own application added as a plaintiff, but his claim was then barred by limitation. *Held*, that the whole suit was not barred by limitation in consequence of the provisions of s. 22 of the Limitation Act (XV of 1877). JAGDEO SINGH v. PADARATH AHIR, 25 C. 285 ... 191

(12) S. 26—See EASEMENT, 26 C. 311.

(13) S. 26—See RIGHT OF WAY, 26 C. 593.

(14) Sch. II, arts. 12, 13—See SALE, 25 C. 179.

(15) *Sch.* II, *art.* 32—*Bengal Tenancy Act* (VIII *of* 1885), *ss.* 25 *and* 155—*Suit to compel the defendant to fill up a tank and to pay compensation, or in the alternative for* khas *possession—Limitation Act, sch.* II, *arts.* 120 *and* 143.—In a suit brought by a landlord against a tenant where the primary relief sought was a mandatory injunction directing the defendant to fill up a tank excavated by him in contravention of the terms of the tenancy and to pay damages to the plaintiff for his wrongful act, and where the secondary relief sought was ejectment, the defence (*inter alia*) was that the suit was barred by limitation, inasmuch as it was brought more than two years after the excavation of the tank. *Held*, that art. 32 of sch. II of the Limitation Act (XV of 1877) applied to the case, and the suit was barred by limitation. SHAROOP DASS MONDAL v. JOGGESSUR ROY CHOWDHRY, 26 C. 564 (F.B.) = 3 C.W.N. 464 ... 962

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(16) *Arts.* 36, 39, 48, 49, 109—*Suit for damages for cutting and carrying away crops.*—In a suit for damages for cutting and carrying away crops: *Held*, by the Full Bench (RAMPINI, J., *dissenting*) such suit does not come within the terms of art. 36 of sch. II of the Limitation Act (XV of 1877). *Per* MACLEAN, C. J (TREVELYAN, J., *concurring*): Assuming that the case does not come within the terms of art. 39, the case is governed by art. 49. The crops, though immoveable in the first place, become specific moveable property when severed, and the fact that the severance was a wrongful act, does not make any difference. *Per* MACPHERSON, J.—The case is governed by art. 49 or 48, as the crops, after they had been cut, come under the description of specific moveable property. Possibly, also, the case might be brought under art. 109 if it is not brought under art. 39. *Per* GHOSE, J.—Art. 49 applied to this case. *Per* RAMPINI, J. (*dissentient*).—The suit, as framed, not being one for compensation for trespass, art. 39 does not apply. Arts. 48 nor 49 also do not apply, as they deal with property which is *ab initio* moveable, and cannot be held applicable unless the first wrongful act, *viz.*, the conversion of the immoveable into moveable property, be disregarded. Art. 109 also does not apply, as it referred to a case in which possession of immoveable property was withheld. Art. 36, therefore, applied to the case. MANGUN JHA *v.* DOLHIN GOLAB KOER, 25 C. 692 (F.B.)=2 C.W.N. 265 ... 454

(17) Art. 89—See JURISDICTION, 26 C. 715.

(18) Art. 95—See SALE, 26 C. 376, note

(19) Art. 110—See LIMITATION ACT (XV OF 1877), 26 C. 204.

(20) *Art.* 119—*Suit for possession of immoveable property by a Hindu, on the allegation that he was the reversionary heir by adoption of the last owner.*—In a suit brought by the plaintiff to recover possession of certain immoveable properties, on the allegation that he was the great grandson by adoption of one *R*, who was the brother of one *V*, to whose adopted son the said properties originally belonged, the defence was that the suit was barred by limitation under art. 119 of sch. II of the Limitation Act. *Held*, that art. 119 of sch. II applies only to a suit for a declaratory decree as to the validity of an adoption, and that the present suit, which was one for possession of immoveable property, was not barred under that article notwithstanding that the plaintiff had to establish the validity of an adoption as the basis of his title. JAGANNATH PRASAD GUPTA *v.* RUNJIT SINGH, 25 C. 354 ... 237

(21) *Art.* 120—*Contribution, Suit for—Liability created by* ekrarnama—*Suit upon a covenant in the* ekrarnama *for money paid - Cause of action.*—A suit upon a covenant in an *ekrarnama* (executed by some of the defendants who were adults, and by the guardian of the others who were minors at the time when the *ekrarnama* was executed) was brought by the plaintiffs for the purpose of obtaining from the defendants contribution in respect of a debt which had been realized by the sale of the property mortgaged by the father of the plaintiffs. The defence mainly was that the suit was barred by limitation, inasmuch as it was not brought within six years from the date when the *ekrarnama* was executed, or from the date when the mortgage debt became repayable upon the mortgage bond. *Held*, that the cause of action in the case arose when the plaintiffs were damnified. *i.e.*, when they paid the mortgage debt, and as the suit was brought within six years from that date it was not barred by limitation. KUMAR NATH BHUTTACHARJEE *v.* NOBO KUMAR BHUTTACHARJEE, 26 C. 241 ... 759

(22) *Art.* 120—*Suit for declaration that the defendant is a mere benamidar for the plaintiff—Suit for relief on ground of fraud—Limitation Act* (XV *of* 1877), *sch.* II, *art.* 95.—A suit brought by *A* to obtain a declaration that a decree originally obtained by *B* against *C* and another, which had been purchased in the name of *D*, had really been purchased by the plaintiff for his own benefit, the cause of action alleged being the wrongful execution of the decree by *D*, is not a suit for relief on the ground of fraud within art 95 of sch. II of the Limitation Act ; but is governed by art. 120 of that schedule. Under the circumstances the suit was held not to be barred by limitation. GOUR MOHUN GOULI *v.* DINONATH KARMOKAR, 25 C. 49=2 C.W.N. 76 ... 34

Limitation Act (XV of 1877)—(Continued). PAGE

(23) Arts. 120 and 143—See LIMITATION ACT (XV OF 1877), 26 C. 564.

(24) *Art.* 121—*Encroachment by a tresspasser—Incumbrance—Adverse possession—Purchaser at sale of taluk for arrears of rent.*—Adverse possession is an incumbrance within the meaning of art. 121, sch. II, of the Limitation Act (XV of 1877). An auction-purchaser of a *putni taluk* in its entirety gets the *taluk* free of all incumbrances; therefore in a suit brought by the auction-purchaser to recover possession of land situated within the *taluk* against a trespasser who was alleged to have held the disputed land adversely, the period of limitation would begin to run from the date when the sale becomes final and conclusive. NUFFER CHANDRA PAL CHOWDHRY v. RAJENDRA LAL GOSWAMI, 25 C. 167 ... 113

(25) *Art.* 124—*Suit by reversionary heir for office of shebait—Hindu Law—Endowment—Succession management.*—Where a *shebait* does not appoint his or her successor as provided in the will of the founder, and where there is no other provision for the appointment of *shebait*, the management of the endowment must revert to the heirs of the founder; and the limitation applicable to a suit for possession of such an office is twelve years under art. 124, and not six years under art. 120, of the Limitation Act. JAGANNATH PRASAD GUPTA v. RUNJIT SINGH, 25 C. 354 ... 237

(26) *Art.* 132—*Mortgage—Usufructuary mortgage—Further mortgage of the same property—Destruction of mortgaged property by diluvion—Transfer of Property Act* (IV *of* 1882), *s.* 68, *Right to sue under—Limitation.*—Plaintiffs advanced money on an usufructuary mortgage of certain land in Magh 1280, (January, 1873), and subsequently advanced another sum of money in Sraban 1280 (July 1873) on the security of the same land. The land was washed away in 1892. In an action brought in 1894 under s. 68 of the Transfer of Property Act (IV of 1882) for the money of both the mortgages on the ground that the defendants declined to give fresh security, the defendants objected that the claim as regards the mortgage of Sraban 1280 was barred before the inundation under art. 132, sch. II of the Limitation Act (1877), the money being due on the date of the bond. *Held*, overruling the objection of limitation; (1) With reference to the terms of the mortgage of Sraban 1280, that it was intended to add the money to the amount of the previous mortgage and to place it on the same conditions, and that the plaintiffs were, therefore, equally entitled to sue for the money upon this mortgage as upon the other. (2) That assuming that there was a right to sue for the money, it did not follow that the plaintiffs were not entitled to have substituted for the security the money which took the place of the security. That on the happening of the event provided for in s 68 the plaintiffs who were admittedly entitled to remain in possession of the property, until the moneys had been repaid, were clearly entitled to have the money substituted for the property. RAM JEWAN MISSER v. JOGGERNATH PERSHAD SINGH, 25 C. 450 ... 299

(27) *Art* 144—Putnidar *and* Darputnidar, *Dispossession of—Adverse possession—Relinquishment by the* Putnidar, *Effect of.*—The land in dispute along with other lands were let out in *putni* and *darputni* by the predecessor in interest of the plaintiffs. During the continuance of the said leases the land in dispute was taken possession of and held adversely by the defendant for their predecessor. The *putni* and *darputni* were relinquished by the *putnidar* and *darputnidar* in favour of the plaintiffs on the 29th June 1891, and they, on the 28th June 1893, brought a suit for recovery of possession of the disputed land from the defendants. The defence was that the suit was barred by limitation. *Held*, that art. 144, sch. II, of the Limitation Act applied to the case, and that the suit was barred by limitation, inasmuch as it was not brought within twelve years from the date when the possession of the defendants became adverse to the plaintiffs. GOBINDA NATH SHAHA CHOWDHRY v. SURJA KANTA LAHIRI, 26 C. 460 ... 897

(28) *Art.* 144—*Suit by a reversioner for possession of immoveable property on death of Hindu female heir—Adverse possession—Limitation Act*, 1877, *s.* 2 —*Revival of extinguished right—Limitation Act* (IX *of* 1871).—*A* and *I*, daughters of one *R*, on his death succeeded in equal shares to the properties left by him. Subsequently *A* died, leaving behind her a minor son *U*, who after his mother's death held possession of half of the said properties

Limitation Act (XV of 1877)—(*Continued*). PAGE

as heir to his mother's father for more than twelve years. The period of twelve years expired before the Limitation Act (IX of 1871) came into operation. In a suit for recovery of possession of the share of the immoveable properties, which was originally in the possession of *U*, but afterwards passed into the hands of a third party, by the reversioner within twelve years from the death of *I*, the female heir, the defence was that the suit was barred by limitation. *Held*, that inasmuch as the possession of *U* was adverse to the female heir, and as her right to the disputed property was barred before the Limitation Act (IX of 1871) came into operation, the right of the reversioner was also barred. BRAJA LAL SEN *v.* JIBAN KRISHNA ROY, 26 C. 285 ... 787

(29) Arts. 166 and 178—See SALE, 26 C. 324.

(30) *Art.* 179—*Meaning of the words "date of the decree"—Execution of decree—Code of Civil Procedure* (*Act* XIV *of* 1882), *ss.* 205 *and* 235.—The words "date of the decree," in sch. II, art. 179 of the Limitation Act, mean the date the decree is directed to bear under s. 205 of the Code of Civil Procedure, and that is the date on which the judgment was pronounced; therefore an application to execute a decree, if not made within three years from the date when the judgment was pronounced, is barred by limitation. GOLAM GAFFAR MANDAL *v.* GOLJAN BIBI, 25 C. 109 ... 75

(31) *Art.* 179, *clauses* (2) *and* (4)—*Execution of decree not materially defective, Application for—Application returned for amendment—Code of Civil Procedure* (*Act* XIV *of* 1882), *ss.* 235 *and* 248—*Decree against joint defendants—Appeal by one of several defendants against part of the decree.*—The plaintiff obtained a joint decree against defendants for possession of immoveable property and damages on 21st May 1886. Against that decree all the defendants, except defendant No. 1, appealed, and on 2nd July 1887 so much of the decree was reversed as made the appealing defendants liable for damages, but it was affirmed in all other respects. A second appeal by the plaintiff from the decree of the appellate Court was dismissed by the High Court on 9th July 1888. An application for execution of the decree was made by the plaintiff on 7th July 1891 within three years from the date of the final decree, dated 9th July 1888. The prayer was for issue of notice on the judgment debtor for delivery of possession, for attachment and sale of certain immoveable properties, for realization of costs and damages decreed. Notice under s. 248 of the Code of Civil Procedure was issued on the judgment debtors on 8th September 1891. The judgment-debtors, except defendant No. 1, objected that, as the application did not contain the right number of suit and date of decree, it was not in accordance with law, and as no other application had been made within three years from date of decree, the execution was barred by limitation. Defendant No 1 objected that limitation as against him would run from 21st May 1886, there being no appeal by or against him from the decree of that date. *Held*, that material defects only could vitiate an application, and as the defects in the present application for execution were not material, it was not barred by limitation. *Held*, also, that even if such application was defective as an application for execution of decree it was still an application to take some step in aid of executoin, namely, to issue a notice under s. 248, which was necessary, the decree having been passed more than a year before; and such notice having been issued it kept the decree alive. *Held*, further, that limitation against defendant No. 1 would run from date of the decree in appeal, therefore the application for execution was not barred by limitation. GOPAL CHUNDRA MANNA *v.* GOSAIN DAS KALAY 25 C. 594 (F.B.) = 2 C.W.N. 556 ... 392

(32) *Art.* 179 *cl.* 3—*Execution of decree—Order allowing amendment of a decree—Review of judgment—Code of Civil Procedure* (*Act* XIV *of* 1882), *ss.* 623, 624 *and* 206.—An order granting an application for amendment of a decree under s. 206 of the Code of Civil Procedure is an order passed upon review of judgment within the meaning of art. 179, sch. II, cl. (3) of the Limitation Act; therefore an application for execution of a decree within three years from such an order is not barred by limitation. KALI PROSUNNO BASU ROY *v.* LAL MOHUN GUHA ROY, 25 C. 258 = 2 C.W.N. 219 ... 174

(33) *Art.* 179, *cl.* (4)—*Step-in-aid of execution—Application for execution "not in accordance with law"—Subsequent application for execution—Objection to the previous application.*—An application for partial execution of a

Limitation Act (XV of 1877)—(*Concluded*). PAGE

decree, is a step-in-aid of execution within the meaning of cl. 4, art. 179, sch. II of the Limitation Act (XV of 1877). A judgment-debtor, who did not appeal against a previous order for execution of a portion of the decree and who did not dispute the validity of such order, cannot, in the matter of a subsequent application for execution of the remaining portion of the decree, contend that the first application was not "in accordance with law," and that the subsequent application being presented after the lapse of three years from the date of the decree was barred by limitation. NEPAL CHANDRA SADOOKHAN v. AMRITA LAL SADOOKHAN, 26 C. 888 ... 1169

Lis Pendens.

(1) *Involuntary alienation—Proceedings—Revenue Sale Law* (*Act* XI *of* 1859), *ss.* 13, 54—*Sale for arrears of Government revenue—Mortgage—Sale in execution of mortgage decree—Right of redemption.*—A decree was obtained for the sale of a mortgaged property, being a share of an estate, on the 31st August 1889. In execution of that decree, the property was purchased by the plaintiffs on the 11th December 1891, and the sale was confirmed on the 5th March 1892. Meanwhile, pending the execution proceedings, a larger share of the estate, including the share mortgaged, was purchased by the defendants at a Revenue sale on the 30th September 1891, which sale was confirmed on the 11th March 1892. In a suit instituted by the plaintiffs for the possession of the property purchased by them, the defendants having questioned the validity of the mortgage decree and contended that they were not bound by it, not being parties thereto, and having in the alternative claimed the right to redeem the mortgaged property, *held*, that the defendants were bound by the mortgage decree, the principle of *lis pendens* applying to the case. *Held*, also, that the defendants, having purchased a share of an estate at a revenue sale, held under the provisions of ss. 13 and 54 of the Sale Law, acquired it subject to the mortgage which they were bound in law to discharge before the sale in execution of the mortgage decree had actually taken place, or before, at any rate, that sale had been confirmed on the 5th March 1892; and that having failed to do so, and there being no equities to the contrary, their right of redemption was extinguished. HAR SHANKAR PRASAD SINGH v. SHEW GOBIND SHAW, 26 C. 966 = 4 C.W.N. 317... 1218

(2) See SALE, 25 C. 179.

Local Areas.

(1) Effect of re-distribution of—See EXECUTION OF DECREE, 25 C. 315.

(2) See JURISDICTION, 25 C. 858.

Local Government.

Rules made by—See EVIDENCE, 26 C. 281.

Lunatic.

Act XXXV *of* 1858—*Uncertificated guardian, powers of—Manager of joint Hindu family, powers of—Guardian—Sale by* de facto *guardian of lunatic's share.*—Act XXXV of 1858 does not affect the general provisions of Hindu law as to guardians who do not avail themselves of the Act, and the managing member of a joint Hindu family, one of the members of which is a lunatic, may, in case of necessity, sell joint family property including the lunatic's share, although he does not hold a certificate under the said Act. KANTI CHUNDER GOSWAMI v. BISHESWAR GOSWAMI, 25 C. 585 = 2 C.W.N. 241 ... 386

Magistrate.

(1) Discretion of—See COMPENSATION, 26 C. 181.

(2) Duty of—See JURY, 26 C. 869.

(3) Jurisdiction of—See CRIM. PRO. CODE (ACT V OF 1898), 26 C. 625.

(4) Jurisdiction of—See NUISANCE, 25 C. 278.

(5) *Jurisdiction of—Crim. Pro. Code* (*Act V of* 1898), *s.* 190, *sub-s.* (1), *cls.* (*a*) *and* (*c*), *and s.* 191—*Taking cognizance of offence by Magistrate upon receiving a complaint of facts—Right of the accused to claim a transfer—Penal Code* (*Act* XLV *of* 1860), *ss.* 193 *and* 195—

Magistrate—(*Concluded*). PAGE

Sanction unnecessary when offence alleged to have been committed in the course of an investigation by the Police—Interference by the High Court in a pending case.—The complainant made a complaint to the Magistrate by a petition in which he named three persons and charged them with offences under certain sections of the Penal Code. The Magistrate thereafter examined the complainant and some witnesses on his behalf and issued summonses against the three persons mentioned in the petition of complaint as well as against the petitioner in this case for an offence other than those mentioned in the said petition. *Held*, the Magistrate took cognizance of the offence as against the petitioner under cl. (*a*) and not cl. (*c*) of sub-s. (1) of s. 190, and consequently he was not debarred by s. 191 of the Crim. Pro. Code from trying the case. No sanction under s. 195 of the Crim. Pro. Code is necessary for taking cognizance of an offence under s. 193 of the Penal Code when the alleged false evidence is said to have been fabricated, not in relation to any proceeding pending in any Court, but in the course of an investigation by the Police into the matter of an information received by them. It is inadvisable to interfere in a pending case unless there is some manifest and patent injustice apparent on the face of the proceedings and calling for prompt redress. JAGAT CHANDRA MOZUMDAR *v.* QUEEN-EMPRESS, 26 C. 786=3 C.W.N. 491 ... 1103

(6) Nomination of Jurors by—See JURY, 26 C. 869.

(7) Rule issued upon—See CRIM. PRO. CODE (ACT X OF 1882), 25 C. 798.

Mahomedan Law.

1.—DIVORCE.
2.—GIFT.
3.—MAINTENANCE.
4.—MARRIAGE.
5.—SUCCESSION.
6.—WIDOW.
7.—WILL.

———**1.—Divorce.**

See MAHOMEDAN LAW (MARRIAGE), 25 C. 537.

———**2.—Gift.**

(1) Of share of profits in talukdari estate—See WILL, 25 C. 816.

(2) See MAHOMEDAN LAW (WILL), 25 C. 9.

(3) See TITLE, 26 C. 11.

———**3.—Maintenance.**

See MAHOMEDAN LAW (WILL), 25 C. 9.

———**4.—Marriage.**

Personal status—Christian marriage followed by Mahomedan marriage—Right of widow under Mahomedan law—Divorce.—In a suit to obtain a widow's share under Mahomedan law in the estate of the deceased, it was proved that the plaintiff and deceased had been married in 1855 as professed Christians in a church at Meerut; that subsequently, having reverted to Mahomedanism, they were married a second time according to Mahomedan law in *nikah* form, which second marriage had not been dissolved by a Mahomedan divorce. In 1886 the husband died, leaving a will excluding the wife from all participation in his estate. *Held*, that the personal status of the deceased being at the time of his death that of a Mahomedan, and the plaintiff's personal status being that of his wife under the same law, she was entitled to a share in his estate, notwithstanding his will, which purported, but under Mahomedan law was inoperative, to exclude her. *Quære.*—Whether in the case of spouses remaining domiciled in India, where religious creed affects the rights incidental to marriage, such as that of divorce, a change of religion made honestly after marriage, with the assent of both spouses, without any intent to commit a fraud on the law, effects any change in those rights. SKINNER *v.* SKINNER, 25 C. 537 (P.C.)=25 I.A. 34=2 C.W.N. 209=7 Sar. P.C.J. 262 ... 356

———**5.—Succession.**

See ACT I OF 1869 (OUDH ESTATES), 26 C. 81.

Mahomedan Law—6.—Widow.

(1) Childless, right of—See MAHOMEDAN LAW, 25 C. 9.

(2) Rights of, under—See MAHOMEDAN LAW (MARRIAGE), 25 C. 537.

(3) See TITLE, 26 C. 11.

———7.—Will.

Right of childless widow—Administration of the estate of a Shiah Mahomedan under his will—Alleged gift—Claims as between his childless widow and the estate—Right of the widow to maintenance—Legacies chargeable on one-third only of the estate—Commission to Executor.—A Mahomedan of the Shiah sect, dying without issue, left a widow. She, as his childless widow, was entitled to one-fourth of his estate other than land. On the administration of his estate the following matters arose, and were decided: The handing over, with formal words of gift by the testator to the widow, of deposit receipts, with intent afterwards to transfer the money into her name at the Bank, which transfer was not effected, would not constitute a gift. A commission of three per cent. on the proceeds of the sale of the testator's property directed by his will was bequeathed to the executor. This was by way of remuneration but was in no sense a debt. As a legacy it was payable only out of one-third of the estate which passed by the will. A Mahomedan widow is not entitled to maintenance out of the estate of her late husband, in addition to what she is entitled to by inheritance or under his will—Hidaya, Book IV, chap. 15, s. 3, Mahomedan law, Imamia, by N. E. Baillie, p. 170, referred to. No contract could be implied that this widow should pay an occupation rent on account of her *having continued* to occupy a house belonging to the testator's estate, for eleven months after his death. Her occupation was referable to her position, and no notice was given to her that rent would be charged. A Mahomedan childless widow is not by Shiah law entitled to share in the value of land forming the site of buildings that belonged to her husband's estate. Her one-fourth includes, as was admitted, a share in the proceeds of sale of the buildings. The text quoted in Book VII, chap. IV., p. 293 of Baillie's Mahomedan Law, Imamia, is not to be construed as referring only to agricultural land. AGA MAHOMED JAFFER BINDANIM v. KOOLSOM BEEBEE. KOOLSOM BEEBEE v. AGA MAHOMED JAFFER BINDANIM, 25 C. 9 (P.C.) = 24 I.A. 196 = 1 C.W.N. 449 = 7 M.L.J. 115 = 7 Sar. P.C.J. 199 ... 7

Maintenance.

Order of Criminal Court as to—Crim. Pro Code (Act X of 1882), s. 488—Imprisonment for default of payment of maintenance—Warrant of commitment—Procedure.—An order of commitment to prison for default in payment of a wife's maintenance allowance cannot be made without proof that the non-payment was due to wilful neglect of the person ordered to pay. The law contemplates a single warrant of commitment in respect of the arrears due at the time of its issue. Where six months' arrears were due, an order for separate warrants of commitment awarding a separate sentence of imprisonment of one month on each warrant was, therefore, held to be bad in law. As to the mode of computing the term of imprisonment, the case of 20 M. 3 followed. BHIKU KHAN v. ZAHURAN, 25 C. 291 ... 195

Manager.

De facto—See HINDU LAW (ALIENATION), 26 C. 820.

Marginal Notes.

To sections of Act—See STATUTES, 25 C. 858.

Marriage.

Dissolution of, Withdrawal of petition for—See PRACTICE, 25 C. 222.

Measurement.

Of lands Order of Special Judge as to standard of—See APPEAL (SECOND APPEAL), 26 C. 556.

Measurement Papers.

Entry made in—See EVIDENCE ACT (I OF 1872), 25 C. 90.

Memorandum.

Of appeal, Time of presentation of—See PAUPER, 26 C. 925.

Mesne Profits. PAGE

(1) Application for ascertainment of—See LIMITATION, 25 C. 203.

(2) *Suit for—Turn of worship—Right of suit—A suit for wasilat in respect of profit derived from a turn of worship, whether maintainable.*—A suit for *wasilat*, in respect of profits derived from a turn of worship, which are in their nature uncertain and voluntary, is not maintainable KASHI CHANDRA CHUCKERBUTTY v. KAILASH CHANDRA BANDOPADHYA, 26 C. 356 = 3 C.W.N. 279 ... 831

Metropolis Management Amendment Act, 1862 (25 and 26 Vict., C. 102).

S. 75—See ACT III OF 1884 (MUNICIPAL, BENGAL), 25 C. 160.

Minor.

(1) Acknowledgment of debt by guardian of—See LIMITATION ACT (XV OF 1877), 26 C. 51.

(2) *Fraudulent representation by minor that he was of age—Mortgage.*—A sum of money was advanced to a minor by a mortgagee, secured by a mortgage of house property, on the representation by the minor that he was of age, and the mortgagee was deceived by such false representation. *Held*, that the mortgagee was entitled to a mortgage decree against the property of the infant. SARAL CHAND MITTER v. MOHUN BIBI, 25 C. 371 = 2 C.W.N. 18 & 201 ... 247

(3) *Mortgage by minor—Attorney for both mortgagor and mortgagee—Notice of minority—Evidence Act (I of 1872), s. 115—Estoppel—Contract Act (IX of 1872), ss 11. 64—Avoiding Contract—Compensation—Specific Relief Act (I of 1877), ss. 38, 41.*—S. 115 of the Evidence Act has no application to contracts by infants; but the term "person" in that section applies only to a person of full age and competent to enter into contracts. The words "person" and "party" in s. 64 of the Contract Act are interchangeable, and mean such a person as is referred to in s. 11 of that Act, *i.e.*, a person competent to contract. A mortgagor employing an attorney, who also acts for the mortgagee in the mortgage transaction, must be taken to have notice of all facts brought to the knowledge of the attorney; and, therefore, where the Court rescinded the contract of mortgage on the ground of the mortgagor's infancy, and found that the attorney had notice of the infancy, or was put upon enquiry as to it, *held* (affirming the decision of JENKINS, J.) that the mortgagor was not entitled to compensation under the provisions of ss. 38 and 41 of the Specific Relief Act. BROHMO DUTT v. DHARMO DAS GHOSE, 26 C. 381 = 3 C.W.N. 488 ... 846

(4) *Mortgage by minor Voidable mortgage—Estoppel—Evidence Act (I of 1872), s 115—Fraud—Contract Act (IX of 1872), s. 64—Restoration of benefit by minor.*—The general law of estoppel as enacted by s. 115 of the Evidence Act (I of 1872) will not apply to an infant unless he has practised fraud operating to deceive. A Court administering equitable principles will deprive a fraudulent minor of the benefit of a plea of infancy; but he who invokes the aid of the Court must come with clean hands and must establish, not only that a fraud was practised on him by the minor, but that he was deceived into action by the fraud. If money advanced to an infant on a mortgage declared void is spent by him, then there is no benefit which he is bound to restore under the provisions of s. 64 of the Contract Act (IX of 1872). DHURMO DASS GHOSE v. BRAHMO DUTT, 25 C. 616 = 2 C.W.N. 330. ... 405

(5) Sale of property of, by *de facto* manager—See HINDU LAW (ALIENATION), 26 C. 820.

(6) Service of summons on—See SUMMONS, 26 C. 267.

(7) See ACT VIII OF 1890 (GUARDIANS AND WARDS), 26 C. 133.

(8) See GUARDIAN, 25 C. 881, 909.

(9) See HINDU LAW (JOINT FAMILY), 26 C. 349.

Misdirection.

(1) See CHARGE, 25 C. 230, 711, 736.

(2) See EVIDENCE, 26 C. 49.

(3) See JURY, 25 C. 561.

Misjoinder.

Of causes of action—See MULTIFARIOUSNESS, 26 C. 891.

Mokarari Lease. PAGE

See INTEREST, 26 C. 130.

Money.

(1) Borrowed by one partner by agreement—See CONTRIBUTION, 26 C. 254, 262 N.

(2) Decree for—See EXECUTION OF DECREE, 25 C. 322.

(3) Deposited by defendant in Court, Right of plaintiff to draw out—See PRACTICE, 26 C. 766.

(4) Paid, Suit on covenant in ekrarnama for—See LIMITATION ACT (XV OF 1877), 26 C. 241.

(5) Realized by Receiver appointed by decree-holder—See EXECUTION OF DECREE, 26 C. 772.

Money-decree.

On covenant in mortgage—See MORTGAGE (GENERAL), 26 C. 78.

Mortgage.

1.—GENERAL.
2.—EQUITABLE.
3.—FORECLOSURE.
4.—REDEMPTION.
5.—SALE.
6.—USUFRUCTUARY.

———**1.—General.**

(1) Attested by only one witness, Validity of—See TRANSFER OF PROPERTY ACT (IV OF 1882), 26 C. 246.

(2) By guardian of minor's property—See GUARDIAN, 25 C. 909.

(3) By Hindu widow—See HINDU LAW (ALIENATION), 26 C. 707.

(4) By minor—See MINOR, 25 C. 371, 616; 26 C. 381.

(5) Claim by, to attached property in Small Cause Court—See ACT XV OF 1882 (SMALL CAUSE COURTS, PRESIDENCY TOWNS), 26 C. 778.

(6) Construction of—See INTEREST, 25 C. 246.

(7) *Construction of mortgage—Operative words in a mortgage deed—General language.*—A mortgage deed having specifically charged the property originally offered as security, extended the operation of the mortgage by general language to include all interest in the *mehals*, villages, and lands, comprised in the *sanad* of a *talukdari* estate. It was now questioned whether one of the villages comprised in the *sanad* was part of the mortgaged property. The operative words, uncontrolled by anything in any recital, declared all the above subject to the mortgage. The deed was, accordingly, *held* to include the village in question, effect being given to the operative words in their ordinary meaning. THE LAND MORTGAGE BANK OF INDIA v. ABUL KASIM KHAN, 26 C. 395 (P.C.) = 7 Sar. P.C.J. 449 ... 855

(8) Decree—See CIV. PRO. CODE (ACT XIV OF 1882), 25 C. 580.

(9) Decree—See DECREE, 26 C. 166.

(10) Decree—See RECEIVER, 26 C. 127.

(11) Enforcement of—See CONTRACT ACT (IX OF 1872), 26 C. 39.

(12) *Transfer of Property Act* (IV *of* 1882), s. 59—*Mortgage deed signed by the mortgagor attested by one witness and containing an acknowledgment by the Sub-Registrar, whether valid*—*Indian Succession Act* (X *of* 1865), s. 50—*Mortgage being invalid whether a money decree can be made upon the covenant in the bond.*—The requirements of s. 59 of the Transfer of Property Act are not satisfied when a mortgage bond is signed by the mortgagor attested by one witness, and contains the Sub-Registrar's signature to the endorsement, recording the admission of the execution by the executant; therefore such a mortgage is not valid in law. When a suit is brought upon a mortgage bond, although the mortgage is held to be invalid on the ground that the requirements of s. 59 of the Transfer of Property Act were not satisfied, the plaintiff is entitled to recover, upon the covenant, money which the defendant covenanted to pay. TOFALUDDI PEADA v. MAHARALI SHAHA, 26 C. 78 ... 654

(13) Unregistered—See EVIDENCE, 26 C. 334.

Mortgage—2.—Equitable. PAGE

(1) *Further Advances—Equitable mortgage on title-deeds already deposited under previous mortgage.*—The defendants had executed a mortgage in favour of the plaintiff, and handed him the title-deeds of the mortgaged property. Subsequently the plaintiff advanced a further sum to the defendants, who agreed that the plaintiff should retain the title-deeds already held by him as a security for the re-payment of the further advances. There was no fresh deposit of the deeds. *Held*, that the plaintiff was entitled to be declared an equitable mortgagee in respect of such further advance. GIRENDRO COOMAR DUTT v. KUMUD KUMARI DASI, 25 C. 611=2 C W.N. 356 ... 402

(2) See SUMMONS, 26 C. 267.

——— 3.—Foreclosure.

(1) *Decree absolute for foreclosure—Transfer of Property Act* (IV *of* 1882), *ss.* 87 *and* 88—*Whether time to redeem would run from the date of the preliminary decree, or from the date of the decree of the Appellate Court, when it simply confirms the decree of the first Court.*—Where, in a suit on a mortgage, the decree of the Appellate Court simply dismisses the appeal, leaving the decree of the first Court untouched, the time for redemption would run from the date of the decree of the first Court. BHOLA NATH BHUTTACHARJEE v. KANTI CHUNDRA BHUTTACHARJEE, 25 C. 311=1 C.W.N. 671... 208

———4.—Redemption.

(1) *Accounts—Account on redemption of a mortgage—Appropriation of payments—Set-off of rents and profits—Expenditure on improvements—Interest—Transfer of Property Act* (IV *of* 1882), *s* 76—*Lower Burma Courts Act* (XI *of* 1889), *s.* 4.—That an account should have been taken between mortgagor and mortgagee in possession consistently with the direction in s. 76 of the Transfer of Property Act, 1882, is in accordance with the "justice, equity and good conscience" required to be administered by s. 4 of the Lower Burma Courts Act, 1889. It made no difference, in the result of the account, whether the rents and profits received by the mortgagee in each year were set off year by year against the amount expended by the mortgagor in that year for improvement and management, or their total was deducted at the end of possession from the sum expended by him. The balance of his expenditure had, in fact, exceeded in each year that of his receipts and carried only simple interest. The mortgage debt decree bore compound interest. *Held*, that the account need not be taken on the principle that the mortgagee should give credit for his receipts first in reduction of that debt which was most burdensome to the debtor. There was no obligation to pay off the compound interest debt before the other. Whether the improvements and the expenditure were reasonable were questions of fact on which two Courts had concurred; and there was no ground for interference with their finding. During the life of the mortgagee, his son managed the property, living on it at a distance. The account directed was of sums "laid out in management." Salary to the manager was not paid, and in the account could not be allowed, such allowance not having been decreed. But the cost of this manager's being separately maintained during the father's life could be allowed. For the period after the father's death, as the son became mortgagee himself, such cost of maintenance could not be allowed. KADIR MOIDIN v. NEPEAN, 26 C. 1 (P.C.)=25 I.A. 241=2 C.W.N. 665=7 Sar. P.C J. 394 ... 605

(2) From what date time for, runs—See MORTGAGE (FORECLOSURE), 25 C. 311.

(3) Right of—See LIS PENDENS, 26 C. 966.

(4) See SALE, 26 C. 734.

——— 5.—Sale.

(1) See DECREE, 26 C. 166.

(2) See EVIDENCE ACT (I OF 1872), 25 C. 603.

(3) See SALE, 26 C. 734.

——— 6.—Usufructuary.

See LIMITATION ACT (XV OF 1877), 25 C. 450.

Mortgagee. PAGE

(1) Payment made by—See VOLUNTARY PAYMENT, 25 C. 305.

(2) Substitution of heir of, in Execution Proceedings—See SUCCESSION CERTIFICATE ACT (VII OF 1889), 26 C. 839.

Motion.

See PRACTICE, 25 C. 649.

Mukhtear.

Communication to—See PRIVILEGED COMMUNICATION, 25 C. 736.

Multifariousness.

Misjoinder of causes of action—Civ. Pro. Code (Act XIV *of* 1882), *s.* 44, *Rule A.*—Where the suit is one to administer the assets of a deceased person, and in the claim various dealings by the executors of the estate are complained of as acts of mal-administration and sought to be redressed, such dealings do not constitute separate causes of action, and such a suit is not multifarious. NISTARINI DASSI v. NUNDO LALL BOSE, 26 C. 891=3 C.W.N. 670 ... 1171

Municipality.

Power of—See JURISDICTION, 26 C. 811.

Munsif.

(1) Jurisdiction of—See EXECUTION OF DECREE, 25 C. 315.

(2) See SALE, 25 C. 46.

Nationality.

See FOREIGN COURT, 26 C. 931.

Negligence.

(1) See ACT III OF 1865 (CARRIERS'), 26 C. 398.

(2) See RAILWAY COMPANY, 26 C. 465.

Non-joinder.

(1) See HINDU LAW (JOINT FAMILY), 26 C. 349.

(2) See WRONGFUL DISTRAINT, 25 C. 285.

Non-occupancy Raiyat.

See LANDLORD AND TENANT, 25 C. 75.

Notice.

(1) For Removal of huts, validity of—See JURISDICTION, 26 C. 811.

(2) Of minority—See MINOR, 26 C. 381.

(3) Of suit—See CIV. PRO. CODE (ACT XIV OF 1882), 25 C. 239.

(4) Service of, Evidence of sufficiency of—See ACT VII OF 1880 (PUBLIC DEMANDS RECOVERY, BENGAL), 26 C. 414.

(5) To give up possession on expiry of lease or to pay rent—See LANDLORD AND TENANT, 26 C. 338.

(6) To quit—See LANDLORD AND TENANT, 25 C. 36, 75.

(7) To quit, sufficiency of—See LANDLORD AND TENANT, 26 C. 761.

(8) See ACT VIII OF 1885 (BENGAL TENANCY), 26 C. 603.

Notification.

(1) Government, of 1862—See JURY, 25 C. 555.

(2) Of substance of warrant, absence of—See WARRANT, 26 C. 748.

Nuisance.

(1) *Cremation—Burning-ghat or cremation-ground—Crim. Pro. Code (Act* X *of* 1882), *ss.* 133, 140, 437 —*Jurisdiction of District Magistrate to order further inquiry, in a proceeding under s.* 133 *of the Code*—"*Legalised nuisance*" *Private cremation ground, Duties of owner of*—"*Public place*"—"*Trade or occupation*"—*Order of removal of burning ghat—Form of Notice.*—A District Magistrate has, strictly speaking, no power under s. 437 of the Crim. Pro. Code (Act X of 1882) to order a further inquiry into a proceeding under s. 133 of the Code which has been practically dropped by a Subordinate Magistrate, the proper course being to refer the matter to the

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High Court. Although a burning ghat or cremation ground may not in itself be a "nuisance" within the meaning of cl. 2, s. 133 of the Crim. Pro. Code (Act X of 1882), still a Magistrate will have jurisdiction to take action under that section if it is shewn that such a ghat or ground is in such an offensive state, or that cremation is carried upon it in such an offensive manner, as to be a source of injury, danger, or annoyance to persons living in the vicinity. A private proprietor may be guilty of acts done on his private property, which may give rise to a public nuisance; the owner of a cremation ground may be held to create a "nuisance" if he allows the cremation of bodies upon that ground to be so performed as to annoy or endanger the lives and properties of persons living in the neighbourhood. The proprietor of a cremation-ground cannot be said to be carrying on any "trade or occupation" within the meaning of cl. 3, s. 133 of the Crim. Pro. Code. A Magistrate has no power under s. 133 of the Crim. Pro. Code to order the removal of a burning-ghat from its position, but he can direct a proprietor to "remove the nuisance," *i.e.*, to take such steps as would result in the cremation of corpses ceasing to be a nuisance to the public. INDRA NATH BANERJEE v. QUEEN-EMPRESS, 25 C. 425 = 2 C.W.N. 113 ... 282

(2) *Crim. Pro. Code* (*Act* V *of* 1898), *s.* 133—Bona fide *question of title—Obstruction to a public way.*—When the person called upon under s. 133 of the Crim. Pro. Code to show cause why an obstruction should not be removed from a public way, denies that it is a public way, it is for the Magistrate to determine whether this is a *bona fide* objection, and he cannot, in spite of the objection (unless he determines that it is not *bona fide*) refer the matter to a jury. KAILASH CHUNDER SEN v. RAM LALL MITTRA, 26 C. 869 ... 1156

(3) *Crim. Pro. Code* (*Act* X *of* 1882), *ss.*133 *and* 137—*Reference by Sub-Divisional Magistrate to a second class Magistrate*—Bona fide *question of title—Jurisdiction of Magistrate—Public nuisance—Obstruction in public way.*—A Sub-Divisional Magistrate having made a conditional order under s. 133 of the Crim. Pro. Code (Act X of 1882) against a person to remove an obstruction on a public thoroughfare, or appear and show cause before a second class Magistrate, the said person appeared as directed, and the order was made absolute under s. 137. In revision the High Court held that, having regard to the penultimate paragraph of s. 133, the order was not illegal on the ground that it was made absolute by a Magistrate with second class powers other than the Magistrate who made the conditional order. When a question of title is *bona fide* raised the Magistrate ought not to make an order under ss. 133 and 137 of the Crim. Pro. Code, but should allow the party an opportunity for the determination of the question by a Civil Court. The claim of title must, however, be *bona fide* and not a mere pretence to oust jurisdiction, and it is for the Magistrate to say whether the claim is a *bona fide* one or a pretence. Although no length of enjoyment can legalize a public nuisance—see 7 B.L.R., 499—yet the long possession or enjoyment of what is said to be a nuisance may give to the objection of the person so possessing or enjoying it the character of a *bona fide* dispute as to title such as might have the effect of ousting the jurisdiction of the Magistrate under ss. 133 and 137 of the Code, and making the question a proper one for the Civil Court. PREONATH DEY v. GOBORDHONE MALO, 25 C. 278 ... 187

(4) *Crim. Pro, Code* (*Act* X *of* 1882), *s.* 144—*Order regulating boat traffic at a landing place—High Court's power of Revision when order cannot be made under that section.*—An order regulating the boat traffic at a certain landing place of a river in the manner directed by the order passed in this case held to be not an order that is authorised by s. 144 of the Crim. Pro. Code. If the order be one that cannot be made under s. 144 of the Crim. Pro. Code, the mere fact of the order purporting to have been made under that section does not prevent the High Court from interfering with it in revision. QUEEN-EMPRESS v. PRATAP CHUNDER GHOSE, 25 C. 852 = 2 C.W.N 593 ... 555

Obstruction.

(1) In public way—See NUISANCE. 25 C. 278.

(2) See PENAL CODE (ACT XLV OF 1860), 25 C. 275.

Occupancy Holding. PAGE.

(1) Sale of—See SALE, 26 C. 937.

(2) See ACT VIII OF 1885 (BENGAL TENANCY), 26 C. 615.

Occupancy Rights.

Transfer of—See RIGHT OF OCCUPANCY, 26 C. 184.

Offence.

(1) Committed in course of investigation by Police, sanction for prosecution of—See MAGISTRATE, 26 C. 786.

(2) Locality of commission of—See JURISDICTION, 25 C. 20.

(3) Uncertainty of place where committed—See JURISDICTION, 25 C. 858.

Official Acts.

Presumption of due performance of—See SETTLEMENT, 26 C. 792.

Official Trustee.

Appointment of—See PRACTICE, 25 C. 856.

Opinion.

As to existence of usage, admissibility in evidence of—See RIGHT OF OCCUPANCY, 26 C. 184.

Order.

(1) Absolute for sale—See CIV. PRO. CODE (ACT XIV OF 1882), 25 C. 133.

(2) Allowing amendment of decree—See LIMITATION ACT (XV OF 1877), 25 C. 258.

(3) Concerning ferry—See SUPERINTENDENCE, 26 C. 188.

(4) Granting application for review of order—See APPEAL (GENERAL), 26 C. 529.

(5) Granting certificate, conditional—See APPEAL (GENERAL), 25 C. 320.

(6) Of Her Majesty in Council—See EXECUTION OF DECREE, 25 C. 283.

(7) Of Special Judge as to standard of measurement of lands—See APPEAL (SECOND APPEAL), 26 C. 556.

(8) Refusing application to commit for Contempt of Court—See LETTERS PATENT, 1865 (HIGH COURT), 25 C. 236.

(9) Refusing to confirm sale—See APPEAL (SECOND APPEAL), 25 C. 175.

(10) Refusing to set aside award—See APPEAL (GENERAL), 26 C. 361.

(11) Regulating boat traffic at landing place—See NUISANCE, 25 C. 852.

(12) Returning plaint to be presented in proper Court—See APPEAL (GENERAL), 26 C. 275.

(13) To make good deficiency on re-sale—See APPEAL (SECOND APPEAL), 25 C. 99.

Ownership.

(1) Evidence of—See BENAMI TRANSACTIONS, 26 C. 227.

(2) Evidence of—See TITLE, 26 C. 11.

(3) Of property by husband, proof of, by widow—See BURDEN OF PROOF, 26 C. 871.

Pardanashin Lady.

(1) *Execution of document by a* pardanashin *lady—Refusal of her application, as defendant, for the issue of a commission to take her evidence—Civ. Pro. Code (Act XIV of 1882), ss. 383, 390—Irregularity not affecting merits of case—Civ. Pro. Code (Act XIV of 1882), s. 578.*—The Court of first instance rejected an application made under chap. XXV of the Civ. Pro. Code for the issue of a commission to take the evidence of a Mahomedan *pardanashin* lady, the defendant in the suit, which was brought against her on a mortgage bond, the execution of which she had denied in her written statement. The Courts below concurred in finding that there was sufficient evidence of the execution of the document by the *pardanashin* with full knowledge of its contents. From their judgments it appeared that if the defendant had been examined on commission and had given her testimony in support of her written statement, it would not have been believed, and in their Lordship's opinion it could not

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reasonably have prevailed. *Held*, that the error alleged by the appellant to have occurred in the refusal of the Court to issue the commission (whether or not it would have been better to have issued it) was, at all events, no valid ground of appeal. The evidence taken on the commission could not have affected the merits of the case within s. 578 of the Civ. Pro. Code. AKTKUNNISSA BIBI v. RUP LAL DAS, 25 C. 807 (P.C.) = 25 I.A. 117 = 2 C.W.N. 566 = 7 Sar. P.C.J. 358 ... 526

(2) Right of, to be examined on commission—See PRACTICE, 26 C. 651-N.

Parties.

(1) Added after suit brought—See LIMITATION ACT (XV OF 1877), 25 C. 409.

(2) *Adding parties on appeal—Respondents—Power of the Appellate Court to add parties as respondents—Code of Civil Procedure* (*Act* XIV *of* 1882), *s.* 559.—*C*, owner of a factory, executed a *hundi* in favour of *B*, and purchased land from *B* from the proceeds thereof. *C* then sold his factory to *H*, who obtained possession of the land In a suit brought by *B* upon the *hundi*, *C* and *H* were made defendants, but *C* did not appear in the first instance and an *ex parte* decree was passed against him alone. *C* appealed against *B* without making *H* a party respondent to his appeal. The lower appellate Court passed an order adding *H* as a respondent, and eventually passed a decree against *H*. On second appeal by *H* to the High Court, *held*, referring to s. 559 of the Civ. Pro. Code (1882), that the lower Appellate Court was right in adding *H* as a party respondent to the appeal. HUDSON v. BASDEO BAJPYE, 26 C. 109 = 3 C.W.N. 76 ... 674

(3) *Civ Pro. Code* (*Act* XIV *of* 1882), ss. 108, 109—*Whether an auction-purchaser is a necessary party to an application to set aside an* ex-parte *decree.*—An auction-purchaser of property sold in execution of an *ex-parte* decree, is not a necessary party to an application made by the judgment-debtor to set aside the said decree, inasmuch as the auction-purchaser does not come under the description of "opposite party" in s. 109 of the Code of Civil Procedure. JATINDRA MOHAN PODDAR v. SRINATH ROY, 26 C. 267 = 3 C.W.N. 261 ... 775

(4) *Co-contractors—Right of some of several co-contractors to sue alone—Refusal to join in the suit as plaintiff, effect of.*—Where two parties contract with a third party, a suit by one of them making the other a co-defendant ought not be dismissed merely because the plaintiff has not proved that the co-defendant had refused to join as a co-plaintiff. PYARI MOHUN BOSE v. KEDAR NATH ROY, 26 C. 409 (F.B.) = 3 C.W.N. 271 ... 864

(5) Compromise by, without knowledge of Attorney—See COSTS, 25 C. 887.

(6) Failing to appear, right of, to support statement of facts—See REFERENCE, 26 C. 585.

(7) Joinder of—See LIMITATION ACT (XV OF 1877), 25 C. 285.

(8) Non-joinder of—See HINDU LAW (JOINT FAMILY), 26 C. 349.

(9) Non-joinder of—See WRONGFUL DISTRAINT, 25 C. 285.

(10) Question between—See APPEAL (SECOND APPEAL), 26 C. 539.

(11) Substitution of—See SUCCESSION CERTIFICATE ACT (VII OF 1889), 26 C. 839.

(12) To suit—See CIV. PRO. CODE (ACT XIV OF 1882), 26 C. 250.

(13) See CIV. PRO. CODE (ACT XIV OF 1882), 25 C. 49.

(14) See RIGHT OF SUIT, 25 C. 98.

(15) See SALE, 25 C. 833.

Partition.

(1) *Estates Partition Act* (*Bengal Act* VIII *of* 1876), *ss.* 112 *and* 128—*Incumbrance created by a co-sharer before partition—Effect of partition by Collector, where the land so incumbered fell exclusively into the share of another co-sharer.*—On partition by a Collector under the Estates Partition Act (Bengal Act VIII of 1876) when any land of an undivided joint estate, which was incumbered by any co sharer, is allotted to any other co-sharer, the latter takes it free from the incumbrance so created. The Cases Sp. Vol. W.R. (1864), 271, and 13 W R., 447 ; 8 B. L. R. App., 73 note, have been overruled in effect by the decision of the Privy Council in the case of 1 I. A. 106. JOY SANKRI GUPTA v. BHARAT CHANDRA BARDHAN, 26 C. 434 = 3 C.W.N. 209 ... 880

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(2) Of estates—See ENHANCEMENT, 26 C. 832.

(3) Right to—See CO-SHARERS, 26 C. 553.

(4) See TRANSFER OF PROPERTY ACT (IV OF 1882), 25 C. 210.

Partners.

See BURDEN OF PROOF AND EVIDENCE, 26 C. 281.

Partnership.

(1) Agreement as to shares in—See BURDEN OF PROOF, 26 C. 281.

(2) Business—See CONTRIBUTION, 26 C. 254, 262-N.

(3) Minors carrying on, with others—See SUMMONS, 26 C. 267.

(4) See HINDU LAW (JOINT FAMILY), 26 C. 349.

Passengers.

Carriage of, by rail—See RAILWAY COMPANY, 26 C. 465.

Pauper.

Suit—Application for leave to appeal as a puper—Time of presentation of memorandum of appeal—Consent of the applicant to pay sufficient Court-fees after the Statutory period of limitation—Sufficient cause—Limitation Act (XV *of* 1877), *s.* 5—*Civ. Pro. Code* (*Act* XIV *of* 1882), *s.* 582-A.—A suit was brought *in forma pauperis* on behalf of a minor represented by his next friend in the Court of the Munsif, and it was dismissed under some alleged compromise. An appeal was preferred to the District Judge within time, but the memorandum of appeal was insufficiently stamped. An application was also filed with the memorandum of appeal for leave to appeal *in forma pauperis*. At the time of the hearing of the said application objection having been taken by the respondent that the minor had become entitled to certain immoveable property, those representing the minor offered to pay proper Court fees on the memorandum of appeal within a month. The Court allowed that to be done in the presence of both parties and admitted the appeal. The Court fees were also paid within the time allowed. On an objection by the defendant, appellant in the High Court, that the appeal by the plaintiff in the lower appellate Court was out of time, *Held* that, inasmuch as the appeal was admitted by the District Judge without any objection from the defendant, the case came either under s. 5 of the Limitation Act or under s. 582-A of the Civ. Pro. Code, and, therefore, the appeal was not out of time. DURGA CHARAN NASKAR v. DOOKHIRAM NASKAR, 26 C. 925 ... 1191

Payments.

(1) Appropriation of—See CONTRACT ACT (IX OF 1872), 26 C. 39.

(2) Appropriation of—See MORTGAGE (REDEMPTION), 26 C. 1.

(3) By judgment-debtor under void agreement—See EXECUTION OF DECREE, 25 C. 86.

(4) Into Court by defendant in satisfaction of claim—See PRACTICE, 26 C. 766.

(5) Of rent of putni, person interested in—See VOLUNTARY PAYMENT, 26 C. 826.

(6) To save putni taluk from sale—See VOLUNTARY PAYMENT, 25 C. 305.

Penal Code (Act XLV of 1860).

(1) S. 21—See PUBLIC SERVANT, 26 C. 158.

(2) Ss. 109, 114—See FORGERY, 25 C. 207.

(3) Ss. 116, 193—See SANCTION FOR PROSECUTION, 26 C. 359.

(4) S. 143, Conviction under—See RECOGNIZANCE TO KEEP PEACE, 26 C. 576.

(5) Ss. 143, 147—See JURY, 25 C. 561.

(6) S. 147—See RIOTING, 26 C. 574.

(7) *S.* 183—*Resistance to attachment—Lawful authority—Village Chaukidari Act (Bengal Act* VI *of* 1870), *ss.* 26, 27 *and* 34.—Where a village chaukidar, without the preparation and publication of a list of defaulters and without any written authority as required by ss. 26 and 27 of the Village Chaukidari Act (Bengal Act VI of 1870) attached some property for levying the amount of arrears: *Held*, that resistance to such attachment was not an offence under s. 183 of the Penal Code. DURGA CHARAN MALI v. NOBIN CHANDRA SIL, 25 C. 274 ... 183

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(8) S. 186—See PUBLIC SERVANT, 26 C. 158.

(9) S. 193—See MAGISTRATE, 26 C. 786.

(10) Ss. 193, 477—See EVIDENCE, 26 C. 49.

(11) S. 235-B—See WARRANT, 26 C. 748.

(12) Ss. 240, 241—See JURY, 25 C. 555.

(13) *S.* 283—*Obstruction in a public way.*—The accused was charged generally with obstructing a public way, no danger, obstruction, or injury being alleged to have been caused to any person, nor was there any clear evidence that the way was a public way. *Held*, that the conviction under s. 283 of the Penal Code could not be sustained. QUEEN-EMPRESS v. BENI MADHAV CHAKRAVARTI, 25 C. 275 ... 184

(14) S. 323—See RIOTING, 26 C. 574.

(15) *S.* 353—*Deterring a public servant from discharge of his duty—Public servant acting under warrant of attachment—Non-production of the warrant at the trial.*—One of the accused was convicted under s. 353 of the Penal Code (assaulting or using criminal force to a public servant in the execution of his duty) and two others of the abetment of an offence under that section. But the warrant of attachment under which the public servant was acting was not produced at the trial nor was any secondary evidence given to show its contents. *Held*, in the absence of any evidence as to the terms of the warrant either by the production of the original or in the form of secondary evidence it was impossible to hold that the conviction was good. TAFAZZUL AHMED CHOWDHRY v. QUEEN-EMPRESS, 26 C. 630 ... 1005

(16) Ss. 380, 395—See JURY, 25 C. 561.

(17) S. 409—See CRIM. PRO. CODE (ACT X OF 1882), 25 C. 557.

(18) *Ss.* 409, 477-A—*Crim. Pro. Code,* (*Act* V *of* 1898), *ss.* 222 (2), 234—*Criminal breach of trust by public servant—Acquittal—Framing new charge—General falsification of accounts for a period extending over two years.*—The alteration in the law by s. 222 (2) of the Crim. Pro. Code (Act V of 1898) does not apply to a charge under s. 477-A of the Penal Code. It applies only to Criminal breach of trust or dishonest misappropriation of money. QUEEN-EMPRESS v. MATI LAL LAHIRI, 26 C. 560=3 C.W.N. 412 ... 959

(19) S. 448—See RECOGNIZANCE TO KEEP PEACE, 25 C. 628.

(20) Ss. 463, 471—See FORGERY, 25 C. 512.

(21) S. 467—See FORGERY, 25 C. 207.

(22) S. 486—See JURISDICTION, 25 C. 639.

(23) *S.* 486—*Selling books with counterfeit property mark—Goods—Indian Merchandise Marks Act* (IV *of* 1889).—Books are the subject of trade and are goods within the meaning of s. 2, cl. (4) of the Indian Merchandise Marks Act (IV of 1889); therefore, when a person sells books with a counterfeit property mark, he commits an offence under s. 486 of the Indian Penal Code. KANAI DAS BAIRAGI v. RADHA SHAYAM BASACK, 26 C. 232=3 C.W.N. 97 ... 752

(24) S. 494—See BIGAMY, 26 C. 336.

Penalty.

See INTEREST, 26 C. 300.

Permanent Tenure.

(1) See LANDLORD AND TENANT, 26 C. 204.

(2) See LIMITATION ACT (XV OF 1877), 26 C. 204.

Personal Discharge.

Application by insolvent for—See INSOLVENT ACT (11 AND 12 VICT., C. 21), 26 C. 973.

Petition.

(1) Filed in former proceeding—See EVIDENCE ACT (I OF 1872), 25 C. 210.

(2) For dissolution of marriage, withdrawal of—See PRACTICE, 25 C. 222.

(3) Verification of—See LETTERS OF ADMINISTRATION, 26 C. 404.

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(1) Amendment of—See DECLARATORY DECREE, 26 C. 845.

(2) *Amendment of Plaint—Civ. Pro. Code (Act XIV of 1882), ss. 42, 45 and 53.*—On the question of amending a plaint, s. 53 of the Civ. Pro. Code should be read with ss 42 and 45; that it is the intention of the Legislature that all matters in dispute should be disposed of in the same suit. The proviso to s. 53 is not intended to interfere with this. SARAL CHAND MITTER v. MOHUN BIBI, 25 C. 371 = 2 C.W.N. 18 and 201 ... 247

(3) Order returning for presentation in proper Court—See APPEAL (GENERAL), 26 C. 275.

Plaintiff.

(1) Refusal to join suit as—See PARTIES, 26 C. 409.

(2) Right of, to draw out money deposited in Court by defendant—See PRACTICE, 26 C. 766.

Plea.

(1) In bar of suit—See HINDU LAW (JOINT FAMILY), 26 C. 349.

(2) Of fraud—See FRAUD, 26 C. 891.

Police Officer.

Confession to—See CONFESSION, 26 C. 569.

Possession.

(1) And mesne profits, decree for—See LIMITATION, 25 C. 203.

(2) On allegation of being heir by adoption—See LIMITATION (ACT XV OF 1877), 25 C. 354.

(3) Order as to, made by Civil Court—See CRIM. PRO CODE (ACT V OF 1898), 26 C. 625.

(4) Order of Criminal Court as to—See CRIM. PRO. CODE (ACT V OF 1898), 26 C. 188.

(5) Right of landlord to recover—See ACT VIII OF 1885 (BENGAL TENANCY), 26 C. 615.

(6) Suit by reversioner for—See LIMITATION ACT (XV OF 1877) and RES JUDICATA, 26 C. 285.

(7) Suit for—See BENAMI TRANSACTION, 25 C. 874.

(8) Suit for—See DECLARATORY DECREE, 26 C. 845.

(9) *Suit for—Previous possession. short of the statutory period of limitation—Dispossession—Suit brought more than six months after dispossession, effect of—Failure to prove title.*—Mere previous possession for any period short of the statutory period of twelve years will not entitle a plaintiff to a decree for recovery of possession in a suit brought more than six months after dispossession, even if the defendant could not establish any title to the disputed land. NISA CHAND GAITA v. KANCHIRAM BAGANI, 26 C. 579 = 3 C.W.N. 568 ... 972

(10) See CRIM. PRO. CODE (ACT X OF 1882), 25 C. 423.

(11) See RES JUDICATA, 25 C. 136.

Potta.

Contract in, allowing surrender of land—See LEASE, 26 C. 29.

Practice.

(1) *Agreement as to costs between attorney and client—Change of attorney—Right of attorney to his taxed costs.*—Where *F*, an attorney, agreed to conduct a suit for his client and to accept Rs. 150 for his personal services, and not in respect of out-of-pocket costs and counsel's fees, and in the event of his client being successful to recover his full costs from the opposite party and to refund the Rs. 150, it was *held*, upon the client desiring to change to another attorney, that he could do so upon payment to *F* of his taxed costs. GHASSEE JEMADAR v. NASSIRUDDIN MISTRY, 26 C. 769 ... 1092

(2) *Commission—Right of* purdahnashin *lady to be examined on—Civ. Pro. Code (Act XIV of 1882), s. 640.*—The defendant applied for a commission to examine a Hindu *purdahnashin* lady. The plaintiff objected on the ground that the lady had prior to this appeared in public, and had also

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been examined in Court in a *palki*. *Held*, the lady being a *purdahnashin*, she was entitled to be examined on commission. MOHESH CHUNDER ADDY v. MANICK LALL ADDY, 26 C. 650=3 C.W.N. 751 ... 1017

(3) *Consent decree, Setting aside—Motion.*—A consent decree cannot be set aside on motion on the ground that it was obtained by fraud and misrepresentation. A separate suit must be brought for that purpose. Charges of fraud cannot properly be tried upon affidavits. FOOLCOOMARY DASI v. WOODOY CHUNDER BISWAS, 25 C. 649 ... 427

(4) *Deposit by defendant of money in Court in satisfaction of claim—Right of plaintiff to draw out such money and prosecute suit for balance claimed—Discretion of Court—Code of Civil Procedure* (*Act* XIV *of* 1882), *ss.* 377, 379.—Suit for recovery of Rs. 5,500 on three promissory notes. Defendant pleaded minority at the date of the transactions, denied all liability, also denied receiving Rs. 5,500, but admitted receipt of Rs. 1,500, which sum together with interest he tendered to the plaintiff in full satisfaction of his claim. On refusal by the plaintiff to accept that sum it was paid into Court. The plaintiff then applied to the Court for payment to him of the said amount. The defendant contended that the amount should be kept in Court pending the hearing as all liability was denied and offered to pay interest if plaintiff succeeded in his suit. *Held*, that the plaintiff was entitled to take the money out of Court. DWARKA DASS AGURWALLAH v. GIRISH CHUNDER ROY, 26 C. 766 ... 1090

(5) *Divorce Act* (IV *of* 1869), *s.* 36—*Alimony* pendente lite, *Application for—Denial of means by respondent—Reference to Registrar—Respondent ordered to attend Court for cross-examination as to his means*—On an application alleging means made by a petitioner, the wife, for alimony *pendente lite*, the respondent denied means. The Court refused to refer the matter to the Registrar to inquire and report, but ordered the respondent to attend Court for cross-examination as to his means. STEVENSON v. STEVENSON, 26 C. 764 ... 1089

(6) *Evidence taken on commission on behalf of defendant—Right of plaintiff to refer to such evidence as part of record of suit—Civ. Pro. Code* (*Act* XIV *of* 1882), *ss.* 389, 390—*Act* VIII *of* 1859, *s.* 179.—Defendant examined a witness on commission. The commission was returned to the Court. The plaintiff in opening his case claimed the right to refer to the evidence taken on commission as part of the record of the suit. Defendant objected, contending that if plaintiff read it, he must read it as his own evidence. *Held*, that the plaintiff was entitled to refer to the evidence as part of the record. NISTARINI DASSEE v. NUNDO LALL BOSE, 26 C. 591=3 C.W. N. 670 ... 999

(7) *Official Trustee, Appointment of—Official Trustee's Act* (XVII *of* 1864), *s.* 10—*Consent of beneficiaries—Evidence Act* (I *of* 1872), *s.* 85—*Affidavit, sufficiency of.*—On an application under s. 10 of the Official Trustee's Act (XVII of 1864), where the petition was not signed by one of the beneficiaries, the Court held upon other evidence that such beneficiary was desirous of having the Official Trustee appointed as trustee of the will, *In the goods of* COLLETT, 25 C. 856 ... 558

(8) *Receiver—Power to sue in his own name—Code of Civil Procedure* (*Act* XIV *of* 1882) *s.* 503—*Trust deed to liquidate debts—Non communication of trust-deed to creditors—Limitation—Limitation Act* (XV *of* 1877), *s.* 10.—The Court has authority, under s. 503 of the Civ. Pro. Code, to confer on a receiver the power to sue in his own name; and if the order appointing the receiver gives him liberty, he may do so. *D S* executed a trust-deed, whereby he made over his property to trustees to manage his affairs and liquidate his debts in manner therein directed. The deed contained this provision: "In order to prepare a list of my debts, the trustees shall ascertain the same by looking into my books of accounts; and they shall not admit any debt without *rokur*, *hathchitta*, or *hundi* bearing the signature of myself or my *monib gomastas*, or without decree." *Held*, in the absence of evidence that this deed was communicated to the creditors, that it did not create a trust in favour of the creditors, but enured only for the benefit of the executant; that therefore the plaintiff, a creditor, was not entitled to rank as a beneficiary under it; and that it did not create a trust in his

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favour so as to take out of the operation of the Limitation Act a claim that otherwise fell within it. FINK v. MOHARAJ BAHADUR SINGH, 25 C. 642=2 C.W.N. 469 ... 422

(9) *Remission of process fees—Rules of High Court, Calcutta, Chap.* XIV—*Process fees—Remission of fees in analogous appeals by the same appellants.*—Where twenty-nine appeals were presented by certain appellants, and an application was made for remission of process fees, and that only five sets of process fees instead of twenty-nine should be charged under Chap. XIV of the Rules of High Court, on the ground that the appeals were analogous and on behalf of the same appellants the Court (GHOSE and RAMPINI, JJ.) refused the application. *Held*, by RAMPINI, J., that the High Court has no power to grant the remission, and that the fees prescribed by the rules *must* be levied. *In the matter of the* APPLICATION OF STUDD, 26 C. 124=3 C.W.N. 82 ... 684

10) *Withdrawal of petition for dissolution of marriage—Costs of petitioner, on what scale allowed—Divorce Act* (IV *of* 1869), *ss.* 7, 35 *and* 45.—The petitioner on the 2nd June 1896 presented her petition, in which she prayed for the dissolution of her marriage with the respondent on the grounds of adultery and cruelty. A commission was issued at her instance to examine witnesses in England on the charges of adultery and cruelty, and the result of their evidence was that the petitioner was satisfied that the charges brought by her against her husband were wholly unfounded, and she on the 2nd September 1897 applied for leave to withdraw her suit and for payment of her costs by the respondent. She contended that her costs should be paid by him as between attorney and client. The respondent submitted he ought to pay costs only as between party and party. *Held*, that the petitioner's costs including costs of this application, be taxed as between party and party, it being open for the attorney for the wife to sue the husband for the rest of the costs. BUTT v. BUTT, 25 C. 222=2 C.W. N. 37 ... 150

(11) See ACT I OF 1895 (SMALL CAUSE COURT, PRESIDENCY TOWNS), 25 C. 455.

(12) See APPEAL (TO PRIVY COUNCIL), 26 C. 246.

(13) See COSTS, 25 C. 893.

(14) See CRIM. PRO. CODE (ACT X OF 1882), 25 C. 798.

(15) See DECLARATORY DECREE, 26 C. 845.

(16) See HINDU LAW (WILL), 25 C. 112.

(17) See INSPECTION, 25 C. 294.

(18) See LETTERS OF ADMINISTRATION, 26 C. 407, 408.

(19) See PRIVY COUNCIL, 25 C. 187, 189.

(20) See REFERENCE, 26 C. 585.

(21) See REVISION, 25 C. 233.

Preliminary Objection.

To appeal, time occupied in hearing—See COSTS, 26 C. 361.

Prescription.

See RIGHT OF WAY, 26 C. 593.

Presidency Magistrate.

(1) Jurisdiction of—See ACT XIII OF 1859 (WORKMAN'S BREACH OF CONTRACT), 25 C. 637.

(2) Jurisdiction of—See SANCTION FOR PROSECUTION, 26 C. 359.

(3) See REVISION, 26 C. 746.

Presumption.

As to fixity of rent—See ENHANCEMENT OF RENT, 26 C. 617.

Primogeniture.

Custom of—See ACT I OF 1869 (OUDH ESTATES), 26 C. 81.

Principal and Agent. PAGE

Holding out, by the principal of the agent's authority.—The right of a third party against the principal on the contract of his agent, though made in excess of the agent's actual authority, was nevertheless enforced where the evidence showed that the contracting party has been led into an honest belief in the existence of the authority to the extent apparent to him. RAM PERTAB v. MARSHALL, 26 C. 701 (P.C.)=3 C.W.N. 313=7 Sar. P.C.J. 455 ... 1048

Printed Case.

Costs of filing—See PRIVY COUNCIL, 25 C. 187.

Private Defence.

Of property, right of—See RIOTING, 26 C. 574.

Private International Law.

See FOREIGN COURT, 26 C. 931.

Privileged Communication.

(1) *Communication to mukhtear when acting as pleader—Evidence Act* (I *of* 1872), s. 126.—The restrictions imposed by s. 126 of the Evidence Act in respect of what are known as privileged communications extend also to communications made to *mukhtears* when acting as pleaders for their clients. ABBAS PEADA v. QUEEN-EMPRESS, 25 C. 736=2 C.W.N. 484 ... 481

(2) See EVIDENCE ACT (I OF 1872), 26 C. 53.

Privy Council.

(1) Order of—See EXECUTION OF DECREE, 25 C. 283.

(2) *Practice of—Concurrent judgments on fact—Hindu Law—Alienation by one of two co-widows—Want of legal necessity.*—Two widows of the same husband, each having inherited her undivided share in the inheritance, disputed as to their rights therein. They then settled their dispute by a compromise in which it was agreed that each had obtained absolute proprietary right in her share as a co-widow, and that division had been made between them. Having no power by this to affect the rights of the successor to the estate on their deaths each was entitled to her share for her widow's estate only. Upon a mortgage made by the elder widow before her death the mortgagee now claimed, not only the interest of both the widows and thus to deprive the younger who had survived the other of her interest during her life, but also claimed a charge on the estate of her inheritance in the land mortgaged. Against the competency of the elder widow to charge the estate of both and to bind the reversioner both Courts below had decided. They had found that there had been no justifying necessity established by the evidence for the mortgage. These concurrent findings having been accepted by the Judicial Committee as correct in regard to the absence of necessity for the mortgage, they saw no occasion to say anything about any other questions as to the competency of the elder widow to mortgage the whole estate in the way in which she did. DHARAM CHAND LAL v. BHAWANI MISRAIN, 25 C. 189 (P.C.) =24 I.A. 133=1 C.W.N. 697=7 Sar. P.C.J. 245 ... 128

(3) *Practice of—Costs of respondents—Printed cases*—Ex-parte *hearing.*—The respondents in four appeals which were consolidated and heard as one, filed their printed case and did not appear at the hearing which was *ex-parte*. *Held*, that the respondents, notwithstanding their non-appearance, were, on the dismissal of the appeal, entitled to the costs thereof up to and including the filing of their printed case, and also to the costs of applying for those costs. SUMBHU NATH SANTRA MAHAPATRA v. SURJAMONI DEI, 25 C. 187 (P.C.)=24 I.A. 191=1 C.W.N. 649=7 Sar. P.C.J. 247 ... 126

Probate.

(1) *Grant of probate—Subsequent inconsistent will of which probate is also granted—Costs of executor.*—The executor of a will had obtained probate thereof, when the executor of a subsequent (and inconsistent) will applied for and obtained probate of the second will. *Held*, that having regard to the circumstances of the case, and to the fact that the litigation was produced by the conduct of the testatrix herself, the executors of both wills were entitled to their costs to be paid out of the estate; but that in so far as the costs would not be covered by the estate, each party must bear his own costs. *In the goods of* TARAMONI DASI, 25 C. 553 ... 365

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(2) *Jurisdiction in probate cases—Transfer of a probate case by the District Judge in whose Court it was instituted to that of a Subordinate Judge—The Bengal, North-Western Provinces and Assam Civil Courts Act* (XII *of* 1887), *s.* 23, *sub-s.* 2 *cl.* (*d*)—*Probate and Administration Act* (V *of* 1881), *s.* 52.—An application was made for probate of the will of a deceased testator in the Court of the District Judge, who transferred the case to that of the Subordinate Judge. The opposite party (*inter alia*) objected that the Subordinate Judge had no jurisdiction to try the case: *Held*, that the case came within the scope of s. 23, sub-s. 2, cl. (*d*) of the Bengal, North-Western Provinces and Assam Civil Courts Act (XII of 1887), and therefore, the Subordinate Judge had jurisdiction to try it. KUNJO BEHARI GOSSAMI v. HEM CHUNDER LAHIRI, 25 C. 340 ... 228

(3) *Of part of a will—Probate and Administration (Act V of 1881) s.* 25.—Probate can be granted of a portion only of a will to the extent to which the contents are proved where the other portion is lost; and there is nothing in s. 25 of the Probate and Administration Act (V of 1881) to prohibit such a grant of probate. KEDAR NATH MITTER v. SAROJINI DASI, 26 C. 634=3 C.W.N. 617 ... 1007

(4) Or Letters of Administration—Payment of fee on—See LETTERS OF ADMINISTRATION, 26 C. 407.

Procedure.

See MAINTENANCE, 25 C. 291.

Proceedings.

(1) In more Courts than one—See ACT VIII OF 1890 (GUARDIANS AND WARDS), 26 C. 133.

(2) Of—See REVISION, 26 C. 746.

Process Fees.

Remission of—See PRACTICE, 26 C. 124.

Proclamation.

Of sale, misdescription of property in—See APPEAL (SECOND APPEAL), 25 C. 99.

Professional Communication.

To clerk of pleader—See EVIDENCE ACT (I OF 1872), 26 C. 53.

Projection.

Caused by restoring old building—See ACT III OF 1884 (BENGAL MUNICIPAL), 25 C. 160.

Promissory Note.

Suit on—See HINDU LAW (JOINT FAMILY), 26 C. 349.

Property.

(1) Misdescription of, in proclamation of sale—See APPEAL (SECOND APPEAL), 25 C. 99.

(2) Suit for conversion of, to uses not intended—See LIMITATION ACT (XV OF 1877), 26 C. 564.

Property Mark.

Selling books with counterfeit—See PENAL CODE (ACT XLV OF 1860), 26 C. 232.

Proprietor.

Unregistered—See ACT VII OF 1876 (LAND REGISTRATION, BENGAL), 26 C. 712.

Prospective Order.

See INSOLVENT ACT (11 AND 12 VICT., C. 21), 26 C. 973.

Prostitute.

Succession to property of—See HINDU LAW (INHERITANCE), 25 C. 254.

Public Nuisance.

See NUISANCE, 25 C. 278.

Public Place.

See NUISANCE, 25 C. 425.

Public Servant. PAGE

(1) Authority of—See PENAL CODE (ACT XLV OF 1860), 26 C. 630.

(2) Criminal breach of trust by—See PENAL CODE (ACT XLV OF 1860), 26 C. 560.

(3) Deterring from discharge of his duty—See PENAL CODE (ACT XLV OF 1860), 26 C. 630.

(4) *Penal Code (Act* XLV *of* 1860), ss. 21 *and* 186—*Surveyor employed by the Collector.*—The Collector acting in the management of a *khas mehal*, the property of the Government, is as much "the Government" within the meaning of s. 17 of the Penal Code as when he is exercising any other of the duties of his official position. A surveyor employed by the Collector in the *khas mehal* department to make a survey of a certain portion of a water-course is a "public servant" within the meaning of s. 21 of the Penal Code. BAJOO SINGH v. QUEEN-EMPRESS, 26 C. 158=3 C.W.N. 115 ... 705

Public Way.

(1) Obstruction in—See NUISANCE, 25 C. 278; 26 C. 869.

(2) See PENAL CODE (ACT XLV OF 1860), 25 C. 275.

Purchase.

By third party while decree and order for sale are valid—See SALE, 26 C. 734.

Purchase-money.

Source of—See BENAMI TRANSACTION, 26 C. 227.

Purchasers.

(1) Contest between rival—See TITLE, 26 C. 11.

(2) Liability of—See ACT VIII OF 1885 (BENGAL TENANCY), 26 C. 315.

(3) Not a party to suit—See SALE, 26 C. 324, 326-N.

(4) Of decree—See CIV. PRO CODE (ACT XIV OF 1882), 26 C. 250.

(5) Of putni taluk—See LIMITATION ACT (XV OF 1877), 25 C. 167.

(6) Of putni taluk during pendency of appeal for setting aside sale, payment by—See VOLUNTARY PAYMENT, 26 C. 826.

(7) Rights of—See SALE, 26 C. 937.

Putnidar.

(1) Liability of—See LANDLORD AND TENANT, 26 C. 103.

(2) Relinquishment by—See LIMITATION ACT (XV OF 1877), 26 C. 460.

Putni Sale.

See VOLUNTARY PAYMENT, 26 C. 826.

Question.

(1) Directly and substantially in issue—See RES JUDICATA, 25 C. 136.

(2) For Court executing decree—See CIV. PRO. CODE (ACT XIV OF 1882), 26 C. 727.

(3) In execution of decree—See APPEAL (GENERAL), 26 C. 529.

(4) In execution of decree—See APPEAL (SECOND APPEAL), 26 C. 539.

(5) In execution of decree—See CIV. PRO. CODE (ACT XIV OF 1882), 25 C. 133; 26 C. 946.

(6) Of title—See ACT XV OF 1882 (SMALL CAUSE COURTS, PRESIDENCY TOWNS), 26 C. 778.

Railway.

Through independent State, jurisdiction on—See JURISDICTION, 25 C. 20.

Railway Company.

Duty to carry passengers safely—Explosion in carriage—Negligence—Onus of proof—Ignorance or knowledge of law as a defence—Is limitation—Damages, measure of—Costs—Held by the appellate Court (affirming the decision of the Court below): In providing for the safety of their passengers it is the duty of a Railway Company to exercise such a degree of care, at the very least, as may reasonably be required from them under all the circumstances of the case, and where an accident happens they must show that it was not preventible by any care or skill. If a railway carriage

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be rendered dangerous to the passengers travelling therein by reason of the faot that there are fire-works in it, and if the carrying of the fire-works could have been prevented by the exercise of due care on the part of the Railway Company they are liable for damage for negligence should an explosion of the fire-works occur. Where loss of life and damage have resulted from the explosion of fire-works in a passenger carriage, the onus is on the railway oompany to show that they took due oare to prevent the conveyance of fireworks in that manner, and not on the plaintiff to show that they did not. Costs in a case like the present should be allowed as between attorney and client, so as not to exhaust the damages or the larger portion thereof. *Per* O'KINEALY, J. (in the Court below):—In the absence of evidence that the defendants had taken steps to prevent passengers from taking fireworks into the oarriage, the Court cannot presume that the fireworks were taken clandestinely into the compartment notwithstanding the fact that such carriage of fireworks is an offence, and that every one is presumed to know the law. The maxim that every man is presumed to know the law is limited to the determination of the civil or criminal liability of the person whose knowledge is in question. It cannot legitimately be made use of where (as in the present case) the parties are different and distinct from him. EAST INDIAN RAILWAY COMPANY v. KALLY DASS MOOKERJEE, 26 C. 465 = 2 C.W.N. 609 = 3 C. W.N. 781 ... 900

Railway Receipts.

For goods, Tender of—See CONTRACT, 26 C. 142.

Raiyat.

Raiyat brought on land by lessee, right of, on expiry of lease—See ACT VIII OF 1885 (BENGAL TENANCY), 26 C. 546.

Raiyati Holding.

See ACT VIII OF 1885 (BENGAL TENANCY), 26 C. 46.

Rateable Payment.

Meaning of—See ACT II OF 1874 (ADMINISTRATOR-GENERAL'S), 25 C. 54.

Ratification.

See SETTLEMENT, 26 C. 792.

Receiver.

(1) Appointed by decree-holder, Money realized by—See EXECUTION OF DECREE, 26 C. 772.

(2) Appointment of—See DECREE, 26 C. 441.

(3) *Mortgage decree—Execution of mortgage decree by sale of properties in the possession of the Receiver—Attachment.*—A judgment-creditor can sell properties in the hands of a Receiver of the Court in execution of a mortage decree, although he cannot execute a decree against such properties by way of attaohment and sale. *Semble.*—A proceeding by way of attachment is an interference with the possession of the Receiver. JOGENDRA NATH GOSSAIN v. DEBENDRA NATH GOSSAIN, 26 C. 127 = 3 C.W.N. 90 ... 686

(4) Power to sue in his own name—See PRACTICE, 25 C. 642.

Recognizance to keep Peace.

(1) *Crim. Pro. Code (Act V of* 1898), *s.* 106—*Security for keeping the peace on conviction—Conviction under* s. 143 *of the Penal Code* (*Act* XLV *of* 1860). —Conviction of a person under s. 143 of the Penal Code is not necessarily a ground for making an order against him under s. 106 of the Crim. Pro. Code. In order to bring his acts within the terms of the latter section, there must either be an express finding to the effect that his acts involved a breach of the peace, or an evident intention of committing the same, or the evidence must be so olear as to satisfy the Court (without an express finding) that such was the case. JIB LAL GIR v. JOGMOHAN GIR, 26 C. 576 ... 970

(2) *Crim. Pro. Code (Act* X *of* 1882), *s.* 106—*Security to keep the peace on conviction—Breach of the peace—Penal Code* (*Act* XLV *of* 1860), *s.* 448 —*House-trespass.*—An order under s. 106 of the Crim. Pro. Code (Act X of 1882) binding down the accused to keep the peace, upon conviction for "house trespass" under s. 448 of the Indian Penal Code, cannot stand

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where the intention of the accused in committing the trespass was to have illicit intercourse with the complainant's wife. It is necessary before an order under s. 106 of the Crim. Pro. Code can be made that the accused should have an opportunity of answering to an accusation for an offence of the kind upon a conviction for which such an order can be made. SUBAL CHUNDER DEY v. RAM KANAI SANYASI, 25 C. 628 =3 C.W.N. 18 ... 413

(3) *Surety bond — Liability to forfeiture—Evidence necessary — Crim. Pro. Code* (*Act* X *of* 1882), *s.* 514.—The mere fact of the person for whom another stands surety being convicted of a breach of the peace ought not to be sufficient to make the surety bond executed by the latter liable to forfeiture without any evidence taken in the presence of the surety to show that the forfeiture has been incurred. The language of s. 514 of the Crim. Pro. Code (Act X of 1882) does not indicate that the final order making a person bound by a bond can be made without taking any evidence in his presence or giving him any opportunity of cross-examining the witnesses on whose evidence the forfeiture is held to be established. The mere production of the original record or of a certified copy of the original record of the trial in which the principal had been convicted of breaking the peace within the period covered by a bond would not be conclusive, if indeed it would be any evidence, against the surety in a proceeding under s. 514 of the Crim. Pro. Code. QUEEN-EMPRESS v. HAR CHANDRA CHOWDHURY, 25 C. 440 ... 292

(4) See CRIM. PRO. CODE (ACT X OF 1882), 25 C. 559.

Record.

(1) Of rights—See ENHANCEMENT, 26 C. 617.

(2) Of Suit, evidence on commission referred to as part of—See PRACTICE, 26 C. 591.

(3) See EVIDENCE ACT (I OF 1872), 25 C. 90.

Recorder of Rangoon.

Jurisdiction of—Reference to High Court, Calcutta—Lower Burma Courts Act (XI *of* 1889), *s.* 42—*Doubt—Conflicting decisions—Decision of Superior Court—Power of Recorder to refer.*—The Recorder of Rangoon, in a suit tried by him, referred to certain decisions of the High Courts at Calcutta, Bombay and Madras, which were in conflict, and, not agreeing with the decision of the Calcutta High Court, referred the case to the High Court in its appellate jurisdiction. *Held*, that as the decisions of the High Court at Calcutta are binding on the Recorder, he had no jurisdiction to make the reference, and that it must be returned. MAHOMED HADY v. SWEE CHEANG AND COMPANY, 25 C. 488=1 C.W.N. 172 ... 324

Reference.

(1) By Sub-divisional Magistrate to second class Magistrate—See NUISANCE, 25 C. 278.

(2) To Registrar—See PRACTICE, 26 C. 764.

(3) *To Registrar—Statement of facts, filing of, after appointed time—Right of party falling to appear and support such statement—Practice—Rules of High Court, Nos.* 522. 537.—On the 4th February 1899 one *G* was granted a month's time to file his statement of facts in a reference which was pending before the Registrar, and in default thereof it was ordered that the reference should be heard *ex parte* against him. The statement of facts was filed before the Registrar seven days after the proper time. The Registrar refused to deal with the statement of facts without an order of Court. *G* then applied to the Court for an order that the Registrar might be at liberty to refer to the statement of facts, and that *G* might be permitted to appear and support them. The party opposing contended that *G* ought not to be allowed to file his statement of facts, that he might appear in person, but had no right to employ counsel or attorney. *Held*, that *G* was entitled to file his statement of facts and that the reference should be proceeded with in the usual course. TARAK MOHINEY DASSEE v. GREES CHUNDER DASS, 26 C. 585 ... 976

Refusal.

To join as plaintiff—See PARTIES, 26 C. 409.

Registrar. PAGE

(1) Reference to—See PRACTICE, 26 C. 764.

(2) See REFERENCE, 26 C. 585.

Registration.

of Name - See ACT VII OF 1876 (LAND REGISTRATION, BENGAL), 26 C. 536.

Registration Act (III of 1877).

(1) Ss. 35, 73, 76, 77—*Denial of execution—Suit to enforce registration—Right of suit.*—Where the executant of a document did not appear before the Sub-Registrar although summons was issued to such executant, and the Sub-Registrar thereupon refused to register the document, *held* in a suit under s. 77 of the Registration Act to enforce registration of the document.—(1) That the case was one of "denial" of execution within the meaning of ss. 35 and 73 of the Registration Act (III of 1877). (2) That an application to the Registrar made under s. 73 of the Act in this case was properly made under that section. (3) That the order of the Special Sub-Registrar to whom the case was referred, refusing registration of the document, was equivalent to an order by the Registrar. (4) That the case came under cl. (a) of s. 76 of the Act, and the present suit did lie under the provisions of s. 77. KUDRATHI BEGUM v. NAJIBUNNESSA, 25 C. 93 ... 63

(2) S. 49—See EVIDENCE, 26 C. 334.

Regulation VIII of 1819 (The Bengal Putni Taluqs).

(1) Ss. 3, 6—See LANDLORD AND TENANT, 25 C. 445.

(2) S. 6—See LANDLORD AND TENANT, 26 C. 103.

(3) S. 12—See LIMITATION ACT (XV OF 1877), 26 C. 460.

(4) S. 14—See VOLUNTARY PAYMENT, 26 C. 826.

Regulation III of 1822 (Bengal Board of Revenue).

S. 5 – See SETTLEMENT, 26 C. 792.

Regulation VII of 1822 (Bengal Land-Revenue Settlement).

(1) See LANDLORD AND TENANT, 26 C. 739.

(2) S. 7—See SETTLEMENT, 26 C. 792.

Regulation XI of 1825 (Bengal Land Revenue Settlement).

S. 4—See LANDLORD AND TENANT, 26 C. 739.

Regulation III of 1872 (Sonthal Pergunnahs Settlement).

S. 6—See CONTRACT ACT (IX of 1872), 26 C. 238.

Regulation II of 1880 (Assam Frontier Tracts).

S. 2—See REVISION, 26 C. 874.

Regulation I of 1886 (Assam Land and Revenue).

Ss. 65, 68, 70, *sub-s.* (2), *sub-s.* (3) *and s.* 71—*Act* XI *of* 1859, *s.* 37—"*Estate*"—"*Property*"—*Shikmi haziram rights.*—A purchaser of a part of a permanently settled estate is entitled to the benefit of s. 71 of the Assam Land and Revenue Regulation, inasmuch as in s. 71 the words used are "property sold under s. 70," and the property to which reference is made in s. 70 includes both an estate as well as a share in respect of which revenue has been separately apportioned. The object of s. 37, Act XI of 1859, is the same as that of s. 71, Reg. I of 1886. Those sections cannot be said to have different meanings, for if it were to be held that the incumbrance which could be set aside under s. 71 of the Reg. I of 1886 must be an incumbrance actively created by the previous holder, it would amount to this, that any acquiescence or laches, either wilful or arising from pure negligence on the part of the holder, by which the *taluk* or estate becomes incapable in the hands of the purchaser of yielding the Government revenue would be outside the scope of this section. MAHOMED NASIM v. KASHI NATH GHOSE, 26 C. 194 = 3 C.W.N. 108 ... 729

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(1) Putnidar, Effect of—See LIMITATION ACT (XV OF 1877), 26 C. 460.
(2) Of land, Contract allowing—See LEASE, 26 C. 29.

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(1) Acceptance of after term of settlement—See SETTLEMENT, 26 C. 792.
(2) Accrued due against female heir after death of last full owner—See SALE, 26 C. 285.
(3) Agreement to pay separately, Effect of—See ACT VIII OF 1885 (BENGAL TENANCY), 25 C. 917.
(4) Arrears of—See LIMITATION ACT (XV OF 1877), 26 C. 204.
(5) Arrears of—See SALE, 26 C. 285.
(6) Arrears of—See VOLUNTARY PAYMENT, 25 C. 305.
(7) Arrears of, Execution of decree for ejectment for—See ACT VIII OF 1885 (BENGAL TENANCY), 26 C. 639.
(8) Assessment of, in respect of accretion to parent estate—See LANDLORD AND TENANT, 26 C. 739.
(9) Customary rate of—See ENHANCEMENT, 26 C. 832.
(10) Decree for—See ACT VIII OF 1885 (BENGAL TENANCY), 26 C. 176.
(11) Decree for—See EXECUTION OF DECREE, 25 C. 322.
(12) Deposit and acceptance of—See LANDLORD AND TENANT, 25 C. 1.
(13) Deposit of, through transferee of holding—See LANDLORD AND TENANT, 25 C. 289.
(14) Enhancement of—See ACT VIII OF 1885 (BENGAL TENANCY), 26 C. 233.
(15) Extension of time for payment of—See ACT VIII OF 1885 (BENGAL TENANCY), 26 C. 639.
(16) Fair and equitable—See ENHANCEMENT, 26 C. 832.
(17) Increase in amount of, by reason of increase in area—See ACT VIII OF 1885 (BENGAL TENANCY), 26 C. 233.
(18) Increase in rate of—See ACT VIII OF 1885 (BENGAL TENANCY), 26 C. 233.
(19) Interest on—See INTEREST, 26 C. 130.
(20) Liability for—See LANDLORD AND TENANT, 26 C. 103.
(21) Of separate share—See SALE, 26 C. 937.
(22) Omission to claim interest on—See INTEREST, 26 C. 160.
(23) Payment of, to some of several joint landlords—See LANDLORD AND TENANT, 25 C. 324.
(24) Presumption as to fixity of—See ENHANCEMENT, 26 C. 617.
(25) Realization of—See LANDLORD AND TENANT, 26 C. 103.
(26) Receipt of, Effect of—See LANDLORD AND TENANT, 25 C. 1.
(27) Settlement of—See APPEAL (SECOND APPEAL), 25 C. 146.
(28) Settlement of fair and equitable rent—See ENHANCEMENT, 26 C. 617.
(29) Suit for—See ACT VIII OF 1885 (BENGAL TENANCY), 25 C. 781: 26 C. 199, 639.
(30) Suit for—See JURISDICTION, 26 C. 204.
(31) Suit for—See RES JUDICATA, 25 C. 136.
(32) Suit for enhancement of—See ACT VIII OF 1885 (BENGAL TENANCY), 25 C. 917.
(33) Transfer of share of under proprietor in—See ACT XVII OF 1876 (OUDH LAND REVENUE), 26 C. 523.
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(36) See RES JUDICATA, 26 C. 428.

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Res Judicata.

(1) *Code of Civil Procedure* (*Act* XIV *of* 1882), *s.* 13—*Issue decided in a previous suit not subject to second appeal—Same issue raised in a subsequent suit subject to appeal—Landlord and tenant—Suit for rent—Instalment—Bengal Tenancy Act* (VIII *of* 1885), *ss.* 53 *and* 153—*Second appeal.*—The question relating to instalments, though it affects the question of interest on the rent is not a question of "the amount of rent annually payable" within the meaning of s. 153 of the Bengal Tenancy Act. Therefore no second appeal would lie in a case where the value of the suit is less than Rs. 100, even if there is a question as to the instalment of rent. In a previous suit for rent valued at less than Rs. 100 by the plaintiff against the defendants, one of the questions raised was, in how many instalments the rent was payable, and it was held that it was not payable in instalments. In a subsequent suit for rent valued at more than Rs. 100 between the same parties, the question of instalments was again raised, as the plaintiffs claimed the rent to be payable in four instalments. The defendants *inter alia* pleaded that the question as to instalments was barred as *res judicata*. The Munsif held that it was so barred. On appeal the Subordinate Judge reversed the decision of the Munsif. On a second appeal to the High Court; *Held*, that the judgment in the previous suit operated as *res judicata*, notwithstanding that no second appeal was allowed by law in that suit. RAI CHARAN GHOSE *v.* KUMUD MOHUN DUTT CHOWDHRY, 25 C. 571=2 C.W.N. 297 ... 377

(2) *Code of Civil Procedure* (*Act* XIV *of* 1882), *s.* 13—*Landlord and tenant—Suit for rent—Issue whether land was* mal *or* lakhiraj—*Question raised in a rent suit, whether directly and substantially in issue in that suit—Subsequent suit for* khas *possession.*—In a previous suit brought by the predecessor in title of the plaintiff against the defendants for rent, one of the questions raised was whether the land, in respect of which rent was claimed, was *mal* or *lakhiraj*, and that question was decided in favour of the defendants. In a subsequent suit by the plaintiff against the same defendants for *khas* possession of certain land the defence was that the land in dispute was their *lakhiraj* land, and that the judgment in the previous suit operated as *res judicata*. *Held*, that though the previous suit was one for rent, yet the issue upon the question whether the land was *mal* or *lakhiraj* was raised directly in that suit and therefore the subsequent suit was barred as *res judicata*. KASISWAR MUKHOPADHYA *v.* MOHENDRA NATH BHANDARI, 25 C. 136 ... 93

(3) *Code of Civil Procedure* (*Act* XIV *of* 1882), *s.* 13—*Suit for rent—Suit for establishment of title.*—A decision in a suit for rent brought by a plaintiff against a person who is alleged to have been his tenant in respect of certain land, does not operate as *res judicata* in a subsequent suit brought by the same plaintiff for establishment of his title to the land, not only against the alleged tenant, but also against the person whose title as landlord the tenant defendant had set up in the rent suit. DWARKANATH ROY *v.* RAM CHAND AICH, 26 C. 428 (F.B.)=3 C.W.N. 266 ... 876

(4) *Suit to set aside sale for arrears of rent accrued due against female heir after death of last full owner—Subsequent suit by reversioner to recover immoveable property sold—Civ. Pro. Code* (XIV *of* 1882), *s.* 13.—A previous suit brought by a female heir to set aside a sale in execution of a decree for arrears of rent accrued due against her after the death of the last full owner was dismissed. In a subsequent suit by the reversioner for recovery of possession of the immoveable property so sold, the defence was that the suit was barred as *res judicata*. *Held*, that the dismissal of the previous suit, which was for recovery only of the limited estate of female heir, would

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not be a bar to the subsequent suit, which was for the recovery of the absolute estate, which vested in the reversioner. BRAJA LAL SEN v. JIBAN KRISHNA ROY, 26 C. 285 ... 787

(5) See ACT XV OF 1882 (SMALL CAUSE COURTS, PRESIDENCY TOWNS), 26 C. 778.

(6) See CIV. PRO. CODE (ACT XIV OF 1882), 26 C. 946.

(7) See EXECUTION OF DECREE, 25 C. 262.

(8) See SALE, 25 C. 833.

Respondent.

(1) Adding person as—See CIV. PRO. CODE (ACT XIV OF 1882), 26 C. 114.

(2) Costs of—See PRIVY COUNCIL, 25 C. 187.

(3) Costs of, security for—See APPEAL, 26 C. 246.

(4) Denial of means by—See PRACTICE, 26 C. 764.

(5) Ordered to attend Court for cross-examination as to his means—See PRACTICE, 26 C. 764.

(6) See PARTIES, 26 C. 109.

Resumption.

See SETTLEMENT, 26 C. 792.

Retrial.

Necessity for, on alteration of charge—See ATTEMPT, 26 C. 863.

Re-valuation.

Made by Municipality, Legality of—See ACT II OF 1888 (CALCUTTA MUNICIPAL CONSOLIDATION, BENGAL), 26 C. 74.

Revenue Court.

See ACT VII OF 1880 (BENGAL PUBLIC DEMANDS RECOVERY), 25 C. 789.

Review.

(1) *Civ. Pro. Code* (*Act* XIV *of* 1882), *ss.* 102, 103 *and* 623—*Dismissal of a suit for default under s.* 102—*Review of judgment without applying to reinstate the suit under s.* 103 *of the Code.*—Where a suit was dismissed for default under s. 102 of the Code of Civil Procedure, and an application for review of judgment was made by the plaintiff without a previous application to have the order of dismissal set aside under s. 103 of the Code: *Held*, that the Court had jurisdiction to entertain the application for review of judgment. RAJ NARAIN PURKAIT v. ANANGA MOHAN BHANDARI, 26 C. 598 984

(2) Of judgment—See ACT VIII OF 1885 (TENANCY, BENGAL), 25 C. 146.

(3) Order, amending sale certificate—See APPEAL (GENERAL), 26 C. 529.

(4) See LIMITATION ACT (XV OF 1877), 25 C. 258.

Revision.

(1) *High Court's power of revision—Presidency Magistrate, Proceedings of—Order for further inquiry—Crim. Pro. Code* (V *of* 1898), *ss.* 423, 435 *and* 439—*Letters Patent, High Court,* 1865, *cl.* 28.—The High Court has under ss. 435 and 439, read with s. 423 of the Crim. Pro. Code, the power to revise the proceedings of a Presidency Magistrate and order a further inquiry to be made. It has the same power under cl. 28 of the Letters Patent of 1865. COLVILLE v. KRISTO KISHORE BOSE, 26 C. 746 ... 1077

(2) *High Court's power of revision—Withdrawal of the operation of the Crim. Pro. Code, Scheduled Districts Act* (XIV *of* 1874), *s.* 6—*Assam Frontier Tracts Reg.* 1880, *s.* 2—*Jurisdiction of the High Court—Power of the Supreme Council.*—The effect of the rules laid down by the Chief Commissioner of Assam under s. 6 of the Scheduled Districts Act (XIV of 1874), taken in conjunction with the notification issued by him in the exercise of the powers conferred by s. 2 of the Assam Frontier Tracts Reg. 1880, directing that the Crim. Pro. Code, should cease to operate in the North Cachar Hills from the date of the notification, is to supersede all previously existing criminal authority in that district by that of the Chief Commissioner.

Revision—(*Concluded*). PAGE

The power of the Supreme Legislative authority of India to remove any place or territory from the jurisdiction of the High Court is, as was said in 4 C. 172 = 5 I. A. 178, "expressly authorized and contemplated" by the Statutes and Letters Patent which affect the constitution and jurisdiction of the Court. *Semble*—Notwithstanding the withdrawal of the operation of the Crim. Pro. Code, from a certain District, the High Court may continue to exercise appellate and revisional powers over that District. SOONDERJEE NANJEE v. MAYLON, 26 C. 874 = 3 C.W.N. 564 ... 1160

(3) Power of High Court in—See CRIM. PRO. CODE (ACT V OF 1898), 26 C. 625.

(4) Power of High Court on—See NUISANCE, 25 C. 852.

(5) *Power of interference by the High Court—Test as to whether case is of exceptional nature or not—Practice in Criminal Case.*—The High Court will not interfere in a case during its pendency in a Subordinate Court, unless it is of an exceptional nature; and one test of its being of such a nature is that a bare statement of the facts of the case without any elaborate argument should be sufficient to convince the High Court that the case is a fit one for its interference at an intermediate stage. CHOA LALL DASS v. ANANT PERSHAD MISSER, 25 C. 233 ... 157

(6) See PRACTICE, 26 C. 124.

(7) See SANCTION FOR PROSECUTION, 26 C. 852.

Right of Occupancy.

(1) Effect of purchase of, by co-sharer landlord—See CO-SHARERS, 26 C. 553.

(2) Not transferable by custom—See CIV PRO CODE (ACT XIV OF 1882), 26 C. 727.

(3) Sale of—See SALE, 26 C. 937.

(4) *Transfer of occupancy rights—Bengal Tenancy Act* (VIII *of* 1885), *ss.* 178, 183 —*Usage or custom—Evidence Act (I of 1872), s. 48—Admissibility of opinion as to existence of custom or usage.*—In this suit the plaintiffs by virtue of *putni* settlements sought to obtain *khas* possession of certain *jote* lands which purported to have been conveyed by the *jotedars*, the first set of defendants, to the second set of defendants, although there was no custom or usage in the village recognising the transferability of occupancy rights. *Held*, that in order to establish *usage* under ss. 178, 183 of the Bengal Tenancy Act, it was not necessary to require proof of its existence for any length of time. *Held*, also, that the statement made by persons who were in a position to know of the existence of a custom or usage in their locality were admissible under s. 48 of the Evidence Act. SARIATULLAH SARKAR v. PRAN NATH NANDI, 26 C. 184 ... 723

(5) Transfer of portion of—See ACT VIII OF 1885 (BENGAL TENANCY), 26 C. 615.

(6) See ACT VIII OF 1885 (BENGAL TENANCY), 26 C. 546.

Right of Suit.

(1) Benamidar—*Suit for ejectment—Parties.*—A mere *benamidar* cannot maintain a suit for ejectment, he having neither title to nor possession of the property. ISSUR CHANDRA DUTT v. GOPAL CHANDRA DAS, 25 C. 98 = 3 C.W.N. 20 ... 67

(2) *Suit to set aside sale for arrears of road and Public cesses—Appeal to Commissioner—Act* XI *of* 1859, *s.* 33—*Public Demands Recovery Act (Bengal Act* VII *of* 1880), *s.* 2—A suit to set aside a sale for arrears of road and public cesses will lie, although no previous appeal to the Commissioner has been made under s. 33 of Act XI of 1859. Such a sale is not one for arrears of revenue or other demands realizable in the same manner as arrears of revenue are realizable within the meaning of that section. MOHIBUL HUQ v. SHEO SAHAY SINGH, 25 C. 85 ... 58

(3) See ACT VII OF 1876 (LAND REGISTRATION BENGAL), 26 C. 712.

(4) See BENAMI TRANSACTION, 25 C. 874.

(5) See LETTERS OF ADMINISTRATION, 25 C. 354.

(6) See MESNE PROFITS, 26 C. 356.

(7) See SALE, 26 C. 324, 326 N.

(8) See SUCCESSION CERTIFICATE ACT (VII OF 1889), 26 C. 839.

Right of Way. PAGE

(1) *Limitation Act* (XV *of* 1877), *s.* 26—*Easement—Prescription—Continuance of enjoyment as of right—Cessation of user—Actual user.*—No rule can be laid down as to what would or would not constitute a continuance of the enjoyment as of right of a right of way, when there has been no exercise of it for any given period ; that must depend upon the circumstances of each case and the nature of the right claimed. For the plaintiff to succeed in a suit for the declaration of a right of way, as acquired under s. 26 of the Limitation Act, conceding that he need not prove an *actual* user of the way up till the end of the statutory period of twenty years, there must, when there is no user for a long time, be circumstances from which the Court can infer the continuance of enjoyment as of right over the whole statutory period, and the cessation of the user must be at least consistent with such continuance. The enjoyment required by the Act cannot be in abeyance, and at the same time continue so as to give the plaintiff the special right claimed. The question of continued enjoyment is an inference to be drawn from facts, rather than one of fact, and if there are no facts to sustain the inference, a decision in favour of such enjoyment cannot stand. The plaintiffs sued the defendant for the declaration of a right of way, as acquired under s. 26 of the Limitation Act, over a plot of land belonging to the defendant. It was alleged that in April 1892, the defendant dispossessed the plaintiffs from the dominant tenement; and that the plaintiffs sued the defendant for recovery of possession of it under s. 9 of the Specific Relief Act, and having obtained a decree. got possession on the 19th June 1895. It was further alleged that thereupon the defendant, on the 21st June 1895, obstructed the disputed way by erecting sheds. The present suit was instituted on the 25th November 1895. *Held*, that the enjoyment of the right of way on the part of the plaintiffs not having continued until within two years of institution of the suit, the suit must fail. JANHAVI CHOWDHURANI v. BINDU BASHINI CHOWDHURANI, 26 C. 593 = 3 C.W.N. 610 ... 981

(2) See EASEMENT, 26 C. 311.

Rioting.

Unlawful assembly—Right of private defence of property—Causing hurt in furtherance of common object—Penal Code (*Act* XLV *of* 1860), *ss.* 147. 323.—The party of the accused accompanied by *R* went armed with *lathis* to fish in a tank in which *R* had a two annas share. The complainant, who with some other co-sharers represented an eleven annas insterest in the tank, went there with some of these co-sharers, to protest on the ground that the accused had no share or interest in the tank. A fight ensued, in the course of which some of the complainant's party received slight injuries. *Held*, that the accused were rightly convicted of rioting and voluntarily causing hurt under ss. 147 and 323 of the Penal Code. ANANT PANDIT v. MADHUSUDAN MANDAL, 26 C. 574 ... 969

Road and Public Cesses.

Suit to set aside sale for arrears of—See RIGHT OF SUIT, 25 C. 85.

Road Cess Returns.

Statements made by deceased tenants in—See EVIDENCE ACT (I OF 1872), 26 C. 832.

Rule against perpetuities.

See HINDU LAW (WILL), 25 C. 112.

Rules.

(1) Of High Court, Ch. XIV—See PRACTICE, 26 C. 124.

(2) Of High Court Ch. XIV, Nos. 522, 537—See REFERENCE, 26 C. 585.

(3) Of Practice, Small Cause Court, Calcutta—See ACT XV OF 1882 (SMALL CAUSE COURTS, PRESIDENCY TOWNS), 26 C. 778.

(4) Rule 16 of Rules made by Local Government under Income Tax Act—See EVIDENCE, 26 C. 281.

Sale.

(1) By *de facto* manager of minor's property—See HINDU LAW (ALIENATION), 26 C. 820.

(2) Certificate of—See ACT VII OF 1880 (PUBLIC DEMANDS RECOVERY, BENGAL), 26 C. 414.

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(3) Confirmation of—Effect of non-payment of fees previous to—See ACT VIII OF 1885 (BENGAL TENANCY), 26 C. 603.

(4) For arrears of rent—See ACT VII OF 1880 (PUBLIC DEMANDS RECOVERY, BENGAL), 26 C. 414.

(5) See ACT VIII OF 1885 (BENGAL TENANCY), 26 C. 315.

(6) See CIV. PRO. CODE (ACT XIV OF 1882), 26 C. 727.

(7) See JAGIR TENURE, 25 C. 396.

(8) See LIMITATION ACT (XV OF 1877), 25 C. 167.

(9) *Act* XI *of* 1859 (*Bengal Revenue Sale Law*), *ss.* 3, 8, *and* 33—*Bengal Excise Act*—*Bengal Act* (VII *of* 1868), *s.* 2 — *Unauthorized sale by Collector* — *Jurisdiction of Civil Court* — Res judicata — *Parties* — *Secretary of State for India.*—Act XI of 1859, the Bengal Revenue Sale Law, providing for the sale of estates in arrear or payment of revenue does not sanction, and by plain implication forbids, the sale of any estate which is not at the time in arrear of such payment. The whole clauses, in so far as they relate to sales, or to their challenge, as well the provisions of Bengal Act VII of 1868, are framed upon the express footing that they are to be applicable to the sale of estates, which are in arrear of duty. A Collector had sold an estate, purporting to act under Act XI of 1859, for a supposed arrear of revenue. There was, however, only an erroneous debit in the Collectorate books against the estate, in excess of the revenue actually assessed upon it, chargeable against it, and due from it. *Held*, that the sale was without authority; that the Civil Court had jurisdiction to declare the sale void; and that the provisions of s. 33 of Act XI of 1859, relating to an appeal to the Commissioner of Revenue, did not exclude that jurisdiction. The enactment in s. 8 had no application to such case. This was not a question about a transfer from the account of one revenue-paying estate to that of another, nor was it a claim for remission or abatement, which had not been duly allowed by the Government. S. 8 has no application, except there be (1) default in payment of the revenue, and (2) possession by the Collector of money of the defaulter not indisputably placed to his credit. But here there was no default. All moneys paid by the appellants were credited, and their alleged default was based upon erroneous debit entries to which they were not parties. In this suit, in the Courts below, the Government had been made a co-defendant, but were not respondents, on this appeal; and the objection was taken, on the argument of this appeal, and by previous petition, that they should be made parties, respondents. *Held*, that it was a mistaken view that a decree annulling the sale in this suit would be *res judicata* in any future question or proceedings, as between the Government and the unsuccessful purchaser. The Secretary of State for India, therefore, was not a necessary respondent. His position was correctly explained in 9 C. 271, in the judgment of MITTER, J. BALKISHEN DAS v SIMPSON, 25 C. 833 (P.C.) = 25 I.A. 151 = 2 C.W.N. 151 = 7 Sar. P.C.J. 363 ... 543

(10) *Application to set aside sale*—*Bengal Tenancy Act* (VIII *of* 1885), *s.* 174, *cls.* (1) *and* (2)—*Deposit of decretal amount incorrectly calculated by ministerial officers of Court*—*Effect of deposit without a prayer in express terms to set aside the sale*—Challans—*Practice.*—The judgment-debtor, within thirty days from the date of sale of his holding for arrears of rent, deposited in Court under s 174 of the Bengal Tenancy Act the decretal amount by a *challan* endorsed by the chief ministral officer of the Court executing the decree. Subsequently it was discovered that the amount was short by 9 pies, which the judgment-debtor forthwith paid in making up the deficiency, and presented a petition, praying that "the execution case may be declared as finally closed," but without applying in express terms to have the sale set aside: *Held*, that under s. 174 of the Bengal Tenancy Act the Court was bound to set aside the sale, notwithstanding that the applicant did not in express terms ask for that relief. The fact of his depositing the amount was a sufficient indication of his intention to seek the relief, *Per* MACPHERSON, J—The *challan* which set out the purpose of the deposit may be regarded as a sufficient application. ABDOOL LATIF MOONSHI v. JADUB CHANDRA MITTER, 25 C. 216 ... 145

(11) *Bengal Tenancy Act* (VIII *of* 1885), *Ch.* XIV *and ss.* 65, 168—*Sale of occupancy-holding in execution of decree for rent by one of several joint*

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landlords—Arrears of rent of separate share—Execution of decree for rent —Joint landlords—Transferability of occupancy holding—Bengal Act VIII *of* 1869, *ss.* 59—64—*Landlord and tenant—Want of saleable interest in judgment debtor—Rights of purchaser.*—The Bengal Tenancy Act does not contemplate or provide for the sale of a holding at the instance of one only of several joint landlords who has obtained a decree for the share of the rent separately due to him ; such a sale must be under the provisions of the Civ. Pro. Code, and would not carry with it the special incidents attaching to a sale under the Bengal Tenancy Act. When, therefore, an occupancy-holding, not transferable by custom or local usage, is sold in execution of a decree obtained by one of several joint landlords for the share of the rent separately due to him, the purchaser acquires nothing by his purchase, the judgment-debtor having no saleable interest in the holding. SADAGAR SIRCAR v. KRISHNA CHANDRA NATH, 26 C. 937 = 3 C.W.N. 742 ... 1199

(12) *Rent accrued due against Hindu female heir after death of last full owner —Effect of sale in execution under Bengal Act* VIII *of* 1869—*Personal execution against female heir.*—A claim for arrears of rent against a female heir accrued due after the death of the last full owner, is a personal claim against her ; therefore by a sale held under the provisions of Bengal Act VIII of 1869, in execution of a decree for arrears of such rent obtained against her by some of the co-sharer landlords, only the limitted estate of the female heir passed, unless the said landlords proceeded to bring the tenure itself to sale. BRAJA LAL SEN v. JIBAN KRISHNA ROY, 26 C. 285 ... 787

(13) *Sale of right, title and interest of a registered tenant—Effect of sale of a tenure in execution of a decree for arrears of rent obtained by a co-sharer landlord against the registered tenant alone.*—In a suit brought by the plaintiffs to set aside the sale of a *shikmi taluk*, or in the alternative for a declaration that the sale did not affect their rights on the allegation that defendants Nos. 3 and 4, who were the proprietors of a certain share of the estate under which the said *taluk* was held, having obtained a collusive decree for arrears of rent for the years 1298 and 1299 (B.S.) against defendant No. 1 who was a joint owner of the *taluk* with the plaintiffs, in execution thereof fraudulently caused the disputed property to be sold, and defendant No. 1 purchased it in the *benami* of defendant No. 2, the defence (*inter alia*) was that the sale was not brought about by fraud or collusion and that the rent suit having been brought against the registered tenant defendant No. 1, the whole tenure passed by the sale. *Held* by BANERJEE and HILL, JJ. (RAMPINI, J., dissenting), that inasmuch as it appeared that the share sold away stood in the name of defendant No. 1, alone ; that the zemindar used to sue defendant No. 1 for rent for the said share; that the defendant No. 1 used to realize a rateable share of costs, road-cesses, &c., which he was bound to pay under rent decrees obtained against him, from the plaintiffs sometimes amicably and generally by contribution suits ; and that the defendants Nos. 3 and 4 who were the fractional shareholders of the zemindari sued the defendant No. 1 as usual for rent for the years 1298 and 1299 B.S., and obtained a decree, the sale though in terms only a sale of the right, title, and interest of the judgment debtor really passed the right, title, and interest, not only of the registered tenant, but also of the unregistered co-owners whom he represented. NITAYI BEHAR SAHA PARAMANICK v. HARI GOVINDA SAHA, 26 C. 677 ... 1038

(14) For arrears of revenue—See JURISDICTION, 25 C. 876.

(15) See LIS PENDENS, 26 C. 966.

(16) See RIGHT OF SUIT, 25 C. 85.

(17) For arrears of Road and Public Cesses, Suit to set aside—See RIGHT OF SUIT, 25 C. 85.

(18) For default in payment of costs of realizing Government Revenue—See CIV. PRO. CODE (ACT XIV OF 1882), 25 C. 239.

(19) In execution of decree—See ACT VIII OF 1885 (BENGAL TENANCY), 26 C. 603.

(20) See APPEAL (SECOND APPEAL), 25 C. 99.

(21) See BENAMI TRANSACTIONS, 26 C. 950.

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(22) See CIV. PRO. CODE (ACT XIV OF 1882), 26 C. 727.

(23) See LIS PENDENS, 26 C. 966.

(24) See RECEIVER, 26 C. 127.

(25) *Civ. Pro. Code* (*Act* XIV *of* 1882), *ss.* 15, 285—*Sale in execution by inferior Court of property already under an attachment by a superior Court—Jurisdiction of Munsif—Preferential right of purchasers at execution sale—Concurrent decrees, execution of.*—*A* obtained a decree against *B* in the Court of the Munsif of Jamui, and in execution thereof attached *B's* property on the 16th March 1891; the property was sold on the 20th April 1891 and purchased by *C* who obtained possession of it on the 3rd August 1891 and then sold his interest to the plaintiff. At the same time the defendant *R* had a decree for costs against *B* and his heirs in the Court of the Subordinate Judge of Monghyr, and in execution thereof attached the same property on the 4th February 1891, and sold it on the 24th August 1891, *i.e.*, about four months after the sale of the property by the Munsif. The plaintiff sued for possession on the ground that having purchased the property of *B* before the second sale by the Subordinate Judge, she was entitled to the property. The defendant contended that the sale by the Munsif of the property under attachment by a Court of a higher grade was absolutely void, and the Munsif had no jurisdiction to sell the property under s. 285 of the Civ. Pro. Code. *Held*, that the sale by the Munsif was not without jurisdiction, and that it conveyed to the plaintiff a valid title to the property. S. 285 of the Civ. Pro. Code is merely a section for procedure to prevent different claims arising out of the attachment and sale of the same property by different Courts. RAM NARAIN SINGH v. MINA KOERY, 25 C. 46 ... 32

(26) *Civ. Pro. Code* (*Act* XIV *of* 1882), *s.* 244—*Suit to set aside a sale on the ground that the decree was obtained by fraud, whether maintainable, where third party is the auction-purchaser—Limitation Act* (XV *of* 1877), *sch* II, *art.* 95.—A suit to set aside an execution sale on the ground of fraud is not maintainable under the provisions of s. 244 of the Civ. Pro. Code, even in a case where the real or nominal auction-purchaser is a person who was not a party to the original suit. A suit to set aside an execution sale on the ground that the decree was obtained by fraud is maintainable and is governed by art. 95 of the Limitation Act. MOTI LAL CHAKERBUTTY v. RUSSICK CHUNDER BAIRAGI, 26 C. 326 N.=3 C.W.N. 395 ... 812

(27) Confirmation of—See APPEAL (SECOND APPEAL), 25 C. 175.

(28) *Fraud—Application to set aside sale on the ground of fraud in a case where a third party is the auction-purchaser—Code of Civil Procedure* (*Act* XIV *of* 1882), *ss.* 2,244, 311 *and* 588—*Second Appeal—Limitation Act* (XV *of* 1877), *sch.* II, *arts.* 166 *and* 178.—The decision in the case of 17 C. 769, has been in effect overruled by the decision of the Privy Council in the case of 19 C. 683; 19 I.A. 166. An application to set aside a sale on the ground of fraud would come under s. 244 of the Civ. Pro. Code, notwithstanding that the purchase was made by a person who was a third party. An application to set aside a sale on the ground of fraud is governed by art. 178 of the Limitation Act. BHUBON MOHUN PAL v. NUNDA LAL DEY, 26 C. 324=3 C.W.N. 399 ... 811

(29) *Mortgage decree, Sale in execution of—Purchase by a third party while the decree and the order for sale are valid—Effect on sale of reversal of* ex parte *decree—Right of redemption of mortgagor.*—A mortgagor is not entitled to redeem the property which was purchased by a third party at a sale held in execution of an *ex parte* mortgage decree and confirmed whilst the *ex parte* decree was still in force, though the said decree was set aside and subsequently reaffirmed after trial. MUKHODA DASSI v. GOPAL CHUNDER DUTTA, 26 C. 734 ... 1069

(30) *Rights of purchasers—Two judicial sales of the same property, each in execution of a separate decree—Conflicting claims thereunder—Purchase* pendente lite—*Limitation Act* (XV *of* 1877), *sch.* II, *arts.* 12 *and* 13.—The same property having been sold in execution of two different decrees, the result was that the two purchasers at the respective sales afterwards contested title to the property. The sale to the first purchaser was confirmed in November 1882. The sale to the second, who obtained possession, took place in October 1881, the property having been attached under the

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second decree in March 1883. The first purchaser on the 28th July 1884 brought a suit, to which the second purchaser was not a party, to have that attachment declared invalid. By a decree of the 14th November to that effect the second purchaser was bound as purchaser *pendente lite* ; and his possession was of no avail to him. *Held*, that the attachment of March 1883, although it had preceded the institution of the first purchaser's suit of 1884, afforded no support to the second purchaser's claim, attachment under ch. XIX of the Civ. Pro. Code merely preventing alienation, and not giving title. Moreover, after the first sale in 1882, there had been no interest left to be sold to another purchaser, so that without there having been the decree of 1885, the second purchaser would still have had no title against the first. There was no occasion for the setting aside the second sale within the meaning of arts. 12 and 13 of sch. II of the Limitation Act (XV of 1877); nor was it set aside. That sale was held not to affect the right of the first purchaser, there being a wide difference between setting aside a sale, and deciding that a plaintiff's right was not affected by it. MOTI LAL v. KARRABULDIN, 25 C. 179 (P.C.)=24 I.A. 170=1 C.W.N. 639=7 Sar. P.C.J. 222 ... 121

(31) Of goods—See CONTRACT, 26 C. 142.

(32) Of mortgaged property—See DECREE, 26 C. 166.

(33) See TRANSFER OF PROPERTY ACT (IV OF 1882), 26 C. 164.

(34) Of unascertained goods—See CONTRACT, 25 C. 505.

(35) Power of Court to set aside—See CIV. PRO. CODE (ACT XIV OF 1882), 26 C. 449.

(36) Suit to set aside—See ACT VII OF 1880 (PUBLIC DEMANDS RECOVERY, BENGAL), 26 C. 172.

(37) See RES JUDICATA, 26 C. 285.

Saleable Interest.

Want of—See SALE, 26 C. 937.

Sanad-holding Talukhdar.

See ACT I OF 1869 (OUDH ESTATES), 26 C. 81.

Sanction.

(1) Of Court, mortgage made without—See GUARDIAN, 25 C. 909.

(2) Of Court to agreement for satisfaction of decree—See EXECUTION OF DECREE, 25 C. 86.

Sanction for Prosecution.

(1) And award of compensation—See COMPENSATION, 26 C. 181.

(2) *Crim. Pro. Code (Act X of 1882), s. 195—Presidency Magistrate, jurisdiction of—Penal Code (Act XLV of 1860), ss. 116, 193—Abetment—Instigating person to give false evidence.—B*, without having obtained sanction under s. 195 of the Crim. Pro. Code, charged *C* before the Chief Presidency Magistrate with instigating her to give false evidence in a certain divorce suit in which *C* was co-respondent. *Held*, that the Chief Presidency Magistrate had no jurisdiction to try the case without the sanction of the Court before which the divorce proceedings were pending, as the offence charged was alleged to have been committed in relation to those proceedings. CHANDRA MOHAN BANERJEE v. BALFOUR, 26 C. 359 ... 833

(3) *Sanction to prosecute a Judge—Power of High Court to revise an order as to sanction under s. 197 of the Crim. Pro. Code—Crim. Pro. Code (Act V of 1898), ss. 197 and 439—Charter Act (24 and 25 Vict., c. 104), s. 15.*—A pleader applied to the Chief Presidency Magistrate for sanction under s. 197 of the Crim. Pro. Code, to prosecute an Honorary Magistrate for using insulting and defamatory language towards him in the course of the trial of a case and sanction was refused. On application to the High Court, *held*—Under the revisional powers conferred by the Crim. Pro. Code the High Court has no authority to interfere with an order made by a Subordinate Court granting or refusing sanction under s. 197 of the Code, but it has sufficient authority for that purpose under s. 15 of the Charter Act (24 and 25 Vict., c. 104). No sanction under s. 197 of the

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Code is necessary, unless the Judge or public servant commits an offence in his judicial or official capacity. NANDO LAL BASAK v. MITTER, 26 C. 852 = 3 C.W.N. 539 ... 1146

(4) See MAGISTRATE, 26 C. 786.

Secretary of State for India.

(1) Suit against—See CIV. PRO. CODE (ACT XIV OF 1882), 25 C. 239.

(2) See SALE, 25 C. 833.

(3) See SETTLEMENT, 26 C. 792.

Security Bond.

(1) Attested by only one witness—See TRANSFER OF PROPERTY ACT (IV OF 1882), 26 C. 246.

(2) Validity of—See APPEAL TO PRIVY COUNCIL, 26 C. 246.

Security for keeping Peace.

On conviction—See RECOGNIZANCE TO KEEP PEACE, 26 C. 576.

Sentence.

See CRIM. PRO. CODE (ACT X OF 1882), 25 C. 557.

Service Tenure.

See LANDLORD AND TENANT, 25 C. 131.

Set-off.

See MORTGAGE (REDEMPTION), 26 C. 1.

Settlement.

(1) Of dispute—See CONTRACT, 25 C, 869.

(2) Of estate—See ACT I OF 1869 (OUDH ESTATES), 26 C. 879.

(3) *Of Noabad taluks in Chittagong—Power of Government to make settlement—Waste lands—Resumption—Kabuliat, effect of—Acceptance of kabuliat by the landlord—Ratification—How far the acts of Government officers bind the Government—Reg. III of* 1822, *s.* 5, *cl.* 1—*Reg.* VII *of* 1822, *s.* 7, *cl.* 1—*Evidence—Presumption of due performance of official acts—Acquiescence—Acceptance of rent after term of settlement.*—The plaintiff sued the Secretary of State for India in Council for the declaration that a certain *noabad mehal* of his in the district of Chittagong was a permanent *taluk* not resumable by the Government. He based his claim on two grounds; (1) that the *mehal* existed from before the time of the Decennial Settlement, and the settlement of 1800 confirmed the permanent right of the *talukdar* in the same; and (2) that at any rate, a *kabuliat* executed in 1836 by his predecessors in title with the approval of the Collector had the same effect. In defence, it was alleged (1) that the *mehal* was not in existence at the time of the Decennial Settlement, and the settlement of 1800 was a temporary one; and (2) that the *kabuliat* was never accepted by the Government, but that on the contrary the Government passed distinct orders that the settlement of 1836 were for thirty years only, which order was duly published by an *istahar* to that effect. It was found on the evidence that the *taluk* was not shown to have been in existence before 1800, and the settlement proceedings of that year and the variation of rent from time to time did not support the plaintiff's contention: *Held*, that the *kabuliat* of 1835 was merely an offer on the part of the *talukdar* for the time being and was not binding on the Government, its terms not having been accepted either by the Government or by any duly authorised officer thereof; that both by law and by the special instructions issued for the guidance of settlement officers, no settlement could be binding on the Government unless confirmed by the Governor-General in Council. There being no proof given by either party as to whether the *istahar* abovementioned was or was not duly published, *Held* that the publication of the *istahar* must be presumed, having regard to the presumption in favour of the due performance of official acts. *held*, also that even assuming that the officers of the Government induced by their act and conduct a belief in the *talukdar* that the *kabuliat* had been accepted by the Government, or that a permanent settlement had been sanctioned by the Government, that did not amount to a ratification of the *kabuliat*, inasmuch as such conduct of

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the officers was in violation of their duty as such officers and in direct contravention of the express orders of the Government. *Held*, also, that the acceptance by the Government of rent, at the old rate from the *tatukdar* for a long time after expiration of thirty years did not amount to an acquiescence in the terms of the *kabuliat*. Unsettled and unoccupied waste land, not being the property of any private owner, must belong to the State. PROSUNNO COOMAR ROY v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL, 26 C. 792 = 3 C.W.N. 695 ... 1107

(4) Second summary, of 1858—See ACT I OF 1869 (OUDH ESTATES), 26 C. 879.

Settlement Officer.

Decision of—See APPEAL (SECOND APPEAL), 25 C. 146.

Shebait.

(1) Suit by reversionary heir for office of—See LIMITATION ACT (XV OF 1877), 25 C. 354.

(2) Suit, to determine right to be appointed as—See LETTERS OF ADMINISTRATION, 25 C. 354.

Shikmi Hasiram Rights.

See REGULATION I OF 1886 (ASSAM LAND AND REVENUE REGULATION), 26 C. 194.

Signatures.

(1) Of Sub-Registrar and identifier on back of bond—See TRANSFER OF PROPERTY ACT (IV OF 1882), 26 C. 246.

(2) See HINDU LAW (WILL), 25 C. 911.

Slander.

Cause of action—Damages for insult, loss of reputation, and mental pain, by the use of abusive language—Suit for libel and slander—Special damage.—Held by the majority of the Full Bench (MACLEAN, C.J., MACPHERSON, HILL and JENKINS, JJ., GHOSE, J., *dissenting*) that the mere use of abusive and insulting language such as *sala* (wife's brother), *haramzada* (base born or bastard), *soor* (pig) *baper beta* (son of the father, that is, ironically bastard) apart from defamation is not actionable irrespective of any special damage. *Per* GHOSE, J.—A case like the present should be decided according to the principles of justice, equity and good conscience, and therefore it is but just and right that a person thus vilified who has suffered from insult and mental pain should be entitled to maintain an action irrespective of any special damage. GIRISH CHUNDER MITTER v. JATADHARI SADUKHAN, 26 C. 653 (F.B.) = 3 C.W.N. 551 ... 1019

Small Cause Court.

(1) Cases cognizable in—See APPEAL (SECOND APPEAL), 26 C. 842.

(2) Suit of nature cognizable in—See APPEAL (SECOND APPEAL), 25 C. 872.

(3) See ACT II OF 1888 (CALCUTTA MUNICIPAL CONSOLIDATION, BENGAL), 26 C. 74.

Special Damage.

See SLANDER, 26 C. 653.

Special Judge.

Appeal from decision of—See APPEAL (SECOND APPEAL), 25 C. 34.

Specific Relief Act (I of 1877).

(1) S. 9—See DECREE, 25 C. 803.

(2) Ss. 38 and 41—See MINOR, 26 C 381.

(3) S. 42—See DECLARATORY DECREE, 25 C. 49; 26 C. 845.

Stamp Act (I of 1879).

S. 23—Bond—Interest.—A bond for a loan of Rs. 100 stipulated that the obligor should "pay twice the amount, including Rs. 100 for interest, total Rs. 200, in eight years from 1301 to 1308, according to *kists* given in the schedule." *Held*, that the amount secured by the bond was Rs. 200, and the bond must be stamped accordingly. S. 23 of the Stamp Act (I of 1879) did not apply to the instrument. SAMBHU CHANDRA BEPARI v. KRISHNA CHARAN BEPARI, 26 C. 179 ... 719

Statement. PAGE

(1) As to existence of relationship—See EVIDENCE ACT (I OF 1872), 26 C. 236.

(2) Of accused person—See EVIDENCE, 26 C. 49.

(3) Of facts filed after time—See REFERENCE, 26 C. 585.

Statute 8 Vic., C. 18 (Land Clauses Consolidation Act).

S. 63—See LAND ACQUISITION ACT (I OF 1894), 25 C. 346.

Statute 24 and 25 Vic., 104.

(1) S. 3—See ACT VIII OF 1890 (GUARDIANS AND WARDS), 26 C. 133.

(2) S. 15—See ACT II OF 1888 (CALCUTTA MUNICIPAL CONSOLIDATION), 26 C. 74.

(3) S. 15—See SUPERINTENDENCE, 26 C. 188.

Statute 24 and 25 Vic., C. 109.

S. 13—See FULL BENCH, 25 C. 896.

Statute 25 and 26 Vict., C. 102 (Metropolis Management Amendment Act, 1862).

S. 75—See ACT III OF 1884 (BENGAL MUNICIPAL), 25 C. 160.

Statute 44 and 45 Vic., C. 41 (Conveyance Act of 1881).

S. 7—See VENDOR AND PURCHASER, 25 C. 298.

Statutes.

(1) Construction of—See ACT V OF 1876 (REFORMATORY SCHOOLS), 25 C. 333.

(2) Interpretation of—See INTEREST, 26 C. 130.

(3) *Marginal notes to sections of Act.*—Marginal notes to sections of an Act do not form part of the Act. PUNARDEO NARAIN SINGH v. RAM SARUP ROY, 25 C. 858=2 C.W.N. 577 ... 559

Stay.

(1) Application for—See COSTS, 25 C. 892.

(2) Of execution—See EXECUTION OF DECREE, 25 C. 322.

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Application for execution of decree—See LIMITATION, 25 C. 203.

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Of raiyat-holding—See ACT VIII OF 1885 (BENGAL TENANCY), 26 C. 46.

Subordinate Judge.

Jurisdiction of—See PROBATE, 25 C. 340.

Sub-Registrar.

Acknowledgment of deed by—See MORTGAGE (GENERAL), 26 C. 78.

Succession Act (X of 1865).

(1) S. 50—See HINDU LAW (WILL), 25 C. 911.

(2) S. 50—See MORTGAGE (GENERAL), 26 C. 78.

(3) S. 256—See LETTERS OF ADMINISTRATION, 26 C. 408.

(4) S. 282—See ACT II OF 1874 (ADMINISTRATOR-GENERAL'S), 25 C. 54.

Succession Certificate Act (VII of 1889).

(1) *S. 4—Right to maintain suit without certificate—Death, during execution proceeding of the original mortgagee and substitution of his heir.*—S. 4 of the Succession Certificate Act (VII of 1889) is not a bar to an execution proceeding instituted on a mortgage decree upon the application of the original mortgagee, by reason of the original mortgagee having died during the pendency of the proceeding and his legal representatives who were substituted in his place not having produced any succession certificate. MAHAMMED YUSUF v. ABDUR RAHIM BEPARI, 26 C. 839=4 C.W.N. 558 ... 1138

(2) *S. 4, cl. (2)—"Debt," Meaning of—Suit for Rent—Certificate of Succession.*—Rent is not a "debt", within the meaning of s. 4 of the Succession

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Certificate Act, and therefore no certificate of succession is necessary before bringing a suit for rent. NAGENDRA NATH BASU v. SATADAL BASINI BASU, 26 C. 536 = 3 C.W.N. 294 ... 914

(3) Ss. 9, 19—See APPEAL (GENERAL), 25 C. 320.

Sufficient Cause.

For delay in presenting appeal—See PAUPER, 26 C. 925.

Summoning.

And re-hearing of witnesses —See WITNESS, 25 C. 863.

Summons.

(1) *Service of—Civ. Pro. Code (Act* XIV *of* 1882), *ss.* 79, 80—*Affidavit of service of summons, sufficiency of.*—Where a defendant cannot be found, the affidavit of service must show—(1) That proper efforts were made to find him, and (2) that the copy of the summons was affixed on the door of the house in which the defendant ordinarily resided at the time of service. Whether or not these conditions are established to the satisfaction of the Court must in each case depend on its own particular circumstances. RAJENDRO NATH SANYAL v. JAN MEAH, 26 C. 101 = 2 C.W.N. 574 ... 669

(2) *Service of—Service of summons on minor carrying on partnership business with others—Affixing summons on house in which business is carried on—Civ. Pro. Code (Act* XIV *of* 1882), *ss.* 74, 76 *and* 443.—In a suit for the enforcement of an equitable mortgage of certain property belonging to a partnership business brought against certain minors and other persons who constituted a firm carrying on business within the jurisdiction of the Court in which the suit was brought, but the minors resided outside its jurisdiction the summonses were neither served upon the minors, nor upon their guardian personally, but were affixed on the house in which, the business was carried on. *Held*, that there was no service of summons either personal or substituted upon the minors either under s. 74 or under 76 of the Code of Civil Procedure even assuming that those sections can apply to a case in which some of the defendants who were interested in the partnership or business, are minors. *Held*, also that ss. 74 and 76 of the Code of Civil Procedure are controlled by s. 443 of the said Code. JATINDRA MOHAN PODDAR v. SRINATH ROY, 26 C. 267 = 3 C.W.N. 261 ... 775

Superintendence.

(1) Of High Court—See ACT II OF 1888 (CALCUTTA MUNICIPAL CONSOLIDATION), 26 C. 74.

(2) *Of High Court.—Charter Act (*24 *and* 25 *Vict., c* 104*), s.* 15—*Crim. Pro. Code (Act V of* 1898), *ss.* 145, 435—*Power of Local Legislature—Power of Revision by High Court—Order concerning a ferry purporting to be made under s.* 145.—The Local Legislature has power to overrule a statutory power conferred on the High Court; but this was not the object and result of the legislation expressed in s. 435 of the Crim. Pro. Code of 1898. The terms of s. 435 mean that orders under the exempted sections mentioned in cl. (3) must have been passed with jurisdiction. If such orders are challenged as made without jurisdiction, the mere fact of their purporting to be passed under the exempted sections would not bring them within those sections so as to debar the exercise of powers by the High Court under s. 15 of the Charter Act. HURBULLUBH NARAIN SINGH v. LUCHMESWAR PROSAD SINGH, 26 C. 188 = 3 C.W.N. 49 ... 725

Supreme Council.

Power of—See REVISION, 26 C. 874.

Surety.

(1) *Liability of surety after decree passed in original suit—Civ. Pro. Code (Act* XIV *of* 1882), *ss.* 108, 253—*Execution of decree against surety.*—An *ex parte* decree was set aside on condition that the defendant should find a surety who would be responsible for any amount that might be found due from the defendant by any decree to be subsequently made in the suit. *Held*, that under s. 108 of the Code of Civil Procedure, a Court has jurisdiction to set aside an *ex-parte* decree on these terms. On an application to execute the decree which was subsequently made against the defendant, by the decree-holder both against the defendant and the surety, objection

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was taken to the execution by the surety, and was allowed by the Court below. *Held*, that under s. 253 of the Code of Civil Procedure the decree-holder was entitled to take out execution against the surety. SONATUN SHAHA v. DINO NATH SHAHA, 26 C. 222=3 C.W.N. 228 ... 746

(2) Right of, to dispute validity of security bond—See APPEAL, 26 C. 246.

Surety Bond.

Unattested and unregistered—See EVIDENCE ACT (I OF 1872), 26 C. 222.

Surveyor.

Employed by Collector—See PUBLIC SERVANT, 26 C. 158.

Talukhdar.

(1) Estate of—See ACT I OF 1869 (OUDH ESTATES), 26 C. 81.

(2) Settlement of estate with—See ACT I OF 1869 (OUDH ESTATES), 26 C. 879.

Tank.

Suit to compel defendant to fill up, and for compensation—See LIMITATION ACT (XV OF 1877), 26 C. 564.

Tenancy.

(1) Nature of—See LANDLORD AND TENANT, 26 C. 204.

(2) See LIMITATION ACT (XV OF 1877), 26 C. 204.

Tenant.

(1) Assignment by—See LANDLORD AND TENANT, 26 C. 338.

(2) Encroachment by—See LANDLORD AND TENANT, 25 C. 302.

(3) Holding over after expiry of lease—See LANDLORD AND TENANT, 25 C. 75.

(4) Registered sale of right, title and interest of—See SALE, 26 C. 677.

(5) Settled on land by trespasser—See LANDLORD AND TENANT, 25 C. 324.

(6) See LANDLORD AND TENANT, 26 C. 739.

Tender.

Of railway receipts for goods—See CONTRACT, 26 C. 142.

Tenement.

(1) Implied grant on—See EASEMENT, 26 C. 516.

(2) Severance of—See EASEMENT, 26 C. 311.

Tenure.

(1) Abandonment of—See CO-SHARERS, 26 C. 553.

(2) Sale of, not for arrears of rent—See ACT VIII OF 1885 (BENGAL TENANCY), 26 C. 603.

Tenure-holder.

Permanent—See ACT VIII OF 1885 (BENGAL TENANCY), 26 C. 611.

Territorial Jurisdiction.

See FOREIGN COURT, 26 C. 931.

Testator.

Testamentary capacity of—See WILL, 25 C. 824.

Theft.

Removing a thing with the object of causing trouble to the owner—Wrongful loss.—The accused, who was charged by his master with having committed theft of a box, stated that he had removed the box and left it concealed in the cowshed to give a lesson to his master. The Sessions Judge in his charge to the jury said "If the jury find that the accused removed the box to put the owner to trouble, that is, causing wrongful loss to the owner, and the act is theft;" and the jury returned a verdict of guilty, finding "that the taking was with the intention of putting the owner to trouble." *Held*, the above charge and verdict were based on an erroneous view of the law. It cannot be said that removing a thing to put the owner to trouble is necessarily and in every case causing "wrongful loss." NABI BAKSH v. QUEEN-EMPRESS, 25 C. 416=2 C.W.N. 347 276

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See ACT XV OF 1882 (SMALL CAUSE COURTS, PRESIDENCY TOWNS), 26 C. 778.

Title.

(1) *Bona fide* question of—See NUISANCE, 26 C. 869.

(2) *Evidence of title—Ownership. evidence of titles contested between rival purchasers—Benami transaction—Declaratory decree, suit for.*—Under the Land Registration Act (Bengal Act VII of 1876), registration of ownership was refused on the application of two rival purchasers of the same property, and a reference concerning them was made to the High Court under s. 55. The one purchaser then sued the other, claiming a decree declaratory of this title, under conveyances made to him in 1890 by a Mahomedan widow, since deceased, and by assignees and lessees from her of parts of her interest in the property. He alleged that a *hibabil-ewaz*, executed by her in 1858 to her son-in-law for no substantial consideration was nothing more than a *benami* transfer, after which she had remained the owner with her former title. On that *hiba*, however, the defence was founded, the defendant averring that it was a real conveyance by the widow, and that through the son-in-law, from whose sons the defendant had purchased the property, the latter had obtained a good title. No actual possession was established by either of the parties: the property had been let in parcels to different tenants. Among other things disputed, it was the subject of conflicting evidence whether leases had been made in the past by the then real owner, or upon assumption of title by the adverse party. The Courts below differed in their conclusion as to which of the parties was entitled to a decree. The Judicial Committee maintained the decision of the Original Court in favour of the plaintiff. NIRMAL CHUNDER BANERJEE v. MAHOMED SIDDIK, 26 C. 11 (P.C.) = 25 I.A. 225 = 7 Sar. P.C.J. 383 ... 611

(3) Failure to prove—See POSSESSION, 26 C. 579.

(4) Implied covenant for—See VENDOR AND PURCHASER, 25 C. 298.

(5) Issue as to, not raised—See APPEAL (GENERAL), 26 C. 944.

(6) Question of—See ACT XV OF 1882 (SMALL CAUSE COURTS, PRESIDENCY TOWNS), 26 C. 778.

(7) Question of—See NUISANCE, 25 C. 278.

(8) Suit for declaration of—See DECLARATORY DECREE, 26 C. 845.

(9) Suit for establishment of—See RES JUDICATA, 26 C. 428.

Tort.

Action on—See WRONGFUL DISTRAINT, 25 C. 285.

Transfer.

(1) Of criminal case—See MAGISTRATE, 26 C. 786.

(2) *Of criminal case—Crim. Pro. Code (Act X of 1882), s. 526, cl. (e)—Expression of belief by the District Magistrate—Fairness and impartiality of the jury—Jury an important part of the tribunal.*—When two such officers, as the District Magistrate and the Sessions Judge, emphatically express their belief that it will be next to impossible to obtain a fair and impartial trial if the case be heard before a jury chosen from a particular district, the bare expression of such belief, quite apart from the foundations thereof, must shake the confidence of the parties interested and of the public in the fairness and impartiality of the particular jury to try the case. An order for transfer in such cases is expedient for the ends of justice under s. 526, cl. (*e*) of the Crim. Pro. Code. The importance of securing the confidence of parties in the fairness and impartiality of the tribunal is next only to the importance of securing a fair and impartial tribunal. The jury in a case triable by jury constitute a part and an important part of the tribunal. It is not quite reasonable to say, where doubt is entertained as to the fairness and impartiality of the jury, that the trial should, nevertheless, go on before such a jury, because an erroneous verdict may, in the end, be set right by the High Court. THE LEGAL REMEMBRANCER v. BHAIRAB CHANDRA CHUCKERBUTTY, 25 C. 727 = 2 C.W.N. 65 ... 476

(3) Of share of under-proprietors in arrears of rent—See ACT XVII OF 1876 (OUDH LAND REVENUE), 26 C. 523.

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Of fractional share of putni estate, liability of—See LANDLORD AND TENANT, 26 C. 103.

Transfer of Property Act (IV of 1882).

(1) S. 6—See LANDLORD AND TENANT, 25 C. 445.

(2) *S. 6, cl. (a)—Reversionary right—Assignment of the interest of a Hindu reversioner.*—The interest of a Hindu reversioner upon the death of a widow does not come within the terms of cl. (*a*) of s. 6 of the Transfer of Property Act (IV of 1882), and an assignment of such interest is allowed by law. BRAHMADEO NARAYAN v. HARJAN SINGH, 25 C. 778 ... 507

(3) Ss. 10 and 15—See CONTRACT, 25 C. 869.

(4) S. 55 (2)—See VENDOR AND PURCHASER, 25 C. 298.

(5) *Ss. 58, 59—Security bond attested by only one witness—Signatures of the Sub-Registrar and the identifier on the back of the bond whether sufficient to render mortgage valid.*—A security bond, by which an interest in specific immoveable property has been transferred to another person for the purpose of securing a future debt, is a mortgage bond within the meaning of s. 58 of the Transfer of Property Act; and in order to create a valid mortgage it must be signed by the executant, and attested by at least two witnesses. Therefore in a case where the mortgage bond by which the liability of a surety was created was signed by the mortgagor only on the front page, and not attested by two witnesses, but on the back of the bond it contained the signatures of the Sub-Registrar and of the identifier, a suit is not maintainable, inasmuch as the bond is not a valid one under s. 59 of the Transfer of Property Act GIRINDRA NATH MUKERJEE v. BEJOY GOPAL MUKERJEE, 26 C. 246=3 C.W.N. 84 ... 762

(6) S. 59—See EVIDENCE ACT (I OF 1872), 26 C. 222.

(7) S. 59—MORTGAGE (GENERAL), 26 C 78.

(8) S. 67—See DECREE, 26 C. 441.

(9) S. 67—See EXECUTION OF DECREE, 25 C. 262.

(10) S. 98—See LIMITATION ACT (XV OF 1877), 25 C. 450.

(11) S. 76—See MORTGAGE (REDEMPTION), 26 C. 1.

(12) Ss. 86, 88—See CONTRACT ACT (IX OF 1872), 26 C. 39.

(13) Ss. 87, 88—See MORTGAGE (FORECLOSURE), 25 C. 311.

(14) S. 88—See CIV. PRO. CODE (ACT XIV OF 1882), 25 C. 133.

(15) S. 90—See DECREE, 26 C. 77, 166.

(16) S. 99—See DECREE, 26 C. 441.

(17) *S. 99—Sale of mortgaged property—Zuripeshgi mortgage—Purchase by the mortgagee.*—S. 99 of the Transfer of Property Act (IV of 1882) applies to zuripeshgi mortgages, and a purchase of the mortgaged property by the mortgagee in execution of a decree for rent due by the mortgagor under a *katkina* lease of the property, was held to be not merely irregular, but absolutely void. SHEODENI TEWARI v. RAMSARAN SINGH, 26 C. 164=3 C.W.N. 290 ... 709

(18) Ss. 99, 100—See EXECUTION OF DECREE, 25 C. 262.

(19) S. 100—See DECREE, 26 C. 441.

(20) S. 105—See CIV. PRO. CODE (ACT XIV OF 1882), 25 C. 703.

(21) *S. 118—Exchange—Partition.*—Some of the co owners possessing an undivided share in several properties took by arrangement a specific property in lieu of their shares in all the properties. *Held*, that this transaction was not an exchange within the meaning of s. 118 of the Transfer of Property Act, but the completed transaction amounted to a partition which is not required by law to be effected by an instrument in writing. GYANNESSA v. MOBARAKANNESSA, 25 C. 210=2 C.W.N. 91 ... 142

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(1) Encroachment by—See LIMITATION ACT (XV OF 1877), 25 C. 167.

(2) Tenant settled on land by—See LANDLORD AND TENANT, 25 C. 324.

(3) See ACT VIII OF 1885 (BENGAL TENANCY), 26 C. 546.

(4) See LANDLORD AND TENANT, 25 C. 302.

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(1) For religious purposes—See HINDU LAW (WILL), 25 C. 112.

(2) Imposed on Talukdar—See ACT I OF 1869 (OUDH ESTATES), 26 C. 879.

Trustees.

Application for execution by, for benefit of assignor's heir—See ACT VIII OF 1885 (BENGAL TENANCY), 26 C. 750.

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See MESNE PROFITS, 26 C. 356.

Unconscionable Bargain.

See ACT VIII OF 1885 (BENGAL TENANCY), 26 C. 315.

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Evidence of—See RIGHT OF OCCUPANCY, 26 C. 184.

Use and Occupation.

(1) Alternative claim for—See JURISDICTION, 26 C. 204.

(2) Compensation for—See LANDLORD AND TENANT, 26 C. 338.

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Cessation of—See RIGHT OF WAY, 26 C. 593.

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See FORGERY, 25 C. 207.

Valuation.

(1) Of land acquired for public purposes—See LAND ACQUISITION ACT (X OF 1870), 25 C. 194.

(2) Suit not exceeding Rs. 50—See FULL BENCH, 25 C. 896.

Vendor and Purchaser.

(1) Duty of vendor—See CONTRACT, 26 C. 142.

(2) *Transfer of Property Act* (IV *of* 1882), *s.* 55, *sub-s.* 2—*Implied covenant for title—English Conveyance Act of* 1881, 44 *and* 45 *Vic.*, *ch.* 41, *s.* 7.—In the absence of any contract to the contrary there is under s. 55, sub-s. 2 of the Transfer of Property Act, an implied covenant for title on the part of the vendor. BASARADDI SHEIKH v. ENAJADDI MALEAH, 25 C. 298=2 C.W.N. 222 ... 200

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(1) Of jury—See CHARGE, 25 C. 230.

(2) Of jury on inspection of locality without taking evidence—See JURY, 26 C. 869.

(3) See JURY, 25 C. 561.

Voluntary Payment.

(1) *Contract Act* (IX *of* 1872), *s.* 69—*Arrears of rent—Payment made to save the* putni taluk *from sale—Payment made by a mortgagee.*—The plaintiff, who was the mortgagee of a certain *putni taluk* obtained a consent decree for Rs. 35,000 on his mortgage bond on the 13th August 1888. In the *solenamah* it was stipulated that if the decretal amount were not paid within a certain date it was to be increased to Rs. 52,000. On the 14th March 1891 the plaintiff applied for execution of that decree, and claimed the larger amount, as admittedly the smaller amount was not paid within the stipulated period. The Subordinate Judge allowed the plaintiff's claim. The defendant appealed to the High Court, and on the 31st September 1891 the order of the Subordinate Judge was reversed, and an inquiry was directed as to the conduct of the plaintiff in the matter. On the 31st August 1892 the Subordinate Judge held that the plaintiff had been guilty of misconduct, and that the decree had been fully satisfied. The plaintiff appealed from this order to the High Court, and on the 4th January 1894 the appeal was dismissed, and he preferred an appeal to Her Majesty in Council. In the meantime on the 13th May 1892 the plaintiff had paid

Voluntary Payment—(*Concluded*). PAGE

a certain sum of money to protect the *putni taluk* from sale for arrears of rent due to the landlord. In a suit brought to recover from the defendant the amount so paid: *Held*, that the payment was not a voluntary payment, and that the plaintiff was interested in the payment of the money, and therefore he was entitled to recover it. BINDUBASHINI DASSI v. HARENDRA LAL ROY, 25 C. 305 = 2 C.W.N. 150 ... 205

(2) *Contract Act* (IX *of* 1872), *s*. 69—*Payment by a purchaser of a* putni taluk *during the pendency of an appeal for setting aside the putni sale—Person interested in the payment of the putni rent—Putni Regulation* (VIII *of* 1819), *s*. 14.—A payment of rent made by the purchaser of a *putni taluk*, after the decision of the first Court in a suit brought by the defaulting *putnidars* for the setting aside of the *putni* sale, by which it was held that the sale was invalid, and during the pendency of an appeal preferred, not by the plaintiff, the auction-purchaser, but by the zemindar at whose instance the said sale had been brought about, is not a voluntary payment, inasmuch as he (the plaintiff) is a person interested in the payment of the money, within the meaning of s. 69 of the Contract Act, The remedy which the plaintiff in this case had, after the reversal of the sale, to be reimbursed by the defendant under s. 69 of the Contract Act, was held not to be curtailed by the provisions of s. 14 of Regulation VIII of 1819. RADHA MADHUB SAMONTA v. SASTI RAM SEN, 26 C. 826 ... 1129

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See INTEREST, 26 C. 160.

Warrant.

(1) *Crim. Pro. Code* (*Act* V *of* 1898), *s*. 80—*Notification of substance of warrant —Penal Code* (*Act* XLV *of* 1860), *s*. 225 *B*.—An arrest by a police officer without notifying the substance of the warrant to the person against whom the warrant is issued as required by s. 80 of the Crim. Pro. Code is not a lawful arrest, and resistance to such an arrest is not an offence under s. 225-B of the Penal Code. SATISH CHANDRA RAI v. JODU NANDAN SINGH, 26 C. 748 = 3 C.W.N. 741 ... 1079

(2) Of attachment, non-production of—See PENAL CODE (ACT XLV OF 1860), 26 C. 620.

(3) Of commitment—See MAINTENANCE, 25 C. 291.

Waste Lands.

See SETTLEMENT, 26 C. 792.

Will.

(1) Construction of—See HINDU LAW (WILL), 25 C. 405.

(2) *Construction of will—Construction of the will of a* talukdar—*Quantity of estate devised—Unlimited gift of share of profits in a* talukdari *estate under Oudh Estates Act* I *of* 1869.—The will of a *talukdhar* who left daughters declared that in respect of his estate, in its entirety and without division, the engagement for the revenue should be in the name of his eldest daughter's son and so continue. Besides this grandson, another, the son of his second daughter, as well as two other daughters of the testator were to be equal sharers entitled to the profits of the estate. Of this estate the will said: The profits may be divided equally among all the four persons. The *talukh* had been included in the first and third of the lists prepared in conformity with the Oudh Estates Act, 1869. On a question whether under the will the son of the second daughter took a heritable interest or only a life-estate, to which, it was argued, the gift was confined by reason of its being only of the profits: *Held*, that in order to show that an unlimited gift of the profits was less than a gift of the *corpus*, some evidence should be found in the context, or in the circumstances affecting the property, tending to show restriction of the interest given. No such evidence having been found here, the interest given by the will was declared to be heritable in the case of the testator's grandson, who was the son of his second daughter. This grandson, dying soon after the testator, had bequeathed his interest to the present appellant, his father. FAIZ MUHAMMAD KHAN v. MUHAMMAD SAID KHAN, 25 C. 816 (P.C.) = 25 I.A. 77 = 2 C.W.N. 385 = 7 Sar. P.C.J. 320 ... 532

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(3) *Evidence as to execution.*—The question whether an alleged Hindu will was genuine or not was raised by the relations of the deceased, on an application, under the Probate and Administration Act V of 1881, for administration with the will annexed, filed by the proponent. It was *held* upon evidence, which was very conflicting, in some respects obscure and unsatisfactory, and in reference to which the Court below had differed, that the will was genuine, and that the High Court was not justified in reversing a decree to that effect. It was also *held* that it is the duty of a Judge in such cases patiently to investigate the actual facts, placing himself as it were in the position of the alleged testator with all his actual surroundings; not to approach the subject from the point of view of what a testator ought or would be likely to have done on some pre-conceived idea of Hindu usages and habits of thought. DOWLAT KOER v. RAMPHUL DAS, 25 C. 459 (P.C.) = 25 I.A. 21 = 2 C.W.N. 177 = 7 Sar. P.C.J. 231 304

(4) *Executor—Administrator-General's Act* (II *of* 1874), *ss.* 18, 26, 27, 29, 52, 54—*Commission—Collection of assets, meaning of.*—When a testator has omitted to appoint an executor under his will the Court will appoint as executor the person whom it would appear from the tenor of the will the testator contemplated should be executor. Under s. 54 of Act II of 1874 the Administrator-General is entitled to charge commission on the collection and distribution of all assets. "Collection of assets" implies the doing of some act in connection with such assets. Where part of the estate consisted of a zemindary of which the testator had granted a *putni* lease subject to payment of fixed rental, and part of the zemindary had been acquired for public purposes, the compensation money being by arrangement divisible between the estate and the *putnidar* in certain pro-portions: *Held* that the Administrator-General was entitled to charge commission on the rents actually collected by him and on the amount apportioned to the estate, but not on the *corpus* of the zemindary estate. *In the goods of* COURJON, 25 C. 65 ... 44

(5) Probate of part of—See PROBATE, 26 C. 634.

(6) See HINDU LAW (WILL), 25 C. 103.

(7) See MAHOMEDAN LAW (WILL), 25 C. 9.

Witness.

(1) Attestation of bond by only one—See TRANSFER OF PROPERTY ACT (IV OF 1882), 26 C. 246.

(2) *Right of accused to have witnesses re-summoned and re-heard—Crim. Pro. Code (Act* X *of* 1882), *s.* 350 (*a*), *s.* 537—*Commencement of proceedings—Interlocutory orders—Trial, Meaning of—Right to have witnesses summoned and reheard—Irregularity—Refusal to recall witnesses.*—An accused person does not lose the right of having the witnesses re-summoned and re-heard under proviso (*a*), s. 350, of the Crim. Pro. Code, because an interlocutory application for enforcing the attendance of certain witnesses has been made and granted not at the trial but before the trial and with a view to the trial. The proper time for making such application is when the trial commences before the Magistrate. The expression "trial" means the proceeding which commences when the case is called on with the Magistrate on the Bench, the accused in the dock, and the representatives of the prosecution and for the defence, if the accused be defended, present in Court, for the hearing of the case. S. 537 of the Crim. Pro. Code cannot cure the defect in the proceedings by reason of the Magistrate's refusal to re-summon and rehear the witnesses in contravention of proviso (*a*), s. 350. GOMER SIRDA v. QUEEN-EMPRESS, 25 C. 863 = 2 C.W.N. 465 ... 563

(3) See MORTGAGE (GENERAL), 26 C. 78.

Words and Phrases.

(1) "Acquisition"—See LAND ACQUISITION ACT (I OF 1894), 25 C. 346.

(2) "An account"—See ACT V OF 1881 (PROBATE AND ADMINISTRATION), 25 C. 250.

(3) "An offence attended by criminal force"—See CRIM. PRO. CODE (ACT X OF 1882), 25 C. 434.

(4) "Assignee"—See ACT VIII OF 1885 (BENGAL TENANCY), 26 C. 750.

(5) "At the time"—See LAND ACQUISITION ACT (I OF 1894), 25 C. 346.

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(6) "Butwara Khasra"—See EVIDENCE ACT (I OF 1872), 25 C. 90.
(7) "Collection of assets"—See WILL, 25 C. 65.
(8) "Courts"—See ACT VIII OF 1890 (GUARDIANS AND WARDS), 26 C. 133.
(9) "Date of the decree"—See LIMITATION ACT (XV OF 1877), 25 C. 109.
(10) "Debt"—See SUCCESSION CERTIFICATE ACT (VII OF 1889), 26 C. 536.
(11) "Decree for arrears of rent"—See EXECUTION OF DECREE, 25 C. 322.
(12) "District Court"—See ACT VIII OF 1890 (GUARDIANS AND WARDS), 26 C. 133.
(13) "Estate"—See REG. I OF 1886 (ASSAM LAND AND REVENUE REGULATION), 26 C. 194.
(14) "For the purposes of execution"—See ACT XV OF 1882 (SMALL CAUSE COURTS, PRESIDENCY TOWNS), 26 C. 778.
(15) "Fraudulently"—See FORGERY, 25 C. 512.
(16) "From time to time appoint"—See ACT V OF 1881 (PROBATE AND ADMINISTRATION), 25 C. 250.
(17) "Goods"—See PENAL CODE (ACT XLV OF 1860), 26 C. 232.
(18) "In respect of any acts purporting to be done by him in his official capacity"—See CIV. PRO. CODE (ACT XIV OF 1882), 25 C. 239.
(19) "Judgment"—See APPEAL (GENERAL), 26 C. 361.
(20) "Legalised nuisance"—See NUISANCE, 25 C. 425.
(21) "Living"—See HINDU LAW (WILL), 25 C. 112.
(22) "Local area"—See JURISDICTION, 25 C. 858.
(23) "Magistrate of Police"—See ACT XIII OF 1859 (WORKMAN'S BREACH OF CONTRACT), 25 C. 637.
(24) "Nuisance"—See NUISANCE, 25 C. 425.
(25) "Party"—See MINOR, 26 C. 381.
(26) "Person"—See EVIDENCE ACT (I OF 1872), 26 C. 236.
(27) "Person"—See LETTERS OF ADMINISTRATION, 25 C. 795.
(28) "Person"—See MINOR, 26 C. 381.
(29) "Person aggrieved"—See BIGAMY, 26 C. 336.
(30) "Police Officer"—See CONFESSION, 26 C. 569.
(31) "Property"—See REG. I OF 1886 (ASSAM LAND AND REVENUE REGULATION), 26 C. 194.
(32) "Public place"—See NUISANCE, 25 C. 425.
(33) "Public servant"—See PUBLIC SERVANT, 26 C. 158.
(34) "Rateable payment"—See ACT II OF 1874 (ADMINISTRATOR GENERAL'S), 25 C. 54.
(35) "Record"—See EVIDENCE ACT (I OF 1872), 25 C. 90.
(36) "References"—See ACT VIII OF 1890 (GUARDIANS AND WARDS), 26 C. 133.
(37) "Report"—See ACT VIII OF 1890 (GUARDIANS AND WARDS), 26 C. 133.
(38) "Representative"—See CIV. PRO. CODE (ACT XIV OF 1882), 26 C. 250.
(39) "Shall be liable to pay"—See ACT II OF 1874 (ADMINISTRATOR GENERAL'S), 25 C. 54.
(40) "Suit"—See ACT VIII OF 1885 (TENANCY, BENGAL), 25 C. 146.
(41) "Tenant"—See INTEREST, 26 C. 130.
(42) "Terms"—See INTEREST, 26 C. 130.
(43) "The decree"—See CIV. PRO. CODE (ACT XIV OF 1882), 25 C. 155.
(44) "To remove the nuisance"—See NUISANCE, 25 C. 425.
(45) "Trade or occupation"—See NUISANCE, 25 C. 425.
(46) "Trial"—See WITNESS, 25 C. 863.
(47) "Unlawful consideration"—See CONTRACT ACT (IX OF 1872), 26 C. 238.
(48) "Usage"—See RIGHT OF OCCUPANCY, 26 C. 184.
(49) "Valuation"—See ACT II OF 1888 (CALCUTTA MUNICIPAL CONSOLIDATION), 26 C. 74.
(50) "Which may have been so erected or placed"—See ACT III OF 1884 (MUNICIPAL, BENGAL), 25 C. 160.

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See ACT XXXII OF 1839 (INTEREST), 25 C. 54.

Written Statement.

Filed in former proceeding—See EVIDENCE ACT (I OF 1872), 25 C. 210.

Wrongful Distraint.

Suit for damages for illegal distraint—Tort—Non-joinder of parties—Parties in action of tort.—A suit for compensation for illegal distraint of crops was brought by one of two persons jointly entitled to the crops distrained. Objection being taken at a late stage of the case on the ground of non-joinder of a party that party was on his own application added as a plaintiff: *Held*, that the rule that persons having the same cause of action must sue jointly, does not apply to actions on tort in every case in which persons have been damnified by the same tortious act. If the objection of non-joinder of party in an action of tort be not taken at the time and in way provided by law, the defendant is liable to such portion of the damages only as have been incurred by the plaintiff who originally brought the suit. JAGDEO SINGH v. PADARATH AHIR, 25 C. 285 ... 191

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See THEFT, 25 C. 416.

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See ACT VIII OF 1885 (BENGAL TENANCY), 26 C. 546.

Zuripeshgi Mortgage.

See TRANSFER OF PROPERTY ACT (IV OF 1882), 26 C. 164.

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